The original documents are located in Box 19, folder "Indians - Passamaquoddy Case" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

Passamaquoddy Issue

1. Interior finish up work on its Litigation Report to Justice.

2. In this process, invite State and Indians' input. (State has asked for this; so have Indians).

3. Interior send final Litigation Report to Justice.

4. Justice release this to the interested parties.

5. White House send letters to the parties inviting written input to a "settlement concept" option paper.

6. White House host one or more informal conferences of the parties to compare the inputs and clarify the issues and gather the pieces of such an option paper.

7. White House, together with Justice, Interior and Indians and in consultation with State, Congressional Delegation etc draw up option paper for President Carter.

8. Justice report the completion of this staff work to Judge Gignoux on his deadline of January 15, 1977, and then, and in the light of this, request a 30-day extension of the Judge's deadline so that President Carter can make up his mind.

9. Outcome of the option paper might be the draft of legislation which Carter could promptly send to Congress -- so that early Congressional action can minimize economic disruption in Maine.

Other case in similar situation is Demsey & Associates Inc. v. SS Sea Star, 321 F.Supp. 663 (S.D.N.Y.1970), where while each bill of lading was subtitled, "To be used with Charter-Parties" and contained the following additional language with regard to charter parties, "* * * freight at the rate of (~~say per~~) as per Charter-Party, ~~dated~~

"All the terms, conditions, liberties, and exceptions of the Charter-Party are herewith incorporated".

The Court held that this does not show what, if any, charter party was intended to be incorporated.

In view of the fact that there is no plain or express incorporation of the charter party in the bill of lading and also based on the decisions of Son Shipping Co. Inc. v. De Fosse & Tanghe, supra; and Demsey and Associates Inc. v. SS Sea Star, supra, defendant's motion to stay proceedings pending arbitration is hereby denied.

It is so ordered.

JOINT TRIBAL COUNCIL OF the PASSAMAQUODDY TRIBE et al., Plaintiffs,

v.

Rogers C. B. MORTON, Secretary, Department of the Interior, et al., Defendants,

and

State of Maine, Intervenor.

Civ. No. 1960.

United States District Court, D. Maine, N. D.

Jan. 20, 1975.

As Amended Feb. 11, 1975.

Action was brought by the Joint Tribal Council of the Passamaquoddy Indian Tribe and the Tribe's two governors against federal officials for a declaratory judgment as to the applicability of the Indian Nonintercourse Act to the Tribe. The State of Maine was permitted to intervene as a party defendant. The District Court, Gignoux, J., held that although the Tribe was never "federally recognized" by a treaty between the United States and the Tribe, the Nonintercourse Act was applicable to the Tribe and established a trust relationship between the United States and the Tribe.

Judgment for plaintiffs.

1. Statutes ⇐181(1), 189

In construing statute duty of court is to give effect to intent of Congress, and in so doing the first reference is to the literal meaning of words employed.

2. Statutes ⇐212.6

Unless contrary appears, it is presumed that statutory words were used in their ordinary sense.

3. Statutes ⇐181(1), 184

Primary consideration in construing statute is the mischief to be corrected and the end to be attained by enactment of the legislation; where possible terms of statute should be construed to give effect to congressional intent.

4. Statutes ⇐217.2, 223.1

Extrinsic aids such as legislative history of statute and the accepted interpretation of similar language in related legislation are helpful in interpreting ambiguous statutory language.

5. Statutes ⇐219(1)

Administrative interpretations by agency entrusted with enforcement of statute are persuasive but the power to issue regulations is not the power to change the law and it is for the courts to determine whether or not administrative interpretations are consistent with intent of Congress and words of statute.

6. Indians ⇐6

Indian Nonintercourse Act, whose literal language used in the ordinary sense clearly encompasses all tribes of

Indians, is applicable to the Passamaquoddies, although Federal Government had never entered into a treaty with the Tribe, Congress had never enacted legislation which specifically mentioned the Tribe and the Commonwealth of Massachusetts and the State of Maine had assumed almost exclusive responsibility for protection and welfare of the Passamaquoddies. 25 U.S.C.A. § 177; 28 U.S.C.A. § 1331.

7. Statutes ⇐189

Departure from plain meaning of statutory language is only justified where application of literal language would be at variance with legislative intent as revealed by statute as a whole and its legislative history.

8. Indians ⇐15(2)

Purpose of Indian Nonintercourse Act forbidding conveyance of Indian land without consent of the United States is to protect land of Indian tribes in order to prevent fraud and unfairness. 25 U.S.C.A. § 177.

9. Indians ⇐15(2)

Plain meaning interpretation of phrase "any * * * tribe of Indians" as used in Indian Nonintercourse Act, forbidding conveyance of Indian lands without consent of United States, is the only construction of Act which comports with basic policy of United States as reflected in Act to protect Indian right of occupancy of their aboriginal lands. 25 U.S.C.A. § 177.

10. Indians ⇐6

Language used in statutes conferring benefits or protection on Indians must be construed in a nontechnical sense as the Indians themselves would have understood it, and all ambiguities in such statutes are to be resolved in favor of the Indians.

11. Indians ⇐15(2)

Indian Nonintercourse Act, forbidding conveyance of Indian land without consent of United States, was applicable to the Passamaquoddy Tribe, although never "federally recognized," and imposed a trust or fiduciary obligation on United States to protect land owned by Tribe. 25 U.S.C.A. § 177.

12. Indians ⇐15(1)

By virtue of duty imposed by the Indian Nonintercourse Act, United States has an obligation to do whatever is necessary to protect Indian land when it becomes aware that Indian rights have been violated, even though United States did not participate in the unconscionable transaction. 25 U.S.C.A. § 177.

13. Indians ⇐3

Termination of Federal Government's responsibility for Indian tribe requires plain and unambiguous action evidencing a clear and unequivocal intention of Congress to terminate its relationship with the tribe.

14. Indians ⇐3

Where Congress never expressly terminated its relationship with the Passamaquoddy Tribe, failure of Federal Government to object to Maine's undertaking certain obligations for protection of Tribe did not evidence such a clear congressional intent as would support a finding of a termination of Federal Government's obligation toward the Passamaquoddies. 25 U.S.C.A. § 177.

15. Constitutional Law ⇐68(1)

Political question doctrine did not bar court from granting declaratory judgment that the Indian Nonintercourse Act did apply to the Passamaquoddy Tribe since only issue before court was whether Congress once having exercised its power to pass protective legislation on behalf of Indians meant to include Tribe and this presented a question of legislative intent for resolution by court rather than a nonjusticiable political question. 25 U.S.C.A. § 177; 28 U.S.C.A. § 1331.

16. Administrative Law and Procedure ⇐704

Where Attorney General of United States in his refusal to institute suit on behalf of Indian tribe relied exclusively on recommendation of Secretary of the Interior and the actions of the Attorney

General and the Secretary were but two stages of single administrative process, their action was a final agency action reviewable under the Administrative Procedure Act. 5 U.S.C.A. §§ 701 et seq., 704; 25 U.S.C.A. § 177; 28 U.S.C.A. §§ 1331, 2201.

17. Declaratory Judgment ⇐304

Secretary of the Interior was proper party to suit by Indian tribe for declaration that the Indian Nonintercourse Act was applicable to it and established a trust relationship between United States and tribe, since the Department of the Interior was a federal agency primarily responsible for protecting Indian land and administering government policy pursuant to statutes. 25 U.S.C.A. § 177; 28 U.S.C.A. § 1331.

18. Declaratory Judgment ⇐203

Doctrine of action committed to agency discretion by law did not preclude Indian tribe from bringing suit for declaratory judgment that the Indian Nonintercourse Act applied to it and established a special trust relationship between tribe and United States after Attorney General declined to bring suit on behalf of tribe, since suit did not seek to require Attorney General to bring suit on tribe's behalf and the doctrine of prosecutorial discretion could not shield legal error resulting from the erroneous legal conclusion of official that the Indian Nonintercourse Act did not apply to tribe. 5 U.S.C.A. § 701(a)(2); 25 U.S.C.A. § 177; 28 U.S.C.A. §§ 516, 519.

19. Declaratory Judgment ⇐91

Indian tribe was not barred from declaratory relief with respect to the applicability of the Indian Nonintercourse Act to it merely because court might not be able to fashion coercive relief to compel Attorney General to bring suit on behalf of tribe. 25 U.S.C.A. § 177.

Thomas N. Tureen, David C. Crosby, Barry A. Margolin, Calais, Me., Robert E. Mittel, Portland, Me., Stuart P. Ross, Washington, D. C., Robert S. Pelcyger, and David H. Getches, Boulder, Colo., for plaintiffs.

Peter Mills, U. S. Atty., Portland, Me., Floyd L. France, Chf. Litigation Section and Anthony S. Borwick, Asst. Atty. Gen., Civil Div., Dept. of Justice, Land & Natural Resources Div., Washington, D. C., for defendants.

OPINION AND ORDER OF THE COURT

GIGNOUX, District Judge.

Plaintiffs in this action are the Joint Tribal Council of the Passamaquoddy Indian Tribe and the Tribe's two governors, who are suing in their individual and official capacities and as representatives of all members of the Tribe. Defendants are the Secretary of the Interior, the Attorney General of the United States, and the United States Attorney for the District of Maine. The State of Maine has been permitted to intervene as a party defendant. Plaintiffs seek a declaratory judgment that the Indian Nonintercourse Act, 1 Stat. 137 (1790), now 25 U.S.C. § 177, forbidding the conveyance of Indian land without the consent of the United States, is applicable to the Passamaquoddy Tribe and establishes a trust relationship between the United States and the Tribe. This Court has jurisdiction under 28 U.S.C. § 1331, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), and declaratory relief is sought pursuant to 28 U.S.C. § 2201. Plaintiffs also invoke applicable provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. The case has been submitted upon a stipulated record, briefs and oral argument.

The Historical Background

The Joint Tribal Council of the Passamaquoddy Tribe is the official governing body of the Passamaquoddy Tribe, a tribe of Indians residing on two reservations in the State of Maine. It is stipulated that since at least 1776 the present members of the Tribe and their ances-

tors have constituted and continue to constitute a tribe of Indians in the racial and cultural sense.

Plaintiffs allege that until 1794 the Passamaquoddy Tribe occupied as its aboriginal territory all of what is now Washington County together with other land in the State of Maine. During the Revolutionary War, the Tribe fought with the American colonies against Great Britain. In 1790, in recognition of the primary responsibility of the newly-formed Federal Government to the Indians in the United States, Oneida Indian Nation v. County of Oneida, *supra* at 667, 94 S.Ct. 772; United States v. Sante Fe Pacific R. Co., 314 U.S. 339, 345, 347–348, 62 S.Ct. 248, 86 L.Ed. 260 (1941), the First Congress adopted the Indian Nonintercourse Act, which as presently codified, 25 U.S.C. § 177, provides in pertinent part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.[1]

Plaintiffs allege that in 1794, four years after passage of the 1790 Nonintercourse Act, the Commonwealth of Massachusetts, Maine's predecessor in interest[2], negotiated a treaty with the Passamaquoddies, by which the Tribe ceded to Massachusetts practically all of its aboriginal territory. It is further alleged that out of the 23,000 acres which the 1794 treaty reserved to the Tribe, Maine and Massachusetts have sold, leased for 999 years, given easements on, or permitted flooding of approximately 6,000 acres. The complaint asserts that the United States has not consented to these transactions and therefore that they violated the express terms of the Nonintercourse Act.

Since the United States was organized and the Constitution adopted in 1789, the Federal Government has never entered into a treaty with the Passamaquoddy Tribe, and the Congress has never enacted legislation which specifically mentions the Passamaquoddies. Furthermore, since 1789, the contacts between the Federal Government and the Tribe have been sporadic and infrequent. In contrast, the State of Maine has enacted comprehensive legislation which has had a pervasive effect upon all aspects of Passamaquoddy tribal life. The stipulated record clearly shows that the Commonwealth of Massachusetts and the State of Maine, rather than the Fed-

1. The first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." By the second Nonintercourse Act passed in 1793, this language was amended to read as follows: "No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution." 1 Stat. 329, 330. This version was carried forward, without major change, in the 1796 Act, 1 Stat. 469, 472; the 1799 Act, 1 Stat. 743, 746; the 1802 Act, 2 Stat. 139, 143; the 1834 Act, 4 Stat. 729, 730; and in Rev.Stat. § 2116, now 25 U.S.C. § 177.

2. Maine was formerly a District of Massachusetts. In 1819 Massachusetts passed legislation, commonly known as the Articles of Separation, which permitted, subject to the consent of Congress, the separation of the District of Maine from Massachusetts, and the establishment of Maine as an independent state. Act of June 19, 1819, Mass. Laws, ch. 61, p. 248. The Articles of Separation provided that Maine would "assume and perform all the duties and obligations of this Commonwealth towards the Indians within said District of Maine, whether the same arise from treaties or otherwise; . . ." Shortly thereafter, Congress approved of Maine's admission to the Union. Act of March 3, 1820, ch. 19, 3 Stat. 544. The Articles of Separation were incorporated into the Maine Constitution as Article X, Section 5. Me.Const. art. 10, § 5.

eral Government, have assumed almost exclusive responsibility for the protection and welfare of the Passamaquoddies.[3]

The Present Action

On February 22, 1972 representatives of the Passamaquoddy Tribe wrote to the Commissioner of the Bureau of Indian Affairs, Department of the Interior, and requested that the United States Government, on behalf of the Tribe, institute a suit against the State of Maine, as a means of redressing the wrongs which arose out of the alleged unconscionable land transactions in violation of the Nonintercourse Act. The letter urged that the requested action be filed by July 18, 1972, the date as of which such an action would be barred by 28 U.S.C. § 2415(b), a special statute of limitations for actions seeking damages resulting from trespass upon restricted Indian lands.[4] On March 24, 1972 the Commissioner recommended to the Solicitor of the Department of the Interior that the litigation be instituted and advised the Solicitor that 28 U.S.C. § 2415(b) might bar a suit after July 18, 1972. Defendants, however, despite repeated urgings by representatives of the Tribe, failed to take any action upon their request.

On June 2, 1972 plaintiffs filed the present action seeking a declaratory judgment that the Passamaquoddy Tribe is entitled to the protection of the Nonintercourse Act and requesting a preliminary injunction ordering the defendants to file a protective action on their behalf against the State of Maine before July 18, 1972. Following a hearing on June 16, 1972 the Court ordered defendants to decide by June 22, 1972 whether they would voluntarily file the protective action sought by plaintiffs. In addition, the Court directed defendants, in the event their decision was in the negative, to state their reasons for so deciding and to show cause on June 23, 1972 why they should not be ordered to bring suit. On June 20, 1972 the Acting Solicitor of the Department of the Interior advised the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, by letter, that no request for litigation would be made. The reasons, as stated in the letter, were as follows:

> As you are aware, no treaty exists between the United States and the Tribe and, except for isolated and inexplicable instances in the past, this Department, in its trust capacity, has had no dealings with the Tribe. On the contrary, it is the States of Massachusetts and Maine which have acted as trustees for the tribal property for almost 200 years. This relationship between the Tribe and the States has apparently never been questioned by the Tribe until recently.
>
> * * * * * *
>
> In view of the Court's Order of June 16, 1972, requesting it be advised of the Secretary's decision on the Tribe's request by June 22, 1972, this Department has again reviewed its position and has again determined that no request for litigation should be made.
>
> The Department does not reach its decision lightly. On the one hand, we are aware that the tribe may thus be foreclosed from pursuing its claims against the State in the federal courts. However, *as there is no trust relationship between the United States and this tribe,* we are led inescapably to conclude that the Tribe's proper legal remedy should be sought elsewhere. * * * (emphasis supplied).

