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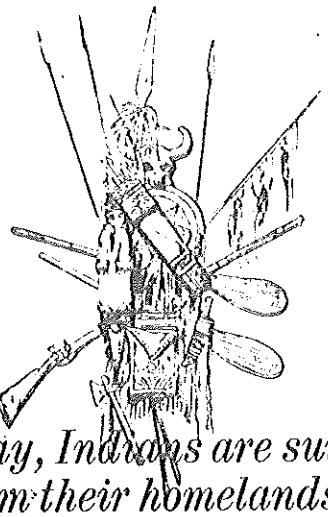

Today, Indians are suing to reclaim their homelands—and the locals are getting restless.

Native American Land Rights

By PETER KOVLER

NOW THAT A DOZEN American Indian tribes are suing—or threatening to sue—land and property owners in Maine, Massachusetts, Rhode Island, Connecticut, New York, and South Carolina, whites in many eastern states are beginning to express a sort of anti-Indian anger that, heretofore, had belonged in the verbal repertoire of the Wild West redneck. In many cases the federal government has examined the suits and, in its role as trustee for Native Americans, has agreed to be part of the prosecution. In addition, the federal courts have issued several rulings that favor the tribes. The combined effects of these two developments have bolstered the claims of the tribes; caused a good deal of economic uncertainty in the disputed areas; and established a division—in a way that immediately recalls the 1950s civil rights courtroom battles in the South—between the federal government, allied with the "minority group," and the states with their cause of states' rights.

The claims by the tribes are based on one simple but neglected law, the Indian Non-Intercourse Act of 1790. This act states that "no sale of lands made by any Indians or any nation or tribe of Indians within the United States shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." While subsequent acts have slightly amended the original, the essential meaning remains unchanged: all land transactions between the tribes and non-Indians must be supervised by the federal government and ratified by Congress.

The gravamen of the tribes' charges is that states and individuals took Indian lands without the approval of the federal government; hence, all deals are off and the land should go back to its real owners. Reliance on the Non-Intercourse Act may seem odd in these cases, for it is an extremely old and obscure law. But its advantage to the Native Americans lies precisely in the fact that it can easily be established that the law's technical requirements were often not met. The Non-Intercourse Act is based on an approach which implies that Native

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Americans ought to be wards of the federal government—an approach which the Indians themselves increasingly reject. Nevertheless, they view the courts' applications of this law as a legal avenue that may offer the quickest and most feasible way to restore the Indians' identity and regain the territories they often lost through theft or chicanery. For years (in the case of the Oneida Tribe vs. the state of New York, 80 years) tribes have tried to convince the federal government that it had the duty to litigate for them. Also, tribes have tried to make the courts adjudicate. But these cases have been considered quixotic. New York's assistant attorney general in charge of Indian affairs, Jeremiah Jochnowitz, points out, "These cases would have been laughed out of court if they were brought 30 years ago."

But within the past five years, the courts have turned around. Decisions at District, Appellate, and Supreme Court levels have favored Native Americans. As a consequence, although none of the cases has been finally and irrevocably decided, Indian claims are suddenly looking realistic.

It is impossible to determine at this point what the outcome will be. Each case is unique. Each of the tribes once possessed a reservation and then lost it through questionable transactions; however, the sizes of the claims, the histories of the tribes, and the contemporary situation of each tribe vary greatly. Equally important, the reactions of the white landowners and the states have been extremely diverse. In some situations state officials are conciliatory and out-of-court agreements seem certain. In others, however, ambitious politicians have been trying to take advantage of ignorant citizens and have acted demagogically. In these states, the mood is tense.

CERTAINLY THE MOST dramatic case has been brought by the Passamaquoddy and Penobscot tribes against the state of Maine. It is also, according to one Justice Department official, "one of the most legally complicated cases ever." In 1972 those tribes filed a suit in the District Court of Maine against the secretary of Interior, Rogers Morton. The suit alleged that the Non-Intercourse Act applied to the tribes and that the federal government had a duty to represent them. The tribes contended that the sale of their land in 1794 to the state of Massachusetts (at that time Maine was part of Massachusetts) was illegal, since it was not ratified by Congress. A statement made by the tribes last March 8 summarizes their position:

Both our nations fought on the side of the Americans in the Revolutionary War pursuant to a treaty negotiated by federal Indian agents in 1777. Because of our efforts, much of Maine is in the United States today rather than in Canada. In that 1777 treaty, the federal government promised to provide us with supplies and promised to protect our hunting grounds. That federal treaty, however, was never ratified by the Congress and in a series of transactions starting in 1794, Maine and Massachusetts took practically all our lands [ten million acres, half the present state of Maine] and left us totally destitute.

