United States General Accounting Office

GAO

Report to the Honorable Rosa L. DeLauro, House of Representatives

June 1994

INDIAN ISSUES

Eastern Indian Land Claims and Their Resolution

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GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-256712

June 22, 1994

The Honorable Rosa L. DeLauro
House of Representatives

Dear Ms. DeLauro:

In late 1992, through a federal court action, the Golden Hill Paugussett Indian Tribe claimed damages and the right to have large tracts of land in Connecticut restored to the tribe. The lawsuit was based, in part, on an assertion that land historically belonging to the tribe had been transferred without the congressional approval required by the Indian Nonintercourse Act of 1790. Concerned about the Congress's apparent responsibilities under the act, the unpredictability of such claims, and the hardships they place on current landowners, you asked us to (1) provide information on land claims made by eastern Indians in the past 20 years, (2) determine how these claims were resolved, and (3) identify actions that the Congress might take to mitigate the unpredictability and impact of these claims.

Results in Brief

Over the last 20 years, at least 21 lawsuits claiming land have been initiated by 22 Indian tribes or groups in seven eastern states and Louisiana. These claims generally have been based on the assertion that past transfers of land by the tribes were invalid because the transfers had not received the congressional approval required by the 1790 act. Both the Golden Hill Paugussett Tribe and, more recently, the Seneca Nation in New York have filed these types of land claims.

Of the 21 lawsuits we identified, 7 were dismissed by the courts, 6 were finally resolved through negotiations that were subsequently formalized in congressional legislation, and 8 remain in various stages of litigation or negotiation. For all six resolved claims, the legislation formalizing the settlements (1) cleared the current landowners' titles by ratifying past land transfers and extinguishing the Indians' title to the claimed land, (2) provided the Indian claimants with land—or funds specifically for purchasing land—and money, and (3) limited the time in which the legislated agreements could be challenged.

Concerns such as you expressed over the unpredictability of Indian land claims and the hardships imposed by such claims on the current landowners were also expressed in the late 1970s and were discussed in congressional hearings in 1982. At that time, the Congress considered but

took no action to address these concerns. Our work suggests that establishing a certain period of time for Indian tribes to assert claims and creating a framework for the federal government to assist in the negotiation and resolution of claims based on the 1790 act could address your concerns.

Background

The Constitution of the United States gives the Congress the power "to regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes." In 1790, the Congress enacted the first of a series of statutes to "regulate trade and intercourse with the Indian tribes." One provision of this statute, commonly referred to as the Indian Nonintercourse Act of 1790, required the Congress to approve any transfer of tribal land rights. This act presently provides that "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 [law] entered into pursuant to the Constitution."[1] Thus, any conveyance of Indians' land rights to states or private parties that lacks the consent of the Congress is invalid.

Despite the passage of the 1790 act, some of the original 13 states continued to negotiate for the acquisition of land and to make treaties with Indian tribes without federal participation or approval. These early assertions of state authority appear to be the source of most eastern Indian land claims brought under the 1790 act. This assertion of state authority has been attributed to several factors: (1) states' difficulty in making the transition from a loose confederacy to a central federal government, (2) early federal inaction in the face of states' exercise of such authority over Indian land, and (3) a belief that the original 13 states were exempt from the 1790 act because they directly succeeded to the title of the former sovereign, Great Britain.

In contrast, the United States frequently acquired title to Indian land in the western states through treaties with the western Indians and either retained or transferred ownership to other parties. As a result of this difference in the history of the ownership of Indian land, Indians' claims in the West have often been made against the federal government. The Indian Claims Commission was created in 1946 to hear such claims. However, eastern Indian land claims essentially contest the validity of land transfers

[1]25 U.S.C. 177.

between nonfederal parties—often states—that did not receive the congressional consent required under the 1790 act.

In late 1992, the Golden Hill Paugussett Indians, located in Connecticut, filed five related suits in federal district court claiming that large areas of land in the state had been inhabited historically by the Golden Hill Paugussett Indian Tribe and that selected transfers of this land had not received congressional approval as required by the 1790 act. The land being claimed contained a number of towns and included both publicly and privately owned land. The defendants named in the lawsuit included the federal government, the state, and numerous individuals—all current owners of the land being claimed. As a result of the land claims, individual landowners' titles were placed in question, thus making it difficult for the landowners to obtain title insurance, sell property, and obtain or refinance mortgages.

In July 1993, the court ruled that the Golden Hill Paugussetts could not maintain a suit under the 1790 act until they had established their status as a tribe through the tribal recognition procedures established by the Department of the Interior's Bureau of Indian Affairs (BIA). In September 1993, the Paugussetts appealed this decision. The case has been briefed and argued before the federal appellate court, which is expected to render a decision later this year.