3. The contacts between the Federal Government and the Passamaquoddies, and between Massachusetts and Maine and the Passamaquoddies, since 1776, as disclosed by the documents stipulated into the record in this case, are set forth in detail in the Appendix to this Opinion.

4. Congress has since extended the time for filing such an action to July 18, 1977. Act of October 13, 1972, P.L. 92-485, 86 Stat. 803.

On June 22, 1972, by means of a written Notice filed with the Court, enclosing a copy of the June 20, 1972 letter from the Department of the Interior to the Department of Justice, defendants notified the Court that they would not voluntarily file the requested action. The Notice stated:

> You are hereby further notified that *consistent with the decision of the Interior Department*, the Assistant Attorney General in charge of the Land and Natural Resources Division, Department of Justice, acting under and by delegation from the Attorney General, has decided not to institute an action against the State of Maine as requested by plaintiffs' counsel. (emphasis supplied)

At the conclusion of the show cause hearing held on June 23, 1972 the Court ordered defendants to file the requested protective action against the State of Maine prior to July 1, 1972.[5] On June 29, 1972 defendants complied with the Court's order by filing an action, United States v. Maine, Civil No. 1966 N.D., in this Court.[6]

On February 1, 1973 plaintiffs filed an amended and supplemental complaint in the present action, abandoning their original request for injunctive relief and seeking only a declaratory judgment that the Passamaquoddies are entitled to the protection of the Nonintercourse Act. On June 17, 1973 the State of Maine was permitted to intervene in the action as a party defendant. On July 15, 1974, following the completion of discovery, plaintiffs filed a second amended and supplemental complaint.

The action is presently before the Court on the basis of plaintiffs' second amended and supplemental complaint, defendants' and intervenor's answers thereto, a stipulated record, briefs and oral argument.

The Issues Presented by the Present Action

In their second amended and supplemental complaint, plaintiffs have dropped their original request for injunctive relief and seek only a declaratory judgment. Their basic position is that the Nonintercourse Act applies to all Indian tribes in the United States, including the Passamaquoddies, and that the Act establishes a trust relationship between the United States and the Indian tribes to which it applies, including the Passamaquoddies. Therefore, they say, defendants may not deny plaintiffs' request for litigation on the sole ground that there is no trust relationship between the United States and the Tribe.[7] In opposition, defendants and intervenor contend that only those Indian tribes which have been "recognized" by the Federal Government by treaty, statute or a consistent course of conduct are entitled to the protection of the Nonintercourse Act and, since the Passamaquoddies have not been "federally recog-

5. Defendants' appeal from the June 23, 1972 order was dismissed by the United States Court of Appeals for the First Circuit on motions filed by plaintiffs and defendants, after the Solicitor General had refused defendants permission to proceed.

6. On July 26, 1972, pursuant to stipulation, the Court ordered that the protective action filed against the State of Maine by the United States on behalf of the Passamaquoddies and a similar action filed by the United States on behalf of the Penobscot Indian Nation, United States v. Maine, Civil No. 1969 N.D., be held in abeyance on the Court's docket and that no action need be taken by the parties in either suit pending the outcome of the present action.

7. In their second amended and supplemental complaint, plaintiffs also seek a declaratory judgment that the Tribe is entitled to the protection of U. S. Const. art. I, § 8 ("The Congress shall have power . . . [t]o regulate Commerce . . . with the Indian Tribes"), art. I § 10 ("[n]o State shall enter into any Treaty . . ") and art. II, § 2 ("[t]he President . . . shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . ."). Plaintiffs have not pressed their initial request for this relief, and the applicability to the Passamaquoddies of these Constitutional provisions is not presently in issue.

nized," the Act is not applicable to them. Defendants and intervenor also deny that the Nonintercourse Act creates any trust relationship between the United States and the Indian tribes to which it applies.

In addition to denying that the Passamaquoddies are protected by the Nonintercourse Act, defendants and intervenor raise several affirmative defenses. First, they say that defendants' refusal to institute suit on behalf of the Passamaquoddies is not subject to judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq., both because it is not "final agency action," 5 U.S.C. § 704, and because it constitutes "agency action . . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2). Next, intervenor asserts that the Court lacks jurisdiction of the action because it presents a nonjusticiable "political question." Finally, intervenor contends that the case is not one in which declaratory relief is proper. Plaintiffs respond that these affirmative defenses are without merit.

The Court will deal separately with each of the issues thus presented.

The Applicability of the Nonintercourse Act to the Passamaquoddies

[1–6] The rules of statutory interpretation by which this Court must be guided in determining the applicability of the Nonintercourse Act to the Passamaquoddies are summarized in United States v. New England Coal and Coke Co., 318 F.2d 138 (1st Cir. 1963), as follows:

> "In matters of statutory construction the duty of this court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed." Unless the contrary appears, it is presumed that statutory words were used in their ordinary sense. A primary consideration is "the mischief to be corrected and the end to be attained" by the enactment of the legislation; and, where possible, its terms should be construed to give effect to the Congressional intent. Extrinsic aids such as the legislative history of the Act, and the accepted interpretation of similar language in related legislation, are helpful in interpreting ambiguous statutory language. Finally, administrative interpretations by the agency entrusted with the enforcement of the statute are persuasive. However, the power to issue regulations is not the power to change the law, and it is for the courts, to which the task of statutory construction is ultimately entrusted, to determine whether or not administrative interpretations are consistent with the intent of Congress and the words of the Act. 318 F.2d at 142–143. (citations omitted).

Applying these rules of construction, the conclusion is inescapable that, as a matter of simple statutory interpretation, the Nonintercourse Act applies to the Passamaquoddies. The literal meaning of the words employed in the statute, used in their ordinary sense, clearly and unambiguously encompasses all tribes of Indians, including the Passamaquoddies; the plain language of the statute is consistent with the Congressional intent; and there is no legislative history or administrative interpretation which conflicts with the words of the Act.

[7] The provisions of the Nonintercourse Act prohibiting dealings in Indian land without the consent of the United States have remained essentially unchanged since passage of the first Act in 1790.[8] The statute in effect in 1794, when Massachusetts negotiated its treaty with the Passamaquoddies, applied to land transactions with "any Indians or nation or tribe of Indians," within the United States. Act of March 1, 1793, 1 Stat. 329, 330. Subsequent versions of the statute, including the present codification, have applied to land transactions with "any Indian nation or

8. *See* n. 1, *supra*.

tribe of Indians." The words employed in the statute are clear and unambiguous; the prohibition against dealings in Indian land without the consent of the United States is applicable to "any . . . tribe of Indians." In the present case, it is stipulated that the Passamaquoddies are a "tribe of Indians." It may be conceded that the Tribe has not been "federally recognized," but there is no suggestion in the statute that, as defendants and intervenor contend, the Act is not applicable to a particular Indian tribe unless that tribe has been recognized by the Federal Government by a formal treaty, mention of the tribe in a statute, or a consistent course of administrative conduct. A departure from the plain meaning of statutory language is only justified where the application of literal languge would be at variance with legislative intent as revealed by the statute as a whole and its legislative history. Marks v. United States, 161 U.S. 297, 301, 16 S.Ct. 476, 40 L.Ed. 706 (1896); Otoe and Missouria Tribe of Indians v. United States, 131 F.Supp. 265, 276, 131 Ct.Cl. 593, cert. denied, 350 U.S. 848, 76 S.Ct. 82, 100 L.Ed. 755 (1955).

[8] Neither defendants nor intervenor have suggested any reason why giving the term "any . . . tribe of Indians" its literal meaning, thereby encompassing the Passamaquoddies, would lead to a result at variance with the statutory objectives of the Nonintercourse Act. To the contrary, it is eminently clear that the literal interpretation of the statute is required to give effect to the Congressional intent. The Court is aware of no legislative history of the Nonintercourse Act, which might reveal whether the First Congress had in mind the Passamaquoddies when it enacted the 1790 Act. Nor have defendants been able to call to the Court's attention any administrative interpretation prior to the filing of the instant litigation as to the applicability of the Act to the Passamaquoddies or any similarly situated Indian tribe.[9] Every court, however, which has considered the purposes of the Act has agreed that the intent of Congress was to protect the lands of the Indian tribes in order to prevent fraud and unfairness. As the Supreme Court noted in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 119, 80 S.Ct. 543, 555, 4 L.Ed.2d 584 (1960):

> The obvious purpose of that [the Nonintercourse] statute is to prevent the unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent.

The decided cases are replete with similar statements of the Act's purpose. *E. g.*, United States v. Candelaria, 271 U.S. 432, 441–442, 46 S.Ct. 561, 562, 70 L.Ed. 1023 (1926) (the intent of Congress was "to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges," and thereby to protect "a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races"); Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885, 888 (2d Cir. 1958), vacated as moot sub nom. McMorran v. Tuscarora Nation of Indians, 362 U.S. 608, 80 S.Ct. 960, 4 L.Ed.2d 1009 (1960) (the statute was enacted "to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain"); Alonzo v. United States, 249 F.2d 189, 196 (10th Cir. 1957), cert. denied, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958) (the purpose of such legislation is to protect the Indians "against the loss of their lands by improvident disposition".

9. Clearly, the administrative determination made in response to this Court's order of June 16, 1972, cannot so qualify. An administrative ruling which is no sooner made than challenged is not authoritative. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 156, 64 S.Ct. 474, 88 L.Ed. 635 (1944).

through overreaching by members of other races"); Seneca Nation of Indians v. United States, 173 Ct.Cl. 917, 923 (1965) ("From the beginning, this legislation has been interpreted as giving the Federal Government a supervisory role over conveyances by Indians to others, in order to forestall fraud and unfairness.").

[9] A plain meaning interpretation of the phrase "any . . . tribe of Indians" is also the only construction of the Nonintercourse Act which comports with the basic policy of the United States, as reflected in the Act, to protect the Indian right of occupancy of their aboriginal lands. Thus, in United States v. Santa Fe Pacific R. Co., *supra*, 314 U.S. at 348, 62 S.Ct. at 252, the Supreme Court cited the Act as embodying

> . . . the unquestioned general policy of the Federal Government to recognize such right of occupancy. As stated by Chief Justice Marshall in Worcester v. Georgia, *supra*, 6 Pet. [515,] at page 557, 8 L.Ed. 483, the Indian trade and intercourse acts "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

Santa Fe also established that "recognition" is not a prerequisite to Nonintercourse Act protection:

> Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the *Cramer* case [Cramer v. United States, 261 U.S. 219, 229, 43 S.Ct. 342, 67 L.Ed. 622 (1923)], "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 314 U.S. at 347, 62 S.Ct. at 252.

In Oneida Indian Nation v. County of Oneida, *supra*, 414 U.S. at 667–668, 94 S.Ct. 772, decided last Term, the Supreme Court reaffirmed these fundamental propositions stated in *Santa Fe*. In *Oneida*, the Supreme Court also again summarized the policy of the United States to protect the rights of Indian tribes to their aboriginal lands:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New York Indian tribes, including the Oneidas. The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day. See 25 U.S.C. § 177. 414 U.S. at 667–668, 94 S.Ct. at 777. (footnote omitted).

It is thus clear that the policy embodied in the Nonintercourse Act is to protect Indian tribes against loss of their

aboriginal lands by improvident disposition to members of other races. The Passamaquoddies, an Indian tribe, fall within the plain meaning of the statutory language, and there is no reason why they should be excluded from the protection which the Act affords.

Defendants and intervenor rely on a trilogy of Supreme Court cases, all involving the Pueblo Indians in New Mexico, for the contention that, despite the all-inclusive language of the Nonintercourse Act, the Act applies only to Indian tribes which have been "federally recognized" by treaty, statute or a consistent course of conduct: United States v. Joseph, 94 U.S. 614, 24 L.Ed. 295 (1876); United States v. Sandoval, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); United States v. Candelaria, *supra*. Close analysis of these decisions, however, leaves little doubt that the Act means what it says and that the protection of the Act is not limited to "recognized" tribes.

Congress had extended the 1834 Nonintercourse Act to the New Mexico and Utah territories in 1851. Act of Feb. 27, 1851, ch. 14, § 7, 9 Stat. 587. The applicability of the Act to the Indians of the Pueblo of Taos in New Mexico was at issue in the *Joseph* case. The Court there held that the Act applied only to "uncivilized" Indians, and therefore did not protect Indians such as the Pueblos and the Senecas or Oneidas of New York, who, unlike the "nomadic" Apaches, Comanches and Navajoes, had attained a high degree of civilization:

> The pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals. 94 U.S. at 617.

It is unclear whether the Court held that the Pueblos were a tribe outside the scope of the Act, or simply not a tribe. In either event, it is clear that, by the standards applied in *Joseph*, even if the case is still good law,[10] the Passamaquoddies in 1794 were "uncivilized" Indians to whom the Act would apply. More importantly, the Court's opinion plainly does not contain any suggestion that "federal recognition" is a precondition to the Act's applicability.

Defendants' reliance on the *Sandoval* case is equally misplaced. That case involved not the Nonintercourse Act, but the Act of January 30, 1897, ch. 109, 29 Stat. 506, a criminal statute prohibiting the introduction of intoxicating liquor into "Indian country." Congress had expressly made this statute applicable to lands owned by the Pueblo Indians as a condition to the admission of New Mexico to statehood. Act of June 20, 1910,

10. As plaintiffs point out, the Court's statement in *Joseph* that the Pueblos, the Senecas and the Oneidas would be outside the scope of the Act because of their high degree of civilization has been rejected with respect to all three tribes. United States v. Candelaria, *supra*; Oneida Indian Nation v. County of Oneida, *supra*; Seneca Nation of Indians v. United States, *supra*.

ch. 310, § 2, 36 Stat. 557. A criminal prosecution brought pursuant to the 1897 statute was dismissed by the District Court on the ground that Congress lacked authority to regulate the sale of liquor in the State of New Mexico. The issue presented to the Supreme Court was not one of statutory construction, as Congress had made it clear in the 1910 Act that the 1897 statute applied to the Pueblo Indians. The only issue before the Court was whether "the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico into statehood," 231 U.S. at 38, 34 S.Ct. at 3, or whether the Pueblos instead were "beyond the range of Congressional power under the Constitution." *Id.* at 49, 34 S.Ct. at 7. On this question, the Court concluded that since the Constitution expressly authorized Congress to regulate commerce with the Indian tribes and prior judicial decisions had affirmed the power and duty of Congress to enact protective legislation on behalf of dependent Indian communities, United States v. Kagama, 118 U.S. 375, 384, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); Tiger v. Western Investment Co., 221 U.S. 286, 315, 31 S.Ct. 578, 55 L.Ed. 738 (1911), the law banning the sale of liquor in Indian country was a legitimate exercise of congress' power. United States v. Sandoval, *supra*, 231 U.S. at 45–46, 34 S.Ct. 1. The Court held that the determination by Congress that the Pueblos were a dependent Indian community entitled to the benefits of protective legislation presented a "political question," upon which the Court was bound to uphold the judgment of Congress unless the classification was so arbitrary as to constitute a usurpation of power. *Id.* at 47, 34 S.Ct. 1. *See* United States v. Holliday, 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1865).