These suits have created a division between the federal government, allied with the minority group, and the states with their cause of states' rights.

According to Barry Margolin, one of the tribes' attorneys, "The state took the land from the tribes in exchange for nothing. . . . To these tribes at that time the whole meaning of real estate—and buying and selling and dealing in land—was meaningless because they had lived there from time immemorial."

Surprisingly, Federal District Court Judge Edward Gignoux agreed with the plaintiffs, and he ordered the federal government to act as the Indians' legal trustee and accept the responsibility for the land claims. The Nixon administration, however, was not going to allow itself to be bullied by a mere District Court judge, and the case was appealed. But in late 1975 the Court of Appeals confirmed Gignoux's decision. At that point the Justice Department chose not to go to the Supreme Court and, therefore, it was compelled to prepare legal actions on behalf of the two tribes.

On February 28 of last year, Interior and Justice announced their conclusion: that the Indians had valid claims to between five and eight million acres of land and that monetary damages were owed for its use. Although the total Penobscot and Passamaquoddy claims have been estimated at 12.5 million acres and $25 billion in back rents and damages, the government and the tribes agreed to take no immediate action against any of the area's 350,000 homeowners and small business people. Rather, the action would be against the state of Maine and the large paper mill companies which own much of the land.

Shortly after the February 1977 decision, doubts about ownership of Maine property caused a disruption in real estate markets: some local communities had trouble issuing bonds to finance projects; banks seriously questioned mortgage loans; and title companies grew cautious about issuing land titles. There is some dispute, however, about the extent of the economic uncertainty. For example, a spokesman for the tribes has pointed out that Morgan Guarantee Trust issued $15 million in bonds just after the announcement of the plans for the suit.

Nevertheless, Maine's senators and representatives asked Congress to resolve the problem. Knowing that Congress has "plenary power" over tribes, they introduced bills that would, essentially, extinguish the claims. In March 1977, Representative William Cohen tried to awe his House colleagues with meteorological and medical metaphors: "A dark cloud of doubt and instability is hovering over the state of Maine as a result of the suit brought by Passamaquoddies and Penobscots . . . the very pendency of the suit threatens to bring the state of Maine to its knees . . . the central nervous system of the municipalities could not survive this act of financial anoxia. . . . Already there is a revolt beginning among the non-Indian citizens."

In the meantime, President Carter ordered a mediator to try to bring the sides together. Last summer Judge William Gunter appraised the situation and came up with the following recommendations: appropriate $25 million and 100,000 acres to the tribes. In short, for every dollar that the tribes are asking for, they would receive one tenth of a penny; for every acre, they would receive 350 square feet—the size of a two-bed-

room apartment. If the tribes did not agree, Judge Gunter recommended, the President should ask Congress to extinguish the Indians' claims.

The tribes, of course, were outraged. In a letter to the President they declared: "Judge Gunter displays no concern for our rights. While he concludes that our claims are meritorious enough to warrant an out-of-court settlement, he admits that he has not attempted to negotiate with us and says if we don't accept his terms that you should recommend that Congress extinguish 90 percent of our claims without any compensation whatsoever. It is difficult for us to understand this."

At this point the principal argument made against the Indians is that they cause instability. Said Judge Gunter, almost echoing Representative Cohen: "The problem with these tribal claims is that they have the unfortunate effect of causing economic stagnation within the claim area. They create a cloud on the validity of real property titles. Were it not for this adverse economic result, these cases would take their normal course through the courts." Basically, the situation is a question of the stability of the state vs. the justice owed to the Indians.

At present, the claims are in limbo. The extinguishment bills are unlikely to move through Congress, largely because key committee chairmen (Senator James Abourezk of South Dakota and Representative Morris Udall of Arizona) are opposed. Meanwhile, the federal government has received a continuance from the District Court, pending an out-of-court settlement. But most significantly, in a surprising development in early February it was announced that the federal government and the tribes had been secretly negotiating, and that they had reached an agreement: an out-of-court settlement should be attempted where the tribes would receive $25 million in cash, $1.7 million a year for 15 years, and 300,000 acres. Clearly the tribes had succeeded in forcing the federal government to take a "better" position. But while the government's newest stance is important to the tribes—giving further credibility to their position—it does not seem that a final settlement is near.