In November 1993, Connecticut enacted legislation designed to address some of the major concerns of private landowners who are defendants in the ongoing Paugussetts'court case. This legislation (1) instructs the state insurance commissioner to write regulations to ensure that affected homeowners can buy title insurance, (2) prevents the attachment of a notice of an Indian land claim lawsuit to property records if the suit concerns land transfers that occurred more than 60 years ago, and (3) gives the state legislature's approval to land transactions that occurred more than 60 years ago.

The most recent such lawsuit was filed by the Seneca Nation in federal district court in August 1993. This suit claims that land in New York—including Grand Island, in the Niagara River, and a portion of the New York State Thruway—was transferred from the tribe in 1815 and 1954, respectively, without the approval of the Congress as required by the 1790 act. The court is now determining whether the lawsuit should be maintained against the defendant landowners as a class. In the meantime, the Tonawanda Band of Seneca Indians, which established its

independence from the Seneca Nation, has intervened in the lawsuit, seeking a share of the recovery as a successor in interest to the Seneca Nation, to which it belonged in 1815 when the land was transferred.

Modern Eastern Indian Land Claims

Since the early 1970s, 22 Indian tribes or groups located in the states of Connecticut, Florida, Louisiana, Maine, Massachusetts, New York, Rhode Island, and South Carolina have initiated 21 lawsuits laying claim to land, asserting that the land was transferred from the tribes without the congressional approval required under the 1790 act. In most instances, the land transfers occurred in the late 1700s and early 1800s. The amount of land claimed has varied greatly—from as few as 20 acres to as many as 12 million acres. At the time the land claims were made, titles to land were held by either state and local governments, private individuals, the federal government, or a combination of these entities.

According to the American Land Title Association,[2] Indian land claims have "clouded" titles held by the current landowners. For private landowners, the Association wrote in a 1978 brief, real property is rendered virtually unmarketable, investments thought to be secure lose substantial value, and mortgage money becomes unavailable, so the economy of the affected area stagnates. Even though the resolution of past claims has not deprived private landowners of their property, title insurance companies have remained reluctant to issue policies on property that has become the subject of an Indian land claim. This reluctance has impeded the mortgaging or refinancing of property.

Resolution of Claims

Of the 21 lawsuits that we identified, 7 have been dismissed by the courts, 8 remain in various stages of litigation or negotiation, and 6 have been resolved. For the six lawsuits that were resolved, negotiated settlements rather than court rulings led to the resolution. These negotiated settlements were then formalized in statutes enacted by the Congress.

Lawsuits were most often dismissed when the courts found that the Indian plaintiffs could not be established as an Indian tribe and therefore lacked standing to bring an action on the basis of the 1790 act's provisions. This finding occurred in six of the seven dismissed lawsuits. The eight unresolved cases are in various stages. For example, in at least three cases, court proceedings have been suspended to allow for negotiations among the parties. In two other cases, the courts are considering various

[2]The Association represents the title insurance industry.

issues raised by the lawsuits. In another case, court proceedings were suspended so that the tribe could seek federal recognition from the Department of the Interior.

The six resolved lawsuits involved land claimed in Connecticut, Florida, Maine, Massachusetts, Rhode Island, and South Carolina. While individual lawsuits proceeded through various stages of litigation, settlements were negotiated among the tribes and representatives of the affected landowners before courts reached determinations resolving the land claims. Persons we spoke with who are generally recognized as having expertise in eastern Indian land claims indicated that negotiations had ordinarily been undertaken because litigation was viewed as costly, complex, and time-consuming and because protracted litigation was seen as causing severe hardships for those who currently held title to the claimed land.

After the affected parties reached negotiated agreements in each of the six cases, the Congress enacted legislation formalizing the agreements. Congressional involvement in formalizing negotiated settlements was needed so that the Congress could approve the land transfers as required by the 1790 act. Each of the six settlement statutes contains provisions specific to the negotiated agreement on which it is based as well as common provisions. Specifically, all of the statutes clear the titles of the current landowners by ratifying the historical land transfers and extinguishing the Indians' title to the claimed land. Also, all of the statutes compensate the Indian tribe through land—or funds designated to buy land—and money. Furthermore, the statutes generally extend federal recognition to previously unrecognized tribes and also limit the time within which the settlements can be challenged.

Legislative Alternatives for Addressing Indian Land Claims

We examined different legislative alternatives, including some that had previously been considered by the Congress, that could address your concerns that eastern Indian land claims have been unpredictable and have caused major hardships for the current landowners. In conducting our work, we considered alternatives that could introduce a degree of certainty into when such claims could surface, as well as alternatives containing mechanisms that would minimize or eliminate the adverse effects of the claims on the current landowners.