In the *Candelaria* case, in 1926, the Supreme Court reexamined for the first time since *Joseph* the applicability to the Pueblo Indians of the 1834 Nonintercourse Act, as extended to the New Mexico territory in 1851. *Candelaria* was an action brought by the United States to quiet title to land of the Pueblo of Laguna occupied by José Candelaria, a non-Indian. The suit was brought on the theory that the Pueblos were wards of the United States, which therefore had the authority and was under a duty to protect them in the ownership of their lands. 271 U.S. at 437, 46 S.Ct. 561. The issue presented to the Supreme Court was whether the guardian-ward relationship between the United States and the Pueblos was such that the United States, as guardian of the Pueblos, was barred from bringing suit by a judgment involving title to the same land entered in a prior lawsuit in which the United States had not been joined as a party. *Id.* at 438, 46 S.Ct. 561. In reaching the conclusion that the Pueblos were wards of the United States whose lands could not be alienated without its consent, the Court had occasion to construe the language "any tribe of Indians" in the Nonintercourse Act:

> While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, "any tribe of Indians." Although sedentary, industrious, and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico. A more reasonable view is that the term "'Indian tribe" was used in the acts of 1834 and 1851 in the sense of "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Montoya v. United

States, 180 U.S. 261, 266, 21 S.Ct. 358, 359 (45 L.Ed. 521). In that sense the term easily includes Pueblo Indians. *Id.* at 441–442, 46 S.Ct. at 563.

There is nothing in this language which would indicate that the Nonintercourse Act applies only to "federally recognized" Indians. Rather, *Candelaria* appears to erase any doubt *Joseph* may have created as to whether the all-inclusive language in the statute should be construed as its plain meaning dictates.[12]

[10] Finally, even if a latent ambiguity might be found in the statutory language, two cardinal principles of statutory construction buttress plaintiffs' position that the Nonintercourse Act applies to all Indian tribes in the United States, including the Passamaquoddies. The Supreme Court has consistently held that language used in statutes conferring benefits or protection on Indians must be construed in a nontechnical sense, as the Indians themselves would have understood it, and that all ambiguities in such statutes are to be resolved in favor of the Indians. *See, e. g.*, Squire v. Capoeman, 351 U.S. 1, 6–8, 76 S.Ct. 611, 100 L.Ed. 883 (1956); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918); Winters v. United States, 207 U.S. 564, 576, 28 S.Ct. 207, 53 L.Ed. 340 (1908); United States v. Payne, 264 U.S. 446, 448–449, 44 S.Ct. 352, 68 L.Ed. 782 (1924); United States v. Celestine, 215 U.S. 278, 290, 30 S.Ct. 93, 54 L.Ed. 195 (1904).

The Court holds that the Nonintercourse Act is to be construed as its plain meaning dictates and applies to the Passamaquoddy Indian Tribe.

The Trust Relationship between the United States and the Passamaquoddies under the Nonintercourse Act

[11] Defendants have rejected plaintiffs' request for assistance on the ground that no trust relationship exists between the United States and the Passamaquoddies. The Court disagrees. In the only decided cases to treat this issue, the Court of Claims has, in a series of decisions during the last ten years, definitively held that the Nonintercourse Act imposes a trust or fiduciary[13] obligation on the United States to protect land owned by all Indian tribes covered by the statute: Seneca Nation of Indians v. United States, *supra*; United States v. Oneida Nation of New York, 477 F.2d 939, 201 Ct.Cl. 546 (1973); Ft. Sill Apache Tribe v. United States, 477 F.2d 1360, 1366, 201 Ct.Cl. 630 (1973).

12. Defendants also refer to the recent case of Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), and to an unreported opinion letter of the District Court in Avalos v. Morton, Civil No. 9920 (D.N.M., September 10, 1974), as supporting their contention that general Indian statutes only apply to "federally recognized" tribes. *Mancari* involved no issue of statutory construction. Instead, it involved a Fifth Amendment Due Process challenge to the Indian Preference in Employment Act, 25 U.S.C. § 472. The Supreme Court did no more than approve the constitutional validity of the Indian preference as rationally related "to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 555, 94 S.Ct. at 2485. The *Avalos* letter resulted from the failure of counsel for the Indian plaintiffs to offer any brief or other argument on the issues in that case. Plaintiffs were suing for benefits afforded members of Indian tribes under the Snyder Act, 25 U.S.C. § 13. The District Court, relying primarily on *Sandoval*, ruled that since it did not have authority to recognize the plaintiffs as a tribe, the action should be dismissed. It is unclear from the letter whether the dismissal was based upon a fundamental misreading of *Sandoval* or upon the failure of the plaintiffs to establish that they were "in fact an American Indian Tribe." (Letter of court, page 3). In the present case, it is stipulated that the Passamaquoddies are in fact an Indian tribe.

13. The courts have used interchangeably the terms "trust," "fiduciary," and "guardian-ward" to describe the relationship between the Federal Government and the Indian tribes. *E. g.* Seminole Nation v. United States, 316 U.S. 286, 296–297, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); Cherokee Nation v. Georgia, 5 Pet. (30 U.S.) 1, 17, 8 L.Ed. 25 (1831); United States v. Seminole Nation, 173 F.Supp. 784, 790–791, 146 Ct.Cl. 171 (1959); Gila River Pima-Maricopa Indian Community v. United States, 140 F.Supp. 776, 780–781, 135 Ct.Cl. 180 (1956).

These decisions are supported by a century of federal Indian case law which has recognized the existence of a fiduciary relationship between the Federal Government and the Indian tribes.

The courts were first squarely presented with the question of the nature of the obligation, if any, imposed by the Nonintercourse Act in Seneca Nation of Indians v. United States, *supra*. In that case, the Senecas sued the United States under the Indian Claims Commission Act, 25 U.S.C. § 70a, claiming damages arising out of four sales of their New York lands at allegedly inadequate prices, to private parties. They alleged that a representative of the United States was present at each of the sales and that the United States breached a fiduciary duty owed the tribe by permitting the unconscionable transactions. The Indian Claims Commission dismissed the claims on the ground that the Federal Government was not responsible for the transactions. The Court of Claims agreed as to the first sale, which took place in 1788 prior to the passage of the Nonintercourse Act, but reversed as to the three later sales, which occurred subsequent to the adoption of the Act in 1790. With respect to the Act, the court began by noting that:

> [T]he requirement has always been for federal consent and participation in any disposition of Indian real property. From the beginning, this legislation has been interpreted as giving the Federal Government a supervisory role over conveyances by Indians to others, in order to forestall fraud and unfairness. *Id.* at 923.

The court then quoted at length from President Washington's speech to the Senecas in December 1790, shortly after the passage of the Act:

> Here, then, is the security for the remainder of your lands. No State, no person, can purchase your lands, unless at some public treaty, held under the authority of the United States. *The General Government will never consent to your being defrauded, but it will protect you in all your just rights.* * * * But your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in future, you cannot be defrauded of your lands; that you possess the right to sell, and the right of refusing to sell your lands; that, therefore, the sale of your lands, in future, will depend entirely upon yourselves. But that, when you may find it for your interest to sell any part of your lands, the United States must be present, by their agent, *and will be your security that you shall not be defrauded in the bargain you may make.* * * * That, besides the before mentioned security for your land, you will perceive, *by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians.* . American State Papers (Indian Affairs, Vol. I, 1832), p. 142. *Id.* at 923–24 (emphasis in original).

This contemporary executive pronouncement, the court observed "plainly show[s] the Federal Government as thenceforth the guardian and preserver of fairness to the Indians in their land dispositions." *Id.* at 924. After reviewing prior judicial construction of the Act, the court concluded:

> In the light of its language, contemporaneous construction, and history, we hold that the Trade and Intercourse Act created a special relationship between the Federal Government and those Indians covered by the legislation, with respect to the disposition of their lands, and that the United States assumed a special responsibility to protect and guard against unfair treatment in such transactions. *Cf.* The Oneida Tribe of Indians v. United States, 165 Ct.Cl. 487 (1964), cert. denied, 379 U.S. 946. [85 S.Ct. 441, 13 L.Ed.2d 544] This responsibility was not merely to be present at the negotiations or to prevent actual fraud, deception, or duress alone; improvid-

> ence, unfairness, the receipt of an unconscionable consideration would likewise be of federal concern. . . . The concept is obviously one of full fiduciary responsibility, not solely of traditional market-place morals. When the Federal Government undertakes an "obligation of trust" toward an Indian tribe or group, as it has in the Intercourse Act, the obligation is "of the highest responsibility and trust," not that of "a mere contracting party" or better business bureau. *Cf.* Seminole Nation v. United States, 316 U.S. 286, 296–97 [62 S.Ct. 1049, 86 L.Ed. 1480] (1942). *Id.* at 925.

[12] In *Oneida Nation* and *Ft. Sill Apache Tribe*, the Court of Claims, in unequivocal language, reaffirmed the holding of *Seneca Nation* "that the Trade and Intercourse Act establishes a fiduciary relationship between the Indians and the United States Government." United States v. Oneida Nation of New York, *supra*, 477 F.2d at 942–943; Ft. Sill Apache Tribe v. United States, *supra*, 477 F.2d at 1366. Moreover, in *Oneida Nation*, the court made clear that by virtue of the fiduciary duty imposed by the Nonintercourse Act, the United States has an obligation to do whatever is necessary to protect Indian land when it becomes aware that Indian rights have been violated, even though the United States did not participate in the unconscionable transaction.

> The Government would argue that the absence of participation in the remaining twenty-three (23) treaties releases it from any fiduciary duty that might have existed. Although the Government did not actually participate in the remaining treaties, we hold the fiduciary relationship would continue to exist if the Government had either actual or constructive knowledge of the treaties. With such knowledge, if the Government subsequently failed to protect the rights of the Indians, then there would be a breach of the fiduciary relationship. This court does not see any distinction between *participation* and failure to exercise a duty, and *knowledge* and the failure to exercise the same duty. *Id.* 477 F.2d at 944 (emphasis in original; footnotes omitted).

These Court of Claims decisions are consistent with an unbroken line of Supreme Court decisions which, from the beginning, have defined the fiduciary relationship between the Federal Government and the Indian tribes as imposing a distinctive obligation of trust upon the Government in its dealings with the Indians. In the early case of Cherokee Nation v. Georgia, *supra*, 5 Pet. (30 U.S.) at 17, 8 L.Ed. 25, Chief Justice Marshall described the condition of the Indians as "in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." The following year, in Worcester v. Georgia, 6 Pet. (31 U.S.) 515, 556, 8 L.Ed. 483 (1832), the same Chief Justice observed that the laws enacted by Congress for the protection of the Indians, and especially the Nonintercourse Act, "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." Fifty years later, in United States v. Kagama, *supra*, 118 U.S. at 383–384, 6 S.Ct. at 1114, the Court reaffirmed that "[t]hese Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." (emphasis in original). Again, in Tiger v. Western Investment Co., *supra*, 221 U.S. at 310, 31 S.Ct. at 584, the Court stated, ". . . the Congress of the United States has undertaken from the earliest history of the Government to deal with the Indians as dependent people and to legislate concerning their property with a view to

their protection as such." More recently, in Seminole Nation v. United States, n.13 *supra*, 316 U.S. at 297, 62 S.Ct. at 1055, the Court recognized that the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged with the most exacting fiduciary standards." Finally, in Federal Power Commission v. Tuscarora Indian Nation, *supra*, 362 U.S. at 119, 80 S.Ct. at 555, the Supreme Court said with specific reference to the Nonintercourse Act:

> The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent.

The Court of Claims decisions are also supported by numerous Supreme Court cases which have held that the power of Congress to restrict the alienation of Indian land is justified only by the existence of the guardian-ward relationship between the Federal Government and the Indian tribes. *E. g.*, Sunderland v. United States, 266 U.S. 226, 233–234, 45 S.Ct. 64, 69 L.Ed. 259 (1924); Brader v. James, 246 U.S. 88, 98, 38 S.Ct. 285, 62 L.Ed. 591 (1918); Tiger v. Western Investment Co., *supra*, 221 U.S. at 316, 31 S.Ct. 578; Lone Wolf v. Hitchcock, 187 U.S. 553, 565, 23 S.Ct. 216, 47 L.Ed. 299 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 306–308, 23 S.Ct. 115, 47 L.Ed. 183 (1902); United States v. Kagama, *supra*, 118 U.S. at 384,[14] 6 S.Ct. 1109.

[13, 14] In view of the foregoing, the conclusion must be that the Nonintercourse Act establishes a trust relationship between the United States and the Indian tribes, including the Passamaquoddies,[15] to which it applies. The Court holds that defendants erred in denying plaintiffs' request for litigation on the sole ground that no trust relationship exists between the United States and the Passamaquoddy Indian Tribe.[16]

14. The imposition of a legal incapacity combined with an undertaking to ensure fairness in transactions involving the incapacitated party's property constitutes the most literal kind of guardianship.

> A guardian of the property of a person who is under an incapacity is a trustee in the broad sense of the term. He is under a duty to his ward to deal with the property for the latter's benefit. Like a trustee a guardian is a fiduciary. He is not, however, a trustee in the strict sense. He is entrusted with the possession and management of his ward's property but he does not take title to it. Scott, Law of Trusts (3rd Ed. 1967) § 7 at 71.

15. While apparently not denying that the Nonintercourse Act may have at one time protected the Passamaquoddies, intervenor argues that the Federal Government has since terminated its obligations toward the Passamaquoddies by acquiescing in Maine's assumption of responsibility for the Tribe. It is clear, however, that termination of the Federal Government's responsibility for an Indian tribe requires "plain and unambiguous" action evidencing a clear and unequivocal intention of Congress to terminate its relationship with the tribe. United States v. Santa Fe Pacific R. Co., *supra*, 314 U.S. at 346, 62 S.Ct. 248; United States v. Nice, 241 U.S. 591, 599, 36 S.Ct. 696, 60 L.Ed. 1192 (1916). *See also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). Congress has never expressly terminated its relationship with the Passamaquoddy Tribe, and the mere fact that the Federal Government has not objected to Maine's undertaking certain obligations for the protection of the Passamaquoddies does not evidence such a clear and unequivocal Congressional intent as will support a finding of termination.