Indeed, at this point it is unlikely that the other parties (the State of Maine and the timber companies) will agree to this resolution. According to Maine's Attorney General Joseph Brennan, "The agreement is irresponsible and indefensible. . . . Apparently the federal government and the tribes have joined together to deliver the people of Maine a set of non-negotiable demands of staggering proportions."

A second case that appears as if it will remain uncertain in the near future pits the Wampanoag tribe against the Cape Cod town of Mashpee. But unlike the Maine case, federal judicial decisions have tended to hamper the Indians' cause. Whites in Mashpee generally seem to be more at ease.

The Oneidas never abandoned their claim to their original homeland. They never accepted the loss of their land but have continued to protest its diminishment until today.

The Mashpee tribe is seeking a declaration of ownership of approximately 13,000 acres. Like the Penobscots and Passamaquoddies, they have exempted from their claim all individual homeowners. The defendants include the town of Mashpee (represented by James St. Clair, Nixon's legal adviser), the State of Massachusetts, several real estate developers, a utility company, and a group of title insurance companies.

The area of Mashpee, says the tribe, "was guaranteed by the Plymouth colonists in 1685. At that time, the Colony pledged that the land would be perpetually owned by the tribe's descendants and that it would never be sold without the consent of all the Indians of Mashpee . . . [But] the state adopted laws which resulted in the alienation of virtually all of the tribe's territory.

"Few non-Indians," the tribe says, "moved into Mashpee until shortly after World War II, when a wave of development began which continued until the filing of the lawsuit. This massive development brought a large influx of non-Indian residents, who took control of the town government away from the native population and who closed off access to the many ponds, rivers, and shore areas of Mashpee [thereby] violating rights promised under both the Indian Non-Intercourse Act and by this country's first European colonists."

The tribe's hopes, however, were severely hurt in early January when a federal jury concluded that the Mashpees were not a tribe. The jury had believed St. Clair's arguments that the Indians had been assimilated into the overall culture of the town and therefore had no distinct claim to the property. Apparently, the jury was not convinced by the Wampanoag position that they were "still living on the same land, practicing the same traditions."

But in spite of this setback, it seems certain that the case will be appealed. Lawyers for the tribe have indicated that they think the judge's instructions to the jury were unfair and, therefore, due process was not accorded. At present, it seems the case will be argued in the courts for many years. The possibility of resolution through mediation seems slim since Judge Gunter is also looking at this case for the White House, and few people believe that he will suggest an acceptable compromise.

IN NEW YORK STATE, three tribes, the Oneidas, the Mohawks, and the Cayugas, are suing for 318,000 acres and for damages in excess of $1 billion. In some cases the Departments of Justice and Interior decided that the claims have merit; the departments have announced that they are prepared to file on the Indians' behalf for recovery of lands and monetary damages for 180 years of trespass. In one Oneida suit, a Federal District Court Judge has already ruled in the tribe's favor.

In many ways, the Oneida suits are the most important to watch, for those cases are the furthest along. Indeed, in July of last year, Federal District Court Judge Edward Port ruled favorably on the merits. While other judicial decisions have been on preliminary issues (Must the federal government represent the Indians? Are the Mashpees a tribe?), in this particular suit the decisions have been on state violations of the Non-Intercourse Act.

The Oneidas claim 246,000 acres of New York. They say that the land is located in the heart of their aboriginal territory and that the land was

confirmed as theirs in the 1794 United States Treaty with the Six Nations of the Iroquois Confederacy. One year later, says the tribe, the State of New York—then in conflict with the new federal government over authority to negotiate Indian land purchases—began to take title to the lands. Possession of nearly all the 246,000 acres was taken by New York State, say the Oneidas, through a series of illegal transactions: 25 unratified treaties (all signed between 1795 and 1842).

Instead of suing for all the acreage, the Oneidas filed a test suit in 1970 for 100,000 acres as well as for damages resulting from the use and occupancy of the land during 1968 and 1969. At first the case seemed doomed when the District Court and the Court of Appeals ruled that the federal courts did not have jurisdiction. But in 1974 the Supreme Court reversed those decisions, declaring that the federal courts do have the duty to judge such cases. The Oneidas brought the suit last year, and on July 12, Judge Port made his ruling:

In 1795, the State of New York acquired from the Oneida Indians, by an instrument variously denominated as a deed or treaty, 100,000 acres in Central New York. The counties of Oneida and Madison have acquired and now occupy undesignated but small portions of that acreage. The claim made in this case is limited to damages for . . . 1968 and 1969 . . . of those "parts of said premises for buildings, roads, and other public improvements."