16. Whether the United States breached its fiduciary duty to plaintiffs by refusing to bring suit against the State of Maine for the redress of alleged violations of the Nonintercourse Act is a question not presently before the Court. In the present action plaintiffs seek no more than a declaratory judgment that defendants erred in denying their request solely on the erroneous legal ground that no trust relationship exists between the United States and the Passamaquoddies. However, to the effect that the Govern-

The Affirmative Defenses

Defendants and intervenor have raised a number of affirmative defenses, which they assert preclude the Court from ruling upon the substantive issues presented by the action. The Court finds these to be without merit.

[15] *The Political Question Doctrine.* Intervenor contends that the Court lacks jurisdiction of the action because it presents a nonjusticiable "political question." Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1961). The position is that "the scope and nature of federal responsibility over Indian tribes is not a matter for the courts to determine." The decisions cited as authority for this proposition, however, deal solely with the *power* of Congress to legislate with respect to Indians. They fall into two categories: (1) cases in which the constitutional power of Congress to enact legislation respecting a particular group of Indians is challenged on the ground that the group is not an "Indian tribe" within the meaning of the Commerce Clause: Board of Commissioners v. Seber, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943); United States v. McGowan, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938); United States v. Ramsey, 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926); United States v. Nice, n.15 *supra*; Peprin v. United States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914); United States v. Sandoval, *supra*; Tiger v. Western Investment Co., *supra*; United States v. Rickert, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903); United States v. Holliday, *supra*; *see also* Baker v. Carr, *supra*, 369 U.S. at 282, 82 S.Ct. 691 (Frankfurter, J., dissenting), and (2) cases which hold that Congressional action involving the administration of Indian affairs is not subject to judicial challenge on the ground that it violates previous treaty commitments. Federal Power Commission v. Tuscarora Indian Nation, *supra*; Sioux Indians v. United States, 277 U.S. 424, 48 S.Ct. 536, 72 L.Ed. 939 (1928); Lone Wolf v. Hitchcock, *supra*. There is no dispute in this case that Congress has the power under the Commerce Clause to pass protective legislation on behalf of the Passamaquoddy Tribe; nor is there any claim that application of the Nonintercourse Act to the Passamaquoddies would violate any prior treaty commitment. The only issue before this Court is whether Congress, once having exercised its power to pass protective legislation on behalf of the Indians, meant to include the Passamaquoddies. This presents a question of legislative intent, which has always been for resolution by the courts. *See, e. g.*, Morton v. Ruiz, 415 U.S. 199, 212–229, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974). It is clear that this case presents no nonjusticiable political question.

[16, 17] *The Availability of Review under the Administrative Procedure Act.* The defendants and intervenor assert that defendants' refusal to institute suit on behalf of the Passamaquoddies against the State of Maine is not subject to judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. Their argument is twofold. First, they contend that defendants' action is not "final agency action" reviewable under 5 U.S.C. § 704. While they concede that the decision of the Attorney General was final action, they argue that the decision of the Secretary of the Interior not to recommend litigation must be "treated separately" and that, so regarded, the Secretary's determination is not judicially-reviewable final action. The record before the Court clearly establishes, however, that the Attorney General relied exclusively on the recommendation of the Secretary in making his decision [17] and that the

ment's obligation may include the duty to litigate, see Mason v. United States, 461 F.2d 1364, 1372–1373, 198 Ct.Cl. 599 (1972), rev'd on other grounds, 412 U.S. 391, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973).

17. The Court rejects as specious defendants' argument that, because the Notice filed by the defendants with this Court on June 22, 1972 (p. 6 *supra*) stated that the Attorney General's decision not to bring suit was

actions of the Attorney General and the Secretary were but two stages of a single administrative process. In the instant action, plaintiffs seek review of the result of this combined administrative determination. Furthermore, there is concededly a final order before the Court, and the Administrative Procedure Act, 5 U.S.C. § 704, expressly provides that an "intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." The cases cited by defendants, Chicago and Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 112–113, 68 S.Ct. 431, 92 L.Ed. 568 (1948), and Federal Power Commission v. Hope Gas Co., 320 U.S. 591, 619, 64 S.Ct. 281, 88 L.Ed. 333 (1944), involved attempts to review an intermediate stage of administrative action without reviewing the ultimate stage; they are inapposite where the ultimate action is itself being reviewed.[18]

[18] The second argument presented by defendants and intervenor as preventing judicial review under the Administrative Procedure Act is that defendants' action constitutes "agency action . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2). The thrust of the argument is that the Attorney General has absolute discretion to institute litigation, 28 U.S.C. §§ 516, 519, and that judicial review of his exercise of that discretion is barred by the doctrine of prosecutorial discretion. United States v. Nixon, 417 U.S. 418, 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); Newman v. United States, 127 U.S.App.D.C. 263, 382 F.2d 479, 480–481 (1967); Smith v. United States, 375 F.2d 243, 246–247 (5th Cir. 1967); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379–382 (2d Cir. 1973); Weiss v. Morgenthau, 233 F.Supp. 307, 308 (S.D.N.Y.1964), aff'd per curiam, 344 F.2d 428 (2d Cir. 1965); Application of James, 241 F.Supp. 858, 860 (S.D.N.Y.1965); Boyd v. United States, 345 F.Supp. 790, 794 (E.D.N.Y.1972).[19] This contention is based on two fundamental misconceptions. In the first place, plaintiffs do not ask this Court to order the Attorney General to bring suit on their behalf; in the present action, plaintiffs seek only a declaratory judgment that the Nonintercourse Act establishes a trust relationship between the United States and the Passamaquoddies. In the second place, the doctrine of prosecutorial discretion cannot shield legal error. As the court stated in Nader v. Saxbe, 497 F.2d 676, 679–680 n. 19 (D.C.Cir.1974),

> It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion

made "consistent with" the Secretary's determination that no trust relationship exists, that was not the sole basis for the Attorney General's decision. The Notice incorporated the determination of the Interior Department and stated that, consistent with that decision, the Justice Department was declining to institute the action requested by plaintiffs. The Notice was filed in response to the Court's order of June 16, 1972 directing defendants, in the event their decision was to deny plaintiffs' request, to state their reasons for so deciding. The only reason stated in the Notice is the Secretary's determination that no trust relationship exists. It is clear that the Attorney General adopted the Secretary's determination as his only reason for declining to bring suit.

18. The defendant Secretary is a proper party because the Department of the Interior is the federal agency primarily responsible for protecting Indian land and administering government policy pursuant to statutes such as the Nonintercourse Act. *See, e. g.*, Hynes v. Grimes Packing Co., 337 U.S. 86, 96–97, 69 S.Ct. 968, 93 L.Ed. 1231 (1949); Boles v. Greenville Housing Authority, 468 F.2d 476, 479 (6th Cir. 1972).

19. Similarly, intervenor cites several cases which stand merely for the proposition that 25 U.S.C. § 175 (requiring that the United States Attorney "shall" represent all Indians in all suits at law and equity) does not impose a mandatory duty. Rincon Band of Mission Indians v. Escondido Mutual Water Co., 459 F.2d 1082, 1084–1085 (9th Cir. 1972); United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d 53, 56 (9th Cir. 1968); Siniscal v. United States, 208 F.2d 406, 410 (9th Cir. 1953), cert. denied, 348 U.S. 818, 75 S.Ct. 29, 99 L.Ed. 645 (1954).

> generally, is subject to statutory and constitutional limits enforceable through judicial review. The law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits to that authority. Judicial review of the latter sort is normally available unless Congress has expressly withdrawn it. (citations omitted).

See also Boyd v. United States, *supra*, 345 F.Supp. at 792–793. Where, as in the present case, the decision of an administrative official is based upon an erroneous legal conclusion, the courts have an obligation to correct the error so that he may exercise his discretion based upon a correct understanding of the law. Perkins v. Elg, 307 U.S. 325, 349–350, 59 S.Ct. 884, 83 L.Ed. 1320 (1939); Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943); McGrath v. Kristensen, 340 U.S. 162, 168–171, 71 S.Ct. 224, 95 L.Ed. 173 (1950). *See* 5 U.S.C. § 706. *Cf.* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 140–141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

The Administrative Procedure Act does not bar judicial review of defendants' action.

[19] *The Propriety of Declaratory Relief.* Intervenor contends that since the Court is without authority to compel the Attorney General to file suit on behalf of plaintiffs, the prayer for declaratory relief is merely an effort to obtain an advisory opinion, which the Court should decline to render. *See* Sierra Club v. Morton, 405 U.S. 727, 732 n. 3, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Public Service Commission v. Wycoff Co., 344 U.S. 237, 241, 73 S.Ct. 236, 97 L.Ed. 291 (1952). Intervenor's argument is identical to that rejected by the Supreme Court in Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). In that case, Adam Clayton Powell sought both a declaratory judgment that the House of Representatives could not constitutionally prevent him from taking his seat because of prior misconduct, and a writ of mandamus or an injunction to compel officers and employees of the House to seat him. The District Court dismissed the complaint, and the Court of Appeals affirmed on the grounds that the case was not justiciable because the requested coercive relief would bring the judiciary into open conflict with a coordinate branch and a declaratory judgment would "not finally terminate the controversy." Powell v. McCormack, 129 U.S.App.D.C. 354, 395 F.2d 577, 597 (1968). The Supreme Court reversed and remanded the case to the District Court with instructions to enter a declaratory judgment for Powell and to consider other appropriate remedies. With respect to the defendants' claim of nonjusticiability because the Court lacked power to grant coercive relief, the Court said:

> We need express no opinion about the appropriateness of coercive relief in this case, for the petitioners sought declaratory judgment, a form of relief the District Court could have issued. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that a district court may "declare the rights . . . of any interested party . . . whether or not further relief is or could be sought." The availability of declaratory relief depends on whether there is a live dispute between the parties, and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate. We thus conclude that in terms of the general criteria of justiciability, this case is justiciable. 395 U.S. at 517–518, 89 S.Ct. at 1962 (citations omitted).

It is thus clear that plaintiffs are not barred from declaratory relief merely because this Court may not be able to fashion coercive relief. *See also* Perkins v. Elg, *supra*, 307 U.S. at 349–350, 59 S.Ct. 884; McGrath v. Kristensen, *supra*, 340 U.S. at 168–171, 71 S.Ct. 224.

* * * * * *

Judgment will be entered for the plaintiffs declaring that the Indian Non-intercourse Act, 25 U.S.C. § 177, is applicable to the Passamaquoddy Indian Tribe; that the Act establishes a trust relationship between the United States and the Tribe; and that defendants may not deny plaintiffs' request for litigation in their behalf on the sole ground that there is no trust relationship between the United States and the Tribe. Plaintiffs may submit a proposed form of decree, with notice to defendants, within ten days. Defendants may present their comments thereon within five days thereafter.

It is so ordered.

APPENDIX

I

Contacts between the Federal Government and the Passamaquoddy Tribe since 1776

1. On December 24, 1776, George Washington wrote to the Passamaquoddy Tribe and told them that he was glad to hear that the Tribe had accepted the chain of friendship which he sent in February 1776, and warned the Tribe against turning against the United States.

2. John Allan served as the Continental Congress' agent to the Indians of the Northeast during the American Revolutionary War. Appointed in 1777, he was instructed to enlist the support of the Indian tribes for the American colonies. In May 1777 Allan met with the Passamaquoddy and St. John's Tribes. In recognition of Allan's promises that the Tribe would be given ammunition for hunting, protection of their game and hunting grounds, regulation of trade to prevent imposition, the exclusive right to hunt beaver, the free exercise of religion, a clergyman, and the appointment of an agent for their protection and support in time of need, the Passamaquoddy Tribe pledged their support to the colonies.

In 1783 and 1784 Allan wrote several letters to the Federal Government in which he indicated that the Passamaquoddy Indians had greatly assisted the American cause and urged Congress to fulfill the promises he had made on behalf of the Government, especially with respect to protecting Passamaquoddy hunting grounds. Congress failed to act on Allan's recommendations, and on March 5, 1784, Allan's appointment was revoked pursuant to a resolution of the Continental Congress revoking the appointments of all Indian Superintendents.

3. In 1793 the same John Allan appeared before the Massachusetts General Court. He reported that during the Revolutionary War the Passamaquoddy Tribe had relinquished their claims to land in Massachusetts on the condition that the United States would confirm the Tribe's right to inhabit, unmolested, certain parcels of their aboriginal territory.

4. In 1819 Congress passed legislation entitled, "An Act making provision for the civilization of the Indian tribes adjoining the frontier settlements." Act of March 3, 1819, 3 Stat. 516. In 1824, using funds appropriated pursuant to this Act, the Federal Government contributed $233.00 to the Tribe, an amount which covered one-third of the cost of the construction of a school. From 1824 to 1828 the Federal Government used funds appropriated pursuant to the 1819 Act to contribute $250.00 a year to Elijah Kellogg, a missionary to the Indians, who sought to establish and maintain a school for the Passamaquoddies. In 1829 the Government withheld funds for the school because of intra-tribal disputes concerning the religion of the Superintendent. In December 1829 two leaders of the Passamaquoddy Tribe, Deacon Sockbason and Sabattis Neptune, met in Washington with Thomas L. McKenny, Director of the Office of Indian Affairs, and John H. Eaton, Secretary of War, seeking a reinstatement of the funds for the school, money to hire a priest, and a parcel of land. Although

the funds for the school were temporarily reinstated and money for a priest was provided, all funds were permanently terminated in 1831 because of the continuation of sectarian strife.

5. In December 1829 President Jackson requested funds from Congress to purchase additional land for the Passamaquoddy Tribe. Congress failed to act on the President's request.

6. In July 1832 the Commissioner of Indian Affairs, Elbert Herring, denied Kellogg's request for funds for the improvement of Passamaquoddy agriculture.

7. During the period 1899 to 1912, five members of the Passamaquoddy Tribe attended the Carlisle Indian School at Carlisle, Pennsylvania. In 1970 a member of the Passamaquoddy Tribe graduated from Haskel Indian College at Lawrence, Kansas.

8. Since 1965 the Tribe has received funds from the Department of Housing and Urban Development, the Office of Economic Opportunity and Federal agencies other than the Department of the Interior. Although eligibility for such assistance has been determined by criteria applicable to all citizens, in many instances the funds were taken from special Indian allocations or were administered by special Indian desks within the various agencies.

II

Contacts between the States of Massachusetts and Maine and the Passamaquoddy Tribe since 1776

Massachusetts Contacts

1. On July 19, 1776, the Governor of Massachusetts on behalf of Massachusetts and the other states entered into a treaty of alliance and friendship with delegates from the St. John's and Micmac Tribes in which the Indian delegates agreed to use their influence to convince the Passamaquoddy and other tribes to supply men for George Washington's army.

2. In 1792 leaders of the Passamaquoddy Tribe petitioned Massachusetts for land where they could "assemble unmolested." In response to the petition, the Massachusetts Legislature appointed a committee to assign land to the Passamaquoddy Indians. Treaty negotiations began in 1793, and on September 24, 1794 Massachusetts and the Passamaquoddy Tribe entered into a treaty. John Allan, the former Federal Indian agent, was one of the members of the committee appointed by the Massachusetts Legislature, and his name appears as one of the signers of the treaty for Massachusetts. By the terms of the treaty, the Passamaquoddy Tribe surrendered all claims to land in the territory of Massachusetts in exchange for a conveyance of 23,000 acres of land at Indian Township, ten acres of land at Pleasant Point, and the exclusive right to fish and hunt the Schoodic River, all in the District of Maine. Seven years later, in 1801, Massachusetts assigned an additional 90 acres of land at Pleasant Point to the Tribe.

3. In 1819 Massachusetts passed legislation commonly known as the Articles of Separation, which provided for the establishment of Maine as a separate State. Under the Articles of Separation Maine agreed to "assume and perform all duties and obligations of the Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties or otherwise, . . ." *See* n. 2, *supra*.

Maine Contacts

4. Since its admission as a State in 1820, Maine has enacted approximately 350 laws which relate specifically to the Passamaquoddy Tribe. This legislation includes 72 laws providing appropriations for or regulating Passamaquoddy agriculture; 33 laws making provision for the appropriation of necessities, such as blankets, food, fuel, and wood, for the Tribe; 85 laws relating to educational services and facilities for the Tribe; 13 laws making provision for the delivery of health care services and facilities to the Tribe; 22 laws making allowance for Passamaquoddy housing

(Me.Const. art. 9, § 14–D, authorizes the Legislature to make available a fund not to exceed $1,000,000.00 for the purpose of insuring mortgages on homes owned, "by members of the 2 tribes on several Indian reservations"); 54 laws making special provision for Indian indigent relief; 54 laws relating to the improvement and protection of roads and water on the Passamaquoddy reservation; and 15 laws providing for the legal representation of the Tribe and its members.

5. The following is a representative sample of Maine statutes currently in effect providing for the welfare and protection of the Passamaquoddy Tribe.

a. Beginning in 1823 Maine has administered trust funds on behalf of the Passamaquoddy Tribe. 22 M.R.S.A. § 4834, as amended, P.L.1973, ch. 141, creates a trust fund out of the annual net proceeds from the sale of timber and grass taken from Indian Township. This statute permits the tribal council to determine the manner in which a certain percentage of the funds shall be expended.

b. 22 M.R.S.A. § 4707 renders void any contract made by an Indian for the sale or disposal of trees, timber, or grass on Indian lands.

c. 22 M.R.S.A. § 4709 authorizes the Attorney General, on his own initiative or at the request of a Tribe, to sue in the name of the Tribe in actions for money owed the Tribe for injuries done to tribal land. The damages recovered by such a suit are to be distributed by the Commissioner of Indian Affairs, or invested in useful articles.

d. In 1954 an amendment to the Maine Constitution, Me.Const. art. 2, § 1, extended the franchise to Indians. 22 M.R.S.A. § 4831, as amended, P.L.1973, ch. 104, authorizes an official tribal government. This statute provides that each Passamaquoddy reservation shall have a governor, lieutenant governor, and six-man tribal council. It further provides that each reservation shall elect, on an alternate basis, a representative to the State Legislature to serve as the Passamaquoddy representative.

e. 22 M.R.S.A. § 4702, as amended P.L.1971, ch. 544, establishes a Department of Indian Affairs, which is under the control and supervision of the Commissioner of Indian Affairs. 22 M.R.S.A. § 4733, as adopted, P.L.1967, ch. 252, eff. May 8, 1967, provides for the creation of an Indian Housing Authority.

f. Maine has always retained a variety of miscellaneous laws which affect various aspects of Passamaquoddy tribal life. For instance, current Maine statutes permit members of the Tribe to obtain free hunting and fishing licenses, 12 M.R.S.A. § 2401–B(7), as amended, P.L.1973, ch. 92; forbid any person from keeping Indian skeletons or bones for more than a year without returning them to the Tribe for burial, 22 M.R.S.A. § 4720, as adopted, P.L.1973, ch. 788, §§ 95, 96, eff. April 1, 1974; and impose a $250.00 fine upon any person who poses as an Indian for the purpose of vending goods or wares, 22 M.R.S.A. § 4715.

Land Office, fixed the lines which controlled the court when a question arose as to whether a claimant was within or without the particular reservation at the time of alleged depredation. French v. U. S., 1914, 49 Ct.Cl. 337.

3. Division of tribal lands among members, surveys for

To accomplish the object of legislation by which Congress provided for the eventual dissolution of certain tribes such as the Creek nation and the division of a large portion of the tribal lands among the members of the tribe, it was necessary under this section to survey and subdivide such lands, in like manner as public lands are divided. U. S. v. Mackey, D.C.Okl.1913, 214 F. 137.

4. Title to Arkansas River bed, grant to Creek tribe as carrying

The grant of lands in Indian Territory to the Creek Tribe of Indians by patent of Aug. 11, 1852, did not vest the tribe with any right or title to the bed of the Arkansas river between high-water marks, but the same remained in the United States and passed to the state of Oklahoma on its admission, subject to such rights as were given by its laws to owners of lands bordering on the stream but the purpose of such grant to the Creeks was to provide them a home in the then far West so long as they should exist as a tribe and continue to occupy the lands granted and to construe such grant as not conveying the bed of such river interferes with no object or purpose of the grant. U. S. v. Mackey, D.C.Okl.1913, 214 F. 137, appeal of certain parties dismissed 216 F. 129, 132 C.C.A. 373, and decree reversed on other grounds 216 F. 126, 132 C.C.A. 370.

5. Errors in surveys

Where in making the survey of the land ceded by the United States to the Choctaw Nation under the treaties of 1820 and 1825, 7 Stat. 210, 234, an error was made in running the eastern boundary of said lands in that the surveyor bore to the west and did not cover in the actual survey all the lands ceded to the Choctaws; and where said error was not discovered until a resurvey was made in 1857 pursuant to the provisions of the Treaty of 1855, 11 Stat. 611, the tract of land was not legally taken until after the Treaty of 1855. Chickasaw Nation v. U. S., 1942, 94 Ct.Cl. 215.

Where the Commissioner of Indian Affairs, after the report of the error in the 1825 survey as discovered in the survey of 1857, decided to stand by the original survey; and where Congress by Act Mar. 3, 1875, 18 Stat. 476, ratified the original marking, because the original erroneous boundary was to be recognized by the Government it was not intended by Congress that the Government should not account to the rightful owners for the property wrongfully taken. Id.

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. R.S. § 2116.

Historical Note

Derivation. Act June 30, 1834, c. 161, § 12, 4 Stat. 730.

Cross References

Patents to be held in trust; descent and partition, see section 348 of this title.

These were a medical certificate stating that petitioner was suffering from tuberculosis, a service memo, and a call-in letter addressed to him in Mexico. He contends that it was error to admit them because they lacked probative value and their authors were not present at the hearing.

Since the documents tended to corroborate a key portion of the statement in Form 1–213, petitioner's return to Mexico in 1961 for health reasons, their relevance is undeniable. Nor does the lack of foundation testimony by live witnesses in a deportation hearing necessitate reversal. *Hernandez v. INS*, 498 F.2d 919, 921 (9th Cir. 1974); *Marlowe v. INS*, 457 F.2d 1314, 1315 (9th Cir. 1972). Without evidence to indicate the need to have these witnesses present, we cannot say that their absence was so fundamentally unfair so as to violate due process.

Our standard on review of a deportation order, fixed by 8 U.S.C. § 1105a(a)(4), is limited to determining that the agency's order is supported by reasonable, substantial, and probative evidence on the record considered as a whole. *Lavoie*, 418 F.2d at 735. From the Form 1–213 and the corroborative documents it was found that petitioner left the United States in 1961 and re-entered in 1972 without inspection or proper documentation. This finding is supported by substantial, probative evidence and will not be overturned by this court.

[7] Under 8 U.S.C. § 1361, petitioner bore the burden of proof on the issue of legal entry. Since he offered no evidence to rebut the evidence of illegal entry in 1972, the order of deportability must be affirmed.

[8, 9] Petitioner also appeals the denial of the privilege of voluntary departure. 8 U.S.C. § 1254(c). He presented no evidence in support of his eligibility, contending that there existed sufficient information in his administrative file to support the application. The petitioner bears the burden of proof to establish eligibility for voluntary departure. *Khalaf v. INS*, 361 F.2d 208 (7th Cir. 1966). Good moral character of the alien is a prerequisite. Since no evidence of that was presented, it was not an abuse of discretion to deny him the status of voluntary departure.

The petition for review of the Service's order of deportation is denied and the order is affirmed.

JOINT TRIBAL COUNCIL OF the PASSAMAQUODDY TRIBE et al., Plaintiffs-Appellees,

v.

Rogers C. B. MORTON, Secretary, Department of the Interior, et al., Defendants-Appellees,

State of Maine, Intervenor-Appellant.

JOINT TRIBAL COUNCIL OF the PASSAMAQUODDY TRIBE et al., Plaintiffs-Appellees,

v.

Rogers C. B. MORTON, Secretary, Department of the Interior, et al., Defendants-Appellants.

Nos. 75–1171, 75–1172.

United States Court of Appeals, First Circuit.

Argued Sept. 11, 1975.

Decided Dec. 23, 1975.

Action was brought by the joint tribal council of the Passamaquoddy Indian Tribe and the tribe's two governors against federal officials for a declaratory judgment as to the applicability of the Indian Nonintercourse Act to the tribe. The state of Maine intervened as a party defendant. Judgment was given for the Indians in the United States District Court for the District of Maine, Edward Thaxter Gignoux, J., 388 F.Supp. 649, and the state of Maine and federal offi-

cials appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that the Nonintercourse Act applies to the Passamaquoddy Tribe and established a trust relationship between the United States and the tribe. No congressional termination of the guardianship role was shown, and neither the tribe nor the state of Maine would have the right to terminate the federal government's responsibility.

Judgment affirmed.

1. Indians ⇐10

Right to extinguish Indian title is attribute of sovereignty which no state, but only United States, can exercise, and Nonintercourse Act gives statutory recognition to that fact. 25 U.S.C.A. § 177; Act Mar. 1, 1793, 1 Stat. 137, 329; Act Mar. 3, 1819, 3 Stat. 516; Act Mar. 3, 1820, 3 Stat. 544.

2. Indians ⇐2

Passamaquoddy Tribe of Indians, though not otherwise federally recognized, is "tribe" within Nonintercourse Act. 25 U.S.C.A. § 177.

See publication Words and Phrases for other judicial constructions and definitions.

3. Indians ⇐6

Congress' power to regulate commerce includes authority to decide when and to what extent it shall recognize particular Indian community as dependent tribe under its guardianship, and Congress has right to determine for itself when guardianship maintained over Indian shall cease, but Congress' power is limited in sense that it may not bring community or body of people within range of its power by arbitrarily calling them an Indian tribe, and may exercise its guardianship and protection only in respect of distinctly Indian communities. 25 U.S.C.A. § 177; U.S.C.A.Const. art. 1, § 8.

4. Indians ⇐7

Voluntary assistance rendered by state to Indian tribe is not necessarily inconsistent with federal protection, and Maine's assumption of duties to Passamaquoddy Tribe did not cut off whatever federal duties existed. 25 U.S.C.A. § 177; 22 M.R.S.A. § 4831.

5. Indians ⇐7

Unwillingness of Congress to furnish aid when requested by Passamaquoddy Indian Tribe did not alone show congressional intention that Nonintercourse Act should not apply. 25 U.S.C.A. § 177.

6. Indians ⇐10

Under Nonintercourse Act, federal government bears trust relationship to Passamaquoddy Indian Tribe; such relationship under the Act pertains to land transactions which are or may be covered by the Act and is rooted in rights and duties encompassed or created by the Act. 25 U.S.C.A. § 177.

7. Indians ⇐6

Once Congress has established trust relationship with an Indian tribe, Congress alone has right to determine when its guardianship shall cease; neither the tribe nor state of Maine, separately or together, has right to make that decision and so to terminate the federal government's responsibilities. 25 U.S.C.A. § 177; 22 M.R.S.A. § 4831.

8. Indians ⇐6

Any withdrawal of trust obligations toward Indian tribe by Congress would have to be plain and unambiguous to be effective. 25 U.S.C.A. § 177.

9. Indians ⇐6

Record in Indian tribe's action against Secretary of the Department of the Interior and other defendants failed to establish that Congress had at any time terminated or withdrawn its protection which had been extended under the Nonintercourse Act. 25 U.S.C.A. § 177.

10. Courts ⇐365(1)

Federal government had no obligation to respond to decision by the Supreme Judicial Court of Maine, which could not affect federal authority with respect to Indian tribe, and federal government's alleged failure to react to such decision was not to be taken by a federal district court as an acknowledg-

ment of such state court ruling. 25 U.S. C.A. § 177.

Martin L. Wilk, Deputy Atty. Gen., with whom Joseph E. Brennan, Atty. Gen., was on brief, for State of Maine, Augusta, Me., appellant.

Edmund B. Clark, Atty., Dept. of Justice, with whom Wallace H. Johnson, Asst. Atty. Gen., Walter Kiechel, Deputy Asst. Atty. Gen., and Edward J. Shawaker, Atty., Dept. of Justice, Washington, D. C., for Rogers C. B. Morton, appellants.

Thomas N. Tureen, Calais, Me., with whom David C. Crosby, Barry A. Margolin, Calais, Me., Stuart P. Ross, Hogan & Hartson, Washington, D. C., Robert S. Pelcyger, Boulder, Colo., and Robert E. Mittel, Portland, Me., were on brief for appellees.

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

This is an appeal from a declaratory judgment entered in the District Court for the District of Maine. 388 F.Supp. 649, 667 (D.Me.1975).

Plaintiffs are, under Maine law, the political representatives of the Passamaquoddy Indian Tribe ("the Tribe"). 22 M.R.S.A. § 4831 (Supp.1975). They brought this action against the Secretary of the Interior and the Attorney General of the United States after the Secretary refused to initiate a lawsuit against the State of Maine on behalf of the Tribe. Earlier, in a letter to the Commissioner of the Bureau of Indian Affairs, the Tribe had stated the following grievances against Maine and its predecessor, Massachusetts (hereinafter collectively "Maine"): that Maine had divested the Tribe of most of its aboriginal territory in a treaty negotiated in 1794; that Maine had wrongfully diverted 6,000 of the 23,000 acres reserved to the Tribe in that treaty; and that Maine had mismanaged tribal trust funds, interfered with tribal self-government, denied tribal hunting, fishing and trapping rights, and taken away the right of members to vote, from 1924 to 1967. The Tribe had requested the Secretary to sue Maine on its behalf to redress these asserted wrongs before July 18, 1972, the date an action would allegedly be barred.[1] Although the Commissioner of the Bureau of Indian Affairs favored compliance with plaintiffs' request, defendants did not act.