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

Although the present owners of the 100,000 acres may have acted in good faith when acquiring their property, such good faith will not render good a title otherwise not valid for failure to comply with the Non-Intercourse Act. Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

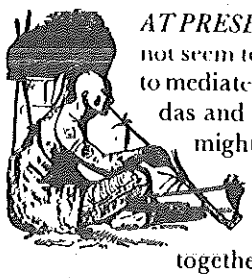
Some of the historical background included in Judge Port's decision is worth repeating here, for it symbolizes the dramatic change in the thinking of much of the federal judiciary:

By 1846, the Oneidas' landholdings had been diminished to a few hundred acres. The social and economic pressures on the Oneidas naturally resulted in the alienation of their land. In addition, white settlers living in the areas continually encroached on the Oneidas' land. . . .

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

Naturally, there was consternation among the area's whites. Representative Jim Hanley (R.-N.Y.) spoke for many of his constituents when he said: "Regardless of how we feel personally about the merits of the case, and I, for one, consider the land claims to be nonsensical, the federal courts are taking them seriously."

The courts' applications of this law are the quickest and most feasible way to restore the Indians' identity and regain the territories they lost.



AT PRESENT, THERE DO not seem to be any attempts to mediate. While the Oneidas and the state say they might have an interest in negotiating, they do not appear eager to get together. So the Oneidas are simply preparing for the next case, which will be a trial to determine how much they should receive in damages. That case is expected to go to Judge Port in the late spring or early fall. After that is resolved, the state will probably appeal. Of all the tribes, it appears the Oneidas have made the most progress.

However, the government has now joined negotiations between the parties in the case of the Mohawks and Cayugas vs. the State of New York. Again, the claims are based on the Non-Intercourse Act. In dispute are at least 275,000 acres of rural land that is sparsely populated (although there are at least 30,000 individual property owners and the land is valued at over $1 billion). St. Regis–Mohawk attorney Art Gajarsa says that "in several 'treaties' the state took parcels of land. Sometimes if white people had occupied those lands and the Indians made claims, the whites would ask the legislature to make a treaty to legitimize their ownership. This would be done and the land would no longer belong to the tribe.

"At times," he continues, "the land was taken and no U.S. Commissioner was present to help the Indians. The tribe didn't speak English, and these treaties were marked with an X. They weren't read for their true meaning. Later on, the state sold most of the Reservation lands for $270,000 . . . right after they took it."

According to Cayuga Chief Jim Leaffe: "A long time ago, before the United States existed, the Cayuga extended from Ontario to Pennsylvania. At that time we made a treaty with New York State so they could buy aboriginal land. It was also agreed to form a Cayuga Reservation of 64,000 acres. A few years later they came back to buy the rest. At that time the Cayuga didn't think about what they were selling, they were naive. They trusted the white man, and they were cajoled. Indians didn't know there were certain procedures that had to be followed. We say, now, that the state obtained the land illegally and the government says we got a case."

Chief Leaffe adds that there is one potential problem. He fears that in negotiations the other parties will try to resolve the dispute by giving the tribes money and not land. It is a fear shared by many claimants. While this may seem fair to others, he says, it is "not just." He adds: "For legal reasons we think it is ours. But, too, and many whites do not understand this, land has a special meaning for Indians. We need a home base, something to go back to, a place to go where nobody can say 'get off.' "

Perhaps above all else, the claim of the Cayugas and the Mohawks demonstrates the momentum behind the land rights claims. These tribes have not even gone to court—and the state is already trying to negotiate an out-of-court settlement.

In South Carolina, the Catawba tribe has asked for the return of 144,000

acres. In this case, too, the Departments of Justice and Interior have taken the side of the Indians. The Catawbas say that the acreage was reserved for them in 1763 at the Treaty of Augusta with the British Crown. In return for these reservation lands, the Catawbas ceded a tract of land 60 miles in diameter. In 1840, the state of South Carolina negotiated a transaction with the Indians which purported to extinguish Indian title to the 1763 reservation. The United States was not a participant in the deal, nor did Congress approve the alienation of the Catawba Indian Reservation. Hence, the trade was made in violation of the Non-Intercourse Act.