On June 2, 1972, plaintiffs filed this action, seeking a declaratory judgment that the Tribe is entitled to federal protection under the Indian Nonintercourse Act, 25 U.S.C. § 177,[2] and a preliminary injunction ordering defendants to file a protective action on the Tribe's behalf against the State of Maine by July 18, 1972. Defendants persisted in their refusal to sue for the Tribe, relying upon the advice of the Acting Solicitor for the Department of the Interior, who stated,

> "[N]o treaty exists between the United States and the Tribe and, except for

1. 28 U.S.C. § 2415(b) sets forth a special statute of limitations for actions seeking damages resulting from trespass on Indian lands. The time for filing such an action was originally July 18, 1972, but has since been extended by Congress to July 18, 1977. Act of October 13, 1972, P.L. 92–485, 86 Stat. 803.

2. Title 25 U.S.C. § 177 provides as follows:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

isolated and inexplicable instances in the past, this Department, in its trust capacity, has had no dealings with the Tribe. On the contrary, it is the States of Maine and Massachusetts which have acted as trustees for the tribal property for almost 200 years.

. . . . . .

[W]e are aware that the Tribe may thus be foreclosed from pursuing its claims against the State in the federal courts. However, as there is no trust relationship between the United States and this Tribe, the Tribe's proper legal remedy should be sought elsewhere."

After a hearing, the district court ordered defendants to file suit by July 1, 1972, and to include all matters of which the Tribe had complained. In compliance, they instituted *United States v. Maine,* Civil No. 1966 N.D. An appeal from that order was dismissed on motions of both plaintiffs and defendants. Civil No. 1966 N.D. has meanwhile been stayed pending final determination of the present action.

Plaintiffs then filed two amended and supplemental complaints herein, abandoning their request for an injunction and seeking only a declaratory judgment. The State of Maine was allowed to intervene. As finally framed and argued in the district court, the issues were,[3] (1) whether the Nonintercourse Act applies to the Passamaquoddy Tribe; (2) whether the Act establishes a trust relationship between the United States and the Tribe; and (3) whether the United States may deny plaintiffs' request for litigation on the sole ground that there is no trust relationship. The district court ruled in plaintiffs' favor on all points. Both the federal defendants and the State of Maine appeal. We affirm, subject to the qualifications hereinafter stated.

I

The issues in this proceeding can best be understood in light of facts about the Tribe appearing in the parties' stipulation and exhibits and in the district court's comprehensive and scholarly opinion.[4]

The Tribe now resides on two reservations in Washington County in Maine. Its members and their ancestors, as was agreed below, have constituted an Indian tribe in both the racial and cultural sense since at least 1776. Plaintiffs allege that until 1794 the Tribe occupied as its aboriginal territory all of what is now Washington County and certain other land in Maine. In 1777, the Tribe pledged its support to the American Colonies during the Revolutionary War in exchange for promises by John Allan, Indian agent of the Continental Congress, that the Tribe would be given ammunition for hunting, protection for their game and hunting grounds, regulation of trade to prevent imposition, the exclusive right to hunt beaver, the free exercise of religion, and a clergyman. In addition, an agent would be appointed for their protection and support in time of need. Allan, as Superintendent of the Eastern Indian Agency, reported to the federal government on several occasions in 1783 and 1784 that the Passamaquoddy Tribe had greatly assisted the revolutionary cause and urged Congress to fulfill these promises made on the Government's behalf. Allan also transmitted the views of the Tribe in this regard. However, the Continental Congress failed to act on Allan's recommendations. His appointment was revoked in March 1784, under a resolution revoking the appointments of all Indian Superintend-

3. Plaintiffs also requested in their second amended and supplemental complaint a declaratory judgment that the U.S.Const. art. I, §§ 8 and 10, and art. II, § 2, are applicable to the Tribe. Relief along these lines was not pursued below and is not now an issue.

4. Plaintiffs' contentions that the Department of the Interior has wrongfully turned its back on the Tribe, and that federal guardianship must replace that of the State, are elaborated in detail in O'Toole & Tureen, *State Power and the Passamaquoddy Tribe; "A Gross National Hypocrisy?"*, 23 Me.L.Rev. 1 (1971).

ents. In 1790, the First Congress adopted the Indian Nonintercourse Act.[5]

In 1792, the Passamaquoddy Tribe petitioned Massachusetts for land upon which to settle, and Massachusetts appointed a committee to investigate, one member of which was the same John Allan. Allan reported that during the Revolutionary War the Passamaquoddy Tribe had given up its claims to lands known to be its haunts on the condition that the United States would confirm its "ancient spots of ground" and a suitable tract for the use of both the Tribe and all other Indians who might resort there. Soon after, in 1794, Massachusetts entered into an agreement, also referred to as a treaty, with the Passamaquoddy Tribe by which the Tribe relinquished all its rights, title, interest, claims or demands of any lands within Massachusetts in exchange for a 23,000 acre tract comprising Township No. 2 in the first range, other smaller tracts, including ten acres at Pleasant-point, and the privilege of fishing on both branches of the Schoodic River. All pine trees fit for masts were reserved to the state government for a reasonable compensation. An additional ninety acres at Pleasant-point were later appropriated to the use of the Tribe by Massachusetts in 1801.

Since 1789, Massachusetts and later Maine have assumed considerable responsibility for the Tribe's protection and welfare. Maine was a District of Massachusetts until 1819, when it separated from Massachusetts under the Articles of Separation, Act of June 19, 1819, Mass. Laws, ch. 61, p. 248, which were incorporated into the Maine Constitution as Article X, Section 5. The Articles provided that Maine "shall . . . assume and perform all the duties and obligations of this Commonwealth [Massachusetts], towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise . . . ." Maine was thereafter recognized by Congress and admitted to the Union. Act of March 3, 1820, ch. 19, 3 Stat. 544. The Maine Constitution, with the above quoted provision relating to the Indians, was read in the Senate, referred to committee, and finally declared by Congress to be established in the course of the admission proceedings.

Since its admission as a state, Maine has enacted approximately 350 laws which relate specifically to the Passamaquoddy Tribe. This legislation includes 72 laws providing appropriations for or regulating Passamaquoddy agriculture; 33 laws making provision for the appropriation of necessities, such as blankets, food, fuel, and wood, for the Tribe; 85 laws relating to educational services and facilities for the Tribe; 13 laws making provision for the delivery of health care services and facilities to the Tribe; 22 laws making allowance for Passamaquoddy housing; 54 laws making special provision for Indian indigent relief; 54 laws relating to the improvement and protection of roads and water on the Passamaquoddy reservation; and 15 laws providing for the legal representation of the Tribe and its members.

In contrast, the federal government's dealings with the Tribe have been few. It has never, since 1789, entered into a treaty with the Tribe, nor has Congress ever enacted any legislation mentioning the Tribe. In 1824, the Department of War contributed funds to the Tribe, one-third toward the construction of a school, pursuant to an act for the civilization of Indian tribes. Act of March 3, 1819, 3 Stat. 516. It also gave money annually

5. The first Nonintercourse Act, 1 Stat. 137, 138, provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This was amended in 1793, 1 Stat. 329, 330: "No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution." Subsequent amendments have made no major changes and the present version was enacted in 1834. (*See* note 2 *supra*.)

from 1824 to 1828 under the same act to Elijah Kellogg of the Society for the Propagation of the Gospel Among the Indians, to support a school for the Tribe. The funds were granted at the request of the State of Maine, were channeled through the State, and were subject to State controls. Kellogg, according to one nineteenth century source, was himself sent to the Tribe as a schoolmaster by the State of Maine, and as a missionary by the Missionary Society of Massachusetts. These funds were withheld during 1829 because of intra-tribal differences concerning the religion of the Superintendent of the school and, as a result, two principal men of the Tribe, Deacon Sockbason and Sabattis Neptune, went to Washington to meet with Thomas L. McKenney, Director of the Office of Indian Affairs, and John H. Eaton, Secretary of War, to seek reinstatement of the school funds and additional money to hire a priest and to purchase a parcel of land. Money was again appropriated for the school and the priest in 1830, although discontinued after 1831 on account of the same intra-tribal differences. However, despite a request from President Jackson, Congress failed to appropriate any money to purchase land for the Tribe. After the school funds were again suspended during 1831 because of the same sectarian strife, the Tribe requested that the funding be reinstated and used for the improvement of the Tribe's agriculture; this request was also denied and the funding was never resumed. During the period from 1899 to 1912, five members of the Tribe attended the Carlisle Indian School for short periods of time. A member of the Tribe also graduated from Haskel Indian College in 1970. Since 1965, various federal agencies other than the Department of the Interior have provided funds to the Tribe under federal assistance programs available to all citizens meeting the requirements of the program. Some of these funds were taken from special Indian allocations or were administered by special Indian desks within the various agencies. In 1966, the General Counsel to the Department of Housing and Urban Development, writing to the Commissioner of the Maine Department of Indian Affairs in regard to the establishment of public housing authorities by the governing councils of the Passamaquoddy and Penobscot Tribes, stated in part that "[i]t is our understanding that these tribes do not have any governmental powers in their own right or by virtue of any federal law. . . ."

In 1968, the Tribe brought suit against the Commonwealth of Massachusetts in the Massachusetts state courts alleging that the Commonwealth, with the consent of the federal government, assumed jurisdiction over and responsibility for the Tribe and that by the act admitting Maine into the Union, Congress confirmed and ratified that relationship.

II

The central issue in this action is whether the Secretary of the Interior was correct in finding that the United States has no "trust relationship" with the Tribe and, therefore, should play no role in the Tribe's dispute with Maine. Whether, even if there is a trust relationship with the Passamaquoddies, the United States has an affirmative duty to sue Maine on the Tribe's behalf is a separate issue that was not raised or decided below and which consequently we do not address. The district court held only that defendants "erred in denying plaintiffs' request for litigation on the sole ground that no trust relationship exists between the United States and the Passamaquoddy Tribe." It was left to the Secretary to translate the finding of a "trust relationship" into concrete duties.

Over the years, the federal government has recognized many Indian tribes, specifically naming them in treaties, agreements, or statutes. The general notion of a "trust relationship," often called a guardian-ward relationship, has been used to characterize the resulting relationship between the federal government and those tribes, *see Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); *Cherokee Nation v. Georgia*, 30

U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831); and the cases cited in the district court's opinion, 388 F.Supp. at 662–63. It is the defendants' and the intervenor's contention here that such a relationship may only be claimed by those specifically recognized tribes.

The Tribe, however, contends otherwise. It rests its claim of a trust relationship on the Nonintercourse Act, enacted in its original form by the First Congress in 1790 to protect the lands of "any . . . tribe of Indians." Plaintiffs argue, and the district court found, that the unlimited reference to "any . . . tribe" must be read to include the Passamaquoddy Tribe as well as tribes specially recognized under separate federal treaties, agreements or statutes. As the Act applies to them, plaintiffs urge that it is sufficient to evidence congressional acknowledgement of a trust relationship in their case at least as respects the Tribe's land claims.

Before turning to the district court's rulings, we must acknowledge a certain awkwardness in deciding whether the Act encompasses the Tribe without considering at the same time whether the Act encompasses the controverted land transactions with Maine. Whether the Tribe is a tribe within the Act would best be decided, under ordinary circumstances, along with the Tribe's specific land claims, for the Act only speaks of tribes in the context of their land dealings. If that approach were adopted here, however, the Tribe would be deprived of a decision in time to do any good on those matters cited by the Department of the Interior as reasons for withholding assistance in litigation against Maine. And without United States participation, the Tribe may find it difficult or impossible ever to secure a judicial determination of the claims. Given, in addition, the federal government's protective role under the Nonintercourse Act, see below, it is appropriate that plaintiffs and the federal government learn how they stand on these core matters before adjudication of the Tribe's dispute with Maine.

Yet the resulting bifurcation of decision necessarily restricts the reach of the present rulings. In reviewing the district court's decision that the Tribe is a tribe within the Nonintercourse Act, we are not to be deemed as settling, by implication or otherwise, whether the Act affords relief from, or even extends to, the Tribe's land transactions with Maine. When and if the specific transactions are litigated, new facts and legal and equitable considerations may well appear, and Maine should be free in any such future litigation to defend broadly, even to the extent of arguing positions and theories which overlap considerably those treated here.

Now, however, for purposes of the issues currently existing between themselves and the federal government, plaintiffs are entitled to declaratory rulings on the basis of which courses can be charted and actions planned and taken.

A. Is the Passamaquoddy Tribe a "tribe" within the Nonintercourse Act?

[1] The district court found the Passamaquoddy Tribe to be within the language of the Nonintercourse Act, "any . . . tribe of Indians." It read the quoted language as encompassing all tribes of Indians. The court reasoned that the Act should be given its plain meaning, there being no evidence of any contrary congressional intent, legislative history, or administrative interpretation; that the policy of the United States is to protect Indian title;[6] that there is no reason why the Passamaquoddy Tribe should be excluded since it is stipulated

6. Indian title, also called "right of occupancy," refers to the Indian tribes' aboriginal title to land which predates the establishment of the United States. *See, e. g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). The right to extinguish Indian title is an attribute of sovereignty which no state, but only the United States, can exercise, the Nonintercourse Act giving statutory recognition to that fact. *Id.* at 667, 670, 94 S.Ct. 772; *O'Toole & Tureen, supra* note 4, at 25–26.

to be a tribe racially and culturally; that there is no requirement that a tribe must be otherwise recognized by the federal government to come within the Nonintercourse Act; and that even if "tribe" is thought to be ambiguous, it should be construed non-technically and to the advantage of Indians so as to include the Passamaquoddy Tribe.

[2, 3] Intervenor and defendants contend that "any . . . tribe of Indians" is ambiguous; that its proper meaning is a community of Indians which the federal government has at some time specifically recognized; and that the Passamaquoddy Tribe is, in that sense, not a tribe. "No court", says intervenor, "has ever held a statute regulating trade and intercourse with Indians to apply to a tribe which the Federal Government disavows any relationship with. . . ."

But while Congress' power to regulate commerce with the Indian tribes, U.S. Const. art. I, § 8, includes authority to decide when and to what extent it shall recognize a particular Indian community as a dependent tribe under its guardianship,[7] *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913), Congress is not prevented from legislating as to tribes generally; and this appears to be what it has done in successive versions of the Nonintercourse Act. There is nothing in the Act to suggest that "tribe" is to be read to exclude a bona fide tribe not otherwise federally recognized.[8] Nor, as the district court found, is there evidence of congressional intent or legislative history squaring with appellants' interpretation. Rather we find an inclusive reading consonant with the policy and purpose of the Act. That policy has been said to be to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty, *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941), *rehearing denied*, 314 U.S. 716, 62 S.Ct. 476, 86 L.Ed. 570 (1942), and the purpose to prevent the unfair, improvident, or improper disposition of Indian lands, *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119, 80 S.Ct. 543, 4 L.Ed.2d 584, *rehearing denied*, 362 U.S. 956, 80 S.Ct. 858, 4 L.Ed.2d 873 (1960); *United States v. Candelaria*, 271 U.S. 432, 441, 46 S.Ct. 561, 70 L.Ed. 1023 (1926). Since Indian lands have, historically, been of great concern to Congress, see *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), we have no difficulty in concluding that Congress intended to exercise its power fully.

This is not to say that if there were doubt about the tribal status of the Tribe, the judgments of officials in the federal executive branch might not be of great significance. The Supreme Court has said that, "it is the rule of this court to follow the executive and other political departments of the government, whose more special duty is to determine such affairs." *United States v. Sandoval*, 231 U.S. at 47, 34 S.Ct. at 6, *quoting United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1865). But the Passamaquoddies were a

7. Congress also has "a right to determine for itself when the guardianship which has been maintained over the Indian shall cease." *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 6, 58 L.Ed. 107 (1913). On the other hand, Congress' power is limited in the sense that it may not bring "a community or body of people within the range of [its] . . . power by arbitrarily calling them an Indian tribe," and may exercise its guardianship and protection only "in respect of distinctly Indian communities." *Id.* It having been stipulated, however, that the Passamaquoddy Tribe is a tribe in both the racial and cultural sense, there is no question that the Tribe is a "distinctly Indian" community.

8. In *United States v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 563, 70 L.Ed. 1023 (1926), the Supreme Court, *quoting Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 45 L.Ed. 521 (1901), read "Indian tribe," as used in the Nonintercourse Act of 1834, 25 U.S.C. § 177, to mean "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory." The Tribe plainly fits that definition.

tribe before the nation's founding and have to this day been dealt with as a tribal unit by the State.[9] *See* 22 M.R.S.A. ch. 1355. No one in this proceeding has challenged the Tribe's identity as a tribe in the ordinary sense. Moreover, there is no evidence that the absence of federal dealings was or is based on doubts as to the genuineness of the Passamaquoddies' tribal status, apart, that is, from the simple lack of recognition. Under such circumstances, the absence of specific federal recognition in and of itself provides little basis for concluding that the Passamaquoddies are not a "tribe" within the Act.

Intervenor cites two cases dealing with the Pueblo Indians of New Mexico for its contention that "tribe" refers only to tribes that have been federally recognized. *United States v. Candelaria, supra*; *United States v. Joseph*, 94 U.S. 614, 24 L.Ed. 295 (1876). In *Joseph*, the Supreme Court found that the Pueblo Indians were not a tribe within the Nonintercourse Act, apparently because of their high degree of civilization and the nature of their earlier relations with the Government of Mexico when they had been under its control.[10] In *Candelaria*, the Court held that the Pueblos did come within the Act, though it did not expressly overrule the *Joseph* view that some tribes, because highly civilized or otherwise, might conceivably be exempt. The Court found that the Pueblos were a simple, uninformed people such as the Act was intended to protect and pointed to federal recognition in the past as evidencing Congress' intention to protect the Pueblos. 271 U.S. at 440–42, 46 S.Ct. 561. These cases lend little aid to intervenor and defendants. The cases do, it is true, suggest that the Act's coverage is limited to tribes consisting of "simple, uninformed people," an interpretation understandable in light of the Act's protective purpose. But it is not claimed that the Tribe and its members are so sophisticated or assimilated as to be other than those entitled to protection. *Cf. Joseph, supra*. *Candelaria* is cited mainly in support of intervenor's argument that the Act requires federal recognition, but it does not elevate recognition to a *sine qua non*; it merely indicates that if there is a question of inclusion, federal recognition of dependent, tribal status may be helpful evidence of Congress' intent.

[4, 5] Appellants also assert that there is significance to Congress' approval of the Articles of Separation between Maine and Massachusetts, providing that Maine would assume the duties and obligations which Massachusetts owed to the Indians. But, as the district court recognized, Maine's assumption of duties to the Tribe did not cut off whatever federal duties existed. Voluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection. *See State v. Dibble*, 62 U.S. (21 How.) 366, 16 L.Ed. 149 (1858). Similarly, Congress' unwillingness to furnish aid when requested did not, without more, show a congressional intention that the Nonintercourse Act should not apply. (*See* Part II, C *infra*.) The reasons behind Congress' inaction are too problematic for the matter to have meaning for purposes of statutory construction. *Cf. Order of Railway Conductors v. Swan*, 329 U.S. 520, 529, 67 S.Ct. 405, 91 L.Ed. 471 (1947).

9. In *State v. Newell*, 84 Me. 465, 24 A. 943 (1892), it is true, the Maine court disputed the continued viability of the Tribe, apparently on the grounds that its sovereignty, such as the power to make war or peace, and the like, had vanished, and the political and civil rights of its members were enforced only in the courts of the State. Nonetheless that court did acknowledge the Passamaquoddies' tribal organization for certain purposes, *id.* at 468, 24 A. 943, and no federal cases hold that the test of tribal existence for purposes of the Act turns on whether a given tribe has retained sovereignty in this absolute sense.

10. The Pueblos had submitted to all laws of the Mexican Government, their civil rights had been fully recognized, and they had been absorbed into the "general mass of the population." *United States v. Joseph*, 94 U.S. 614, 617, 24 L.Ed. 295 (1876).

We have considered appellants' remaining arguments carefully and find them unpersuasive. We agree with the district court that the words "any tribe of Indians" appearing in the Act include the Passamaquoddy Tribe.

B. *Is there a trust relationship between the Passamaquoddy Tribe and the federal government?*

[6] The district court found that the Nonintercourse Act establishes a trust relationship between the United States and the Indian tribes, including the Passamaquoddy Tribe. It relied on a series of decisions by the Court of Claims, *Fort Sill Apache Tribe v. United States*, 201 Ct.Cl. 630, 477 F.2d 1360 (1973); *United States v. Oneida Nation of New York*, 201 Ct.Cl. 546, 477 F.2d 939 (1973); *Seneca Nation v. United States*, 173 Ct.Cl. 917 (1965), while also finding support in an extensive body of cases holding that when the federal government enters into a treaty with an Indian tribe or enacts a statute on its behalf, the Government commits itself to a guardian-ward relationship with that tribe. *See, e. g., Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912); *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *Worcester v. Georgia*, *supra*.

We agree with the district court's conclusions and in large part with its reasoning and analysis of legal authority. That the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question, both from the history, wording and structure of the Act and from the cases cited above and in the district court's opinion. The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy, *United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 348, 62 S.Ct. 248, and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances.

We emphasize what is obvious, that the "trust relationship" we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. Congress or the executive branch may at a later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities; and we of course do not rule out the possibility that there are statutes or legal theories not now before us which might create duties and rights of unforeseen, broader dimension. But on the present record, only the Nonintercourse Act is the source of the finding of a "trust relationship," and neither the decision below nor our own is to be read as requiring the Department of the Interior to look to objects outside the Act in defining its fiduciary obligations to the Tribe.

Once this is said, there is little else left, since it would be inappropriate to attempt to spell out what duties are imposed by the trust relationship. This dispute arises merely from the defendants' flat denial of any trust relationship; no question of spelling out specific duties is presented. It is now appropriate that the departments of the federal government charged with responsibility in these matters should be allowed initially at least to give specific content to the declared fiduciary role.

Thus we are not moved by intervenor's criticism of the lower court's interpretation of cited Court of Claims cases, for those arguments go more to the scope of the federal government's duties under particular circumstances than to the existence of a trust relationship. Nor are we moved by intervenor's other complaint that the judgment below implies some sort of overly "general" fiduciary relationship, unlimited and undefined. A fiduciary relationship in this context must indeed be based upon a specific statute, treaty or agreement which helps define and, in some cases, limit the relevant duties; but, as we have held, the Nonintercourse Act is such a statute.

We affirm, on the basis set forth herein, the finding of a trust relationship and the finding that the federal government may not decline to litigate on the sole ground that there is no trust relationship.

C. *Are plaintiffs precluded by acquiescence or by congressional termination of its guardianship role from now asserting a trust relationship with the federal government?*

[7] Intervenor also contends that, under general equitable principles, the Tribe should be precluded from now invoking a trust relationship with the federal government because of its long-standing relationship with the State of Maine. However, once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease. *United States v. Nice*, 241 U.S. 591, 598, 36 S.Ct. 696, 60 L.Ed. 1192 (1916); *Tiger v. Western Investment Co.*, 221 U.S. 286, 315, 31 S.Ct. 578, 55 L.Ed. 738 (1911). Neither the Passamaquoddy Tribe nor the State of Maine, separately or together, would have the right to make that decision and so terminate the federal government's responsibilities.[11]

[8, 9] We turn, then, to whether Congress itself has manifested at any time a determination that its responsibilities under the Nonintercourse Act should cease with respect to the Tribe. The district court cited a rule of construction that statutes or treaties relating to the Indians shall be construed liberally and in a non-technical sense, as the Indians would naturally understand them, and never to the Indians' prejudice. *Antoine v. Washington*, 420 U.S. 194, 199–200, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930). We agree with the district court that any withdrawal of trust obligations by Congress would have to have been "plain and unambiguous" to be effective.[12] We also agree that there is no affirmative evidence that Congress at any time terminated or withdrew its protection under the Nonintercourse Act. The federal government has been largely inactive in relation to the Tribe and has, on occasion, refused requests by the Tribe for assistance. Intervenor argues that this course of dealings is sufficient in and of itself to show a withdrawal of protection. However, refusing specific requests is quite different from broadly refusing ever to deal with the Tribe, and, as stated above, there is no evidence of the latter.

[10] Intervenor also points to a decision by the Supreme Judicial Court of Maine, *State v. Newell*, 84 Me. 465, 24 A. 943 (1892), which found that the Passamaquoddy Tribe has never been recognized by the fedeal government, and argues that the federal government's failure to react to that decision by recognizing the Tribe in some way amounts to an acknowledgement of that ruling. However, the federal government had no obligation to respond to the state court's decision, which could not affect federal authority with respect to the Tribe. *See Oneida Indian Nation v. County of Oneida, supra.*

We accordingly affirm the district court's ruling that the United States never sufficiently manifested withdrawal of its protection so as to sever any trust relationship. In so ruling, we do not foreclose later consideration of whether Congress or the Tribe should be deemed

11. One might argue that, although Congress has not terminated this relationship, the Tribe's own course of dealings with the State of Maine still prevent it from asking Congress for assistance. However, the Indians' presumed helplessness is at the heart of the guardian-ward analogy; to deny the ward a right to call upon the guardian for protection would be to deny that he was incapable of looking out for himself.

12. The Supreme Court has said with respect to the termination of Indian reservations that it will not lightly conclude that a reservation has been terminated and will require a clear indication of that fact. *DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

in some manner to have acquiesced in, or Congress to have ratified, the Tribe's land transactions with Maine.

Judgment affirmed.

UNITED STATES of America, Plaintiff-Appellee,

v.

Alvin WILLIS, Jr., Defendant-Appellant.

No. 75-3009.

United States Court of Appeals, Ninth Circuit.

Jan. 12, 1976.

The United States District Court for the Eastern District of California, Thomas J. MacBride, Chief Judge, found defendant guilty of interstate transportation of a forged security, and he appealed. The Court of Appeals held that where defendant knowingly and fraudulently deposited a forged check drawn on a Texas bank in his California bank account knowing that the signature of the drawer was forged, and where he drew the money after the forged check cleared the Texas bank, he was properly found guilty of interstate transportation of a forged security, even though the fruition of the alleged scheme occurred after the mails were utilized.

Affirmed.

1. Receiving Stolen Goods ⇐1

Where defendant knowingly and fraudulently deposited a forged check drawn on a Texas bank in his California bank account knowing that the signature of the drawer was forged, and where he drew the money after the forged check cleared the Texas bank, he was properly found guilty of interstate transportation of a forged security, even though the fruition of the alleged scheme occurred after the mails were utilized. 18 U.S. C.A. § 2314.

2. Receiving Stolen Goods ⇐1

Mail fraud statute's peculiar language, i. e., that use of the mails be for the purpose of executing a fraudulent scheme, is not an element of the crime of interstate transportation of a forged security; all that the interstate transportation statute requires is that defendant either transport or cause to be transported in interstate commerce the forged security knowing it was forged. 18 U.S. C.A. § 2314.

Jerome S. Stanley, Sacramento, Cal., for defendant-appellant.

Bruce Babcock, Jr., Asst. U. S. Atty., Sacramento, Cal., for plaintiff-appellee.

OPINION

Before CHOY and KENNEDY, Circuit Judges, and WONG,* District Judge.

PER CURIAM:

On stipulated facts, Defendant was found guilty of interstate transportation of a forged security. We affirm.

He contends here that *United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974) bars his conviction because the fruition of the alleged scheme occurred after the mails were utilized. (In *Maze*, a case under the mail fraud statute, 18 U.S.C. § 1341, the mailing occurred after the fraud was consummated so the Court held that the use of the mails had not been "for the purpose of executing such [fraudulent] scheme or artifice" as the statute required.)

[1] Here the essential stipulated facts were that Willis knowingly and fraudu-

* The Honorable Dick Yin Wong, United States District Judge, District of Hawaii, sitting by designation.

THE WHITE HOUSE

WASHINGTON

August 26, 1976

MEMORANDUM FOR: The Secretary of the Treasury
The Secretary of Defense
The Attorney General
The Secretary of the Interior
The Secretary of Agriculture
The Secretary of Commerce
The Secretary of Labor
The Secretary of Health, Education, and Welfare
The Secretary of Housing and Urban Development
The Secretary of Transportation
The Director, Office of Management and Budget
The Chairman, Civil Service Commission
The Administrator of General Services
The Administrator, Small Business Administration
The Administrator of Veterans Affairs
The Director, Community Services Administration
The Administrator, Environmental Protection Agency
The Acting Chairman, Equal Employment Opportunity Commission
The Governor, Farm Credit Administration

I am today designating Bradley H. Patterson, Jr., of the White House Office to assist me in the area of American Indian affairs. It will be Mr. Patterson's specific responsibility to work with each of you to improve the coordination among the Federal agencies with programs that serve the Indian people.

It is important that you insure the effective delivery and efficient operation of Federal Indian programs and services. I request that priority attention be given to coordination of these efforts among the Departments and Agencies and within the Executive Office of the President.

In addition, I request you continue to insure that when Federal actions are planned which affect Indian communities, the responsible Indian leaders are consulted in the planning process.

Gerald R. Ford

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The New York Times/Arthur Grace

Nicholas Sappiel, leader of Penobscot Indians, chides Maine officials who "used to laugh about this case"

Maine Indian Suit for Land Halts Bond Sales and Endangers Titles

By JOHN KIFNER
Special to The New York Times

CALAIS, Me., Oct. 23—The Indians may legally own two-thirds of Maine.

This possibility, raised in a lawsuit that seemed insignificant, even ludicrous, four years ago, has suddenly blocked the sale of millions of dollars of municipal bonds, cast in doubt the ownership of private lands and whole towns and thrown the state government here into consternation.

The suit on behalf of the Passamaquoddy and Penobscot Indian tribes charges that their ancestrial forest lands were illegally bargained away to the local white authorities in violation of the Federal Nonintercourse Act of 1790.

The claims center on 12 million acres or more, worth some $25 billion, according to Thomas N. Tureen, attorney for the Indians here.