According to the Catawbas' attorney, South Carolina State Representative Jean Toal, "During the mid-1800s, the state took most of the land, leaving the tribe only about 630 acres. They said to the Catawbas, 'If you let us have your reservation for $5000 we'll move you up to where the Cherokees are in North Carolina'; so a bargain was struck. But the Cherokees and North Carolina did not want to make the deal and the Catawbas were left with 630 barren, unproductive acres. The state reneged on the deal."

For the last 14 months settlement talks have taken place between the tribe and the state attorney general. Both sides agree that an out-of-court settlement is likely. In general, both sides agree that there should be a Catawba Indian Lands Claims Settlement Act which would establish a Catawba reservation, create a tribal development fund, and grant federal recognition to the tribe.

Perhaps more than any of the other claims, the South Carolina case shows what can happen when the state and the present landowners are willing to negotiate. An agreement is almost certain. The area's representative in the House, Republican Ken Holland (who has been instrumental in getting the ides together), says: "We started to ew the consequences, we saw how exosive it could be, and we were able to t the confidence of everybody. What ikes me about the way things have tten up in Maine is that people cted in a purely political fashion. haps if they had acted reasonably and in a conciliatory way, there wouldn't be unrest there now.

"Actually," says Holland, "we think our settlement could well be a model. We think that the U.S. government can buy some of the property, and allow the Catawbas to establish more fully their reservation. The Catawbas can use it for cultural and educational programs, and it could even be a tourist spot—something that our area could use. We saw this as an opportunity."

The state took land by treaty. If white people were occupying that land, the whites would ask the legislature to make a treaty to legitimize their ownership.

MEANWHILE, LESS progress has been made in smaller suits in Massachusetts, Rhode Island, and Connecticut. In Massachusetts the Wampanoag Tribal Council of Gay Head is seeking return of 250 acres of town-owned land, although the tribe's potential claim is for 3600 acres. Two years ago the town sought a negotiated settlement. The first session was held 20 months ago and in late December 1976, the town voted to cede 243 acres of "common land" to the tribe. This transfer of land requires legislation by the State of Massachusetts, and the Gay Head Taxpayers Association—representing non-Indian landowners—opposes legislative approval until there is a settlement on the question of all the land. At present, the case is being mediated by Harvard Law School Dean Albert Sacks.

And in Rhode Island the Narragansett tribe is suing the state because it claims that "in 1880 the State purported to dissolve the Narragansett tribal government and require sale of the remaining 3500 acres of tribal lands without the participation and consent of the United States." According to a tribal spokesman, the Narragansetts fell prey to the same wave of termination that had taken place in other states. Rhode Island came up with the idea of breaking up the tribe and ordering the land sold off.

In early March, Rhode Island officials and a group of private landholders announced agreement with the Narragansetts on a plan to transfer 1800 of the 3500 acres. Under the plan, an Indian-controlled corporation will hold title to the land, although all but 200 acres would be excluded from any kind of development. The federal government is expected to pay for the land, and the Narragansetts will receive no monetary damages. Despite the agreement of the parties to the dispute, it is anticipated that Congress will delay approval of this settlement for fear of setting a precedent of land restoration.

Finally, in Connecticut the Western Pequot Tribe and the Schaghticoke Tribe are suing for the return of their lands. The Western Pequots want 800 acres and the Schaghticokes want 1300. Both tribes allege that aboriginal and reservation lands were taken without the consent of the federal government. Both cases are in the courts and mediation does not appear imminent.

Now that the long epoch of neglect of Indian rights seems to be drawing to a close, the Native Americans may be regaining lands that, largely, were taken from them or that they were cheated out of. These victories have come through pressure and the use of every available legal avenue. The response from some whites has been bitter resentment.

Suzan Harjo, a Cheyenne and the Washington representative of the Native American Rights Fund, expresses a view that in all likelihood is typical of American Indian thinking. She says: "It is a shame that we have to spend so much time, years and years, and money in the courtroom, simply to get the government to take us seriously. But that seems to be necessary.

"When Indians tried," she says, "to make their problems known by going outside the system—at Wounded Knee for instance—everybody told us to work within the system. That is what we're doing. And if the government or anybody else is going to tell us—now that the system is working for us—that the system is wrong . . . well, I don't like to think of the consequences."

The illustrations for this article are taken from King Philip's War *by Daniel Stock, Jr. (1851), and* Harper's *magazine. They show the contemporary white images of Native Americans.*