"They used to laugh about this case and everything else," said Nicholas Sappiel, the leader of the Penobscot Indians. "Now they're getting a few gray hairs. You've never seen so many lawyers. It reminds you of a cartoon."

"It's preposterous," said State Attorney General Joseph E. Brennan, Maine's chief legal officer. "You just don't undo 200 years of history that readily."

But Mr. Tureen, a young antipoverty lawyer who read the fine print of history, has steered his case over a convoluted course that saw the Federal courts order the United States Government to sue the State of Maine on behalf of the Indians.

Mr. Tureen contends that the Federal courts have now settled what he says is the central issue of the case by finding that the Nonintercourse Act applies to the Maine tribes.

"Nobody could believe it," Mr. Tureen said of the suit he filed in 1972, and added, "We would have settled cheap."

Now the Indians, who were allies of the patriots in the Revolution, are not inclined to accept Gov. James B. Longley's urging that they drop their land claims.

The existence of the case has, in recent days, stopped the sale of $27 million of bonds by the Maine Bond Bank, halting school and hospital construction in small municipalities. It has also left the larger towns of Ellsworth and Millinocket unable to float $4.4 million in bonds and sent Governor Longley and other offi-

Continued on Page 59, Column 1

THE WHITE HOUSE

WASHINGTON

November 24, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: BOBBIE KILBERG BK

Counsel's Office agrees with the actions reported in Cannon's memorandum.

cc: Phil Buchen ✓

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: November 18, 1976 Time:

FOR ACTION: cc (for information):

Phil Buchen (Bobbie Kilberg)

FROM THE STAFF SECRETARY

DUE: Date: Soon as Possible Time:

SUBJECT:

Memo from Bradley Patterson & George Humphreys re: Governor Longley's Inquirey re the Passamaquoddy/Penobscot Case

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

__X__ For Your Comments ____ Draft Remarks

REMARKS:

As Discussed would like your comments on this informational memo before sending into the President.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

THE WHITE HOUSE

WASHINGTON

INFORMATION

November 15, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: JAMES M. CANNON

FROM: BRADLEY H. PATTERSON, JR.
GEORGE W. HUMPHREYS

SUBJECT: Governor Longley's Inquiry re the Passamaquoddy/Penobscot Case

Governor Longley of Maine met with you recently and asked you to look into this matter; you told him you would do so.

The Passamaquoddy Indian Tribal Council won a Federal Court decision from Judge Gignoux at the beginning of 1975 declaring that the United States has a trust responsibility to the Tribe and declaring that the Tribe is in fact covered by the terms of the 1790 Nonintercourse Act (25 USC 177) which forbids the conveyance of Indian land without the consent of the United States. This decision was affirmed by the First Circuit Court of Appeals on December 23, 1975.

The chain of effects from that decision is:

-- The land conveyances in the treaties of 1794 and 1818 between Maine (then Massachusetts) and the Passamaquoddy and Penobscot Indians respectively, wherein the Indians gave up some 2,000,000 and 10,000,000 acres respectively of their aboriginal lands may well be void, since the United States was not a party to these treaties nor were they ever ratified by the Senate.

-- This in turn puts a cloud over the ownerships and titles in those 12,000,000 acres -- which amounts to 60% of the State of Maine.

-- Because of this cloud, bond attorneys have advised clients not to buy State of Maine construction bonds, and a $27 million sale of same has been held up.

-- Tax anticipation bonds (from real estate taxes) for the operating expenses of Maine towns and counties will probably suffer the same fate as of next January. This will hurt some of those communities.

-- The Federal Government, now as Trustee for the Indians, has in the Circuit Court's words "the duty to investigate and take such action as may be warranted in the circumstances." This may well mean pursuing or expanding (to other property-owning defendants) two protective lawsuits filed some time ago against Maine on behalf of the tribes by Justice at the insistence of the Court.

-- Judge Gignoux has set back a November 15 deadline to January 15, 1977 for the Federal Government to come into his court and tell him what they are going to do to discharge their trusteeship obligation. Much research must be done to put any expanded suits in final form before a July, 1977 expiration of the Statute of Limitations for all Indian claims for trespass damages.

The State Attorney General continues to call the Indians' claim "preposterous", "frivolous" and "without merit"; the Maine Congressional delegation introduced a bill to repeal the Nonintercourse Act and has more recently washed its hands of the matter claiming that it is a problem for the Courts.

The Indians have long been ready to talk about a comprehensive settlement package but the State has shown little interest.

Actions Now Being Taken:

Solicitor Austin of Interior is sending a letter to the Maine Deputy General, transmitting documents showing the the strength of the case and inviting his input and comment.

Secretary Kleppe is responding to a letter he has received from Governor Longley, will refer to Mr. Austin's invitation to the State Deputy Attorney General, and will also refer to the Governor's visit with you -- by saying that "The President has asked me to look into this matter." We and Mr. Buchen believe that this discharges your obligation to Governor Longley and keeps the matter at the proper arm's length from the White House.

The Future:

After receiving input from both the Indians and the State, Interior will send its Litigation Report to Justice -- i.e., the formal request for definitive or expanded lawsuits.

The Litigation Report will then be made available to the Indians and the State and further comments will be invited.

These comments may point to a possible overall settlement, such as a "Maine Native Claims Settlement Act" by the Congress (as an alternative to months if not years of claims litigation.)

Justice will inform Judge Gignoux of the steps taken so far.

Mr. Carter, then as President, will have to make the final judgment about what kind of lawsuits or a legislative package to support.

THE WHITE HOUSE

WASHINGTON

November 29, 1976

NOTE FOR

Phil Buchen
George Humphreys

Attached for your information are copies of the two letters which Interior has sent to Maine officials, i.e. Governor Longley and Deputy Attorney General Paterson respectively.

As agreed, the letter to the Governor mentions the President's interest in this matter.

Interior will send me a copy of the material received from Mr. Paterson when it arrives.

Jack

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Honorable James B. Longley
State of Maine
Office of the Governor
Augusta, Maine 04333

NOV 22 1976

Dear Governor Longley:

Thank you for your letters of October 8 and October 26, 1976, regarding the land claims of the Maine Indian Tribes. As I indicated to you when we met some weeks ago, I understand and appreciate the very real concerns of the people of your State. The President has also expressed interest in this matter, and has asked me to give it my personal attention.

As you know, shortly after our meeting Mr. Brennan, your Attorney General, met with Mr. Austin, my chief legal officer. Subsequent to that meeting, attorneys in the Solicitor's Office, including Mr. Austin himself, undertook a very careful analysis of a proposed litigation report to the Justice Department with regard to the claims of the Passamaquoddy Tribe. A similar report on the claims of the Penobscot Nation is in the preliminary stages.

That analysis is not yet completed. It involves, among many other things, a complete historical and legal review of over 200 years of transactions. It is not proper to suggest that our ultimate decision in this matter is controlled by a threat of a suit by the Tribe. This Department was sued by one of the tribes and this Department defended that suit jointly with the State of Maine. The Court has now rendered its decision and we are required to comply with that judgment.

I am understandably concerned with the implications contained in your stated desire that you receive "fair treatment or fairer treatment" than you perceive you have received to date. I was unaware of any unevenness of treatment in this respect but I will restate the position I enunciated at the time of our conversation

in my office: the posture of the Government today vis-a-vis the State of Maine is different from the relationship that existed when the Government and the State defended the suit of the tribe in the Joint Tribal Council of the Passamaquoddy Tribe v. Morton.

Nothing in the foregoing is to be taken as meaning that we are not keenly aware of the ramifications of the situation. You were particularly effective in bringing home to me the seriousness of the State's position and the distress some persons in your State have already experienced. We are not unconcerned.

For example, Mr. Austin has indicated to me that he appreciates your Deputy Attorney General's letter of October 21, 1976 in which he offers to submit a memorandum on his view of the Indian claims. Mr. Austin also informs me that he is amenable to the idea of sharing with your Attorney General certain of the materials which support the Passamaquoddy and Penobscot land claims so that the Department's litigation reports will reflect a thoroughly considered decision in these matters. This is but one indication of our desire to try to assist the State all we can subject to the legal limitations placed on us by our trust relationship with the Tribes.

Please be assured that we are giving high priority to the evaluation of the tribal claims and that that evaluation will be the result of very careful study.

Sincerely yours,

Kent Frizzell Austin

Acting Secretary of the Interior

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

NOV 11 1976

John M. R. Paterson, Esquire
Deputy Attorney General
Department of the Attorney General
State of Maine
Augusta, Maine 04333

Dear Mr. Paterson:

This will acknowledge your letter of October 21, 1976, with respect to United States v. Maine, in which you stated your understanding of the status of the preparation of our litigation report to the Department of Justice, requested that the United States make available to you certain factual and historical materials which we now have in hand, and described your reservations concerning the disclosure to the United States of factual and legal aspects of the position of the State of Maine in opposition to the anticipated claims of the Passamaquoddy and Penobscot Tribes.

While your description of our present posture is accurate, the matter is of sufficient importance that I would like to restate one point in order to avoid even a remote possibility of misunderstanding.

The draft litigation report submitted by us to the Department of Justice does take the form of a firm recommendation; however, you are correct in stating that we have not yet made a firm recommendation to the Department, since our report is still in draft form.

We are thoroughly sympathetic with the concerns expressed by you with respect to revealing, at this time, the factual or legal basis of your position in opposition to the anticipated claims of the Passamaquoddy and Penobscot Tribes. I would like to repeat that we have neither requested nor urged that the State make such a disclosure to us. However, I did state that we are still in the process of formulating the position which this Department will take on behalf of

the Tribes, and that any factual or legal information supplied to us by the State of Maine might be helpful to us in establishing our position and deciding upon the course which we will pursue on behalf of the Indian Tribes.

In response to your request that we make factual and historical materials available to you, we are submitting herewith summaries of the factual bases for the Passamaquoddy and Penobscot land claims. If you wish to attempt to rebut any or all of the conclusions found therein, please do so in the memorandum which you intend to prepare for us. Again, however, please understand that you are not obliged to do so.

I think we agree that it is in everyone's interest to resolve the questions posed by the Tribes' claims as soon as possible. Therefore, if you expect to offer your arguments to us, please submit them no later than November 30, 1976.* As you know, the Justice Department is now required to inform the court of the government's final decision by January 15, 1977.

Sincerely yours,

H. Gregory Austin
Solicitor

* Extended to Dec. 7 at Paterson's request.

THE WHITE HOUSE
WASHINGTON

November 23

TO: PHIL BUCHEN

FROM: GEORGE W. HUMPHREYS

Memo went to the
President on 11/15.

COPY FOR MR. BUCHEN

COPY to Bobbie
to hold
FILE

THE WHITE HOUSE

WASHINGTON

November 12, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: JAMES M. CANNON

FROM: BRADLEY H. PATTERSON, JR.
GEORGE W. HUMPHREYS

SUBJECT: Governor Longley's Inquiry re the Passamaquoddy/Penobscot Case

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THE WHITE HOUSE

WASHINGTON

December 3, 1976

MEMORANDUM TO: PHIL BUCHEN
BRADLEY PATTERSON

FROM: JIM CANNON

SUBJECT: Passamaquoddy and Penobscot Land Claims

The President would like an option paper for his review on the Maine Indian land claims problem.

I have asked George Humphreys to work with you, or your designate, to present a full discussion of possible Presidential action that may be advisable in order to effect an early settlement. George will be calling you shortly for your advice and guidance.

As a starter, I am attaching five legislative options that have been suggested to us. You may want to review this list for any good ideas it may suggest.

PASSAMAQUODDY SETTLEMENT LEGISLATION OPTIONS

Option 1: The President could recommend that the Congress ratify the 1794 Treaty conveyance nunc pro tunc, thus probably extinguishing any claim which the tribes may have to the land in question or compensation therefor.

Option 2: The President could recommend to the Congress the enactment of a Maine Native Claims Settlement Act (MNCSA) which would provide that the Indian Claims Commission, or a specially constituted commission, would determine the scope of the aboriginal lands of the tribes as of 1794, and determine the value of the aboriginal lands which were conveyed by the tribes under the 1794 Treaty, and then award to the tribes the 1794 value of the aboriginal lands which were conveyed, which would probably amount to something less than $15 million. In addition, the Indians could be awarded interest on the value of the lands conveyed. At 5% per annum simple interest, this would increase the award by a factor of approximately 10, to a total of something less than $150 million. At 5% per annum compound interest, the increase would be by a factor of approximately 700, to a total of something less than $105 billion.

Option 3: The President could recommend a MNCSA which would provide that the Indian Claims Commission, or a similarly constituted commission, would evaluate the legal claim now being advanced by the Indians, and award to the tribes the present value of any land the title to which the tribes were found to have a valid claim. This award would amount to the present value of up to 16 million acres of Maine land including approximately 100,000 private homes and buildings.

Option 4: The President could recommend a MNCSA which would simply set an arbitrary sum to be paid to the tribes in full settlement of any legal claims they might have by reason of the 1794 Treaty. Such a settlement might amount to a payment of cash in the amount of $1,000 to $100,000 for each of the approximately 3,000 members of the tribes.

Option 5: The President could recommend a MNCSA along the lines described in options 2 through 4 and, in addition, recommend that the MNCSA contain provisions requiring that the State of Maine, as its contribution to the settlement, deed certain state-owned lands to the tribes.

DISCUSSION

Option 1: The Congress has legal authority to extinguish Indian land claims, such as are involved in these cases, by statute without compensation. It can be argued that the Maine Indians have no equitable or moral argument in support of their claim, and that any compensation paid to them would amount to a windfall. The tribes have not argued that they were dealt with unjustly, but rather based their entire claim solely upon technical non-compliance with the Nonintercourse Act.

Option 2: Historically, Congress has not taken a hard line on extinguishment of aboriginal title. Under the Indian Claims Act, Congress has provided that tribes who have lost their aboriginal lands unfairly under Federal treaties may sue for the value of the land at the time of loss. Although the Indian Claims Act generally provides for compensation when there is a presence of fraud, unconscionable consideration, etc., an analogy could be made between such situations and the extinguishment of a valid claim under the Nonintercourse Act. No interest is allowed under the Indian Claims Act but if simple reimbursement for the 1794 value of the land (probably less than $1 per acre) appears unreasonably low, simple interest might be added for these purposes.

Option 3: As a matter of Indian advocacy, this option must be considered. This option would give to the Indians the monetary equivalent of the value of the tribes' Nonintercourse Act Claim. To give the tribes anything less is, arguably, to take from the tribes something granted by act of Congress.

Option 4: This option could be supportable on grounds that, in light of the availability of option 1, only token compensation is justifiable. It would have the further advantages of being fast, simple and predictable in cost.

Option 5: Since fault, if any, lies with the State of Maine (or its predecessor, the State of Massachusetts), and since the entire burden of the Indian claim will fall on the residents of the State of Maine in the absence of congressional action, there is good justification for requiring a contribution from the State of Maine to the settlement. The State of Maine does own undeveloped lands which could be made available to the tribes. Since the tribes claim close attachment to the land, providing land as a part of the compensation might make a settlement more palatable to the tribes.