1982 Legislative Proposal

In 1982, federal legislation was proposed to address all known ancient claims made under the Indian Nonintercourse Act against the current landowners in New York and South Carolina. This proposal, known as the Ancient Indian Land Claims Settlement Act of 1982, would have (1) ratified all transfers of Indian land that occurred before a specific cutoff date and extinguished the Indians' title to that land, (2) provided a 180-day period for a tribe to petition the Secretary of the Interior to review and validate its claim, (3) authorized the Secretary to determine "a fair and equitable monetary award"—based on the value of the land at the time of the invalid transfer—in settlement of the claim, and (4) provided for judicial consideration of a claim covered by the act either as an alternative to the administrative process established under the proposal or as a mechanism for a tribe to appeal the Secretary's determination on its claim.

The Congress did not enact the 1982 proposal. During the course of hearings on it, constitutional and federal policy issues emerged. In particular, the provisions that would have ratified all prior transfers of Indian land and extinguished Indians' title to the land raised the question of whether such actions constituted takings of property under the fifth amendment to the Constitution and would therefore entitle tribes to just compensation. It was also argued that the legislative proposal was inconsistent with the federal government's trust responsibility to Indian tribes.

Other Actions to Address Concerns

We identified other legislative actions that could be considered to reduce the unpredictability and the adverse effects of eastern Indian land claims on landowners. Each action could be considered separately, combined with others, or treated collectively as one comprehensive approach.

Specifically, legislation could be enacted that would (1) establish a specific time period for the assertion of tribal claims based on the 1790 act, (2) specify criteria to be used in determining whether a claimant constitutes an Indian tribe and designate an institution or mechanism for making such a determination, (3) provide an incentive for title insurance companies to continue to write policies for land affected by claims during the period the claims are being negotiated and settled, and (4) designate private individuals to facilitate discussions and negotiations to resolve tribal claims and to file a report with the Congress recommending legislation to formalize a negotiated settlement or identifying points of agreement and disagreement when the negotiating parties have not settled.

Establishing a specific period of time for the assertion of tribal claims would, in effect, create a statute of limitations for claiming that transfers of Indian lands were invalid because they did not receive congressional approval under the 1790 act. Such a statute would address the unpredictability of tribal claims and ultimately eliminate the potential for such claims to cloud landowners' legal titles and impede the transfer of property. We believe that the period for asserting claims should be relatively short—possibly a year or two—but long enough for the tribes to determine whether they have a claim to assert. The statute could also require that all such claims and related actions, such as requests for injunctions, be brought in federal court. Such a requirement would eliminate duplicative state court litigation and ensure greater uniformity in court decisions. Establishing a statute of limitations might, however, have the unintended effect of causing a number of Indian groups or tribes to come forward and assert claims that they might not otherwise have made.

Legislation specifying the criteria to be used in determining whether a claimant is an Indian tribe in the context of the 1790 act's provisions would help to clarify which Indian groups have standing to assert claims, thereby minimizing the number of unjustified land claims. We believe it would also be important in any such legislation to specify whether BIA, some other federal agency, or the courts should be responsible for making such a determination. For many of the past land claims we reviewed, the courts made this determination. However, in the more recent court decision involving the Golden Hill Paugussetts, the federal district court dismissed consideration of any claim until BIA had decided whether the Paugussetts met the criteria for federal recognition as an Indian tribe.[3] On the basis of this decision, the court made attaining federal recognition as an Indian tribe through BIA's process a condition necessary to bring a lawsuit under the 1790 act's provisions. As discussed previously, the Golden Hill Paugussetts have appealed this decision. We believe, therefore, that clarifying the criteria for recognition as an Indian tribe in the context of the 1790 act would facilitate the consideration of tribal assertions of land claims. We recognize that in clarifying such criteria, a distinction can be made between the criteria for obtaining federal recognition as a tribe and the criteria for having standing as a tribe to pursue a claim under the 1790 act.

To alleviate the adverse effects that claims have on the current landowners, legislation could authorize the federal government to

[3]Obtaining federal recognition as an Indian tribe is a prerequisite for an Indian tribe to receive certain federal benefits.

indemnify title insurance companies, for a fee, so that they would continue to issue policies on property whose title has been clouded by an Indian land claim. From the fees collected, the federal government would reimburse the title insurance companies for any amounts paid out on their policies to satisfy a land claim settlement. The title insurance companies could recoup the fee for federal indemnification by increasing the title insurance premium. We recognize that this action could be viewed as removing leverage Indian tribes now have to facilitate the resolution of their claims. In this regard, any legislative action taken should seek to balance the interests of Indian claimants and the current landowners. For example, taking this action together with establishing a federally assisted negotiation process (discussed below) would, in our view, help to achieve such a balance.

To help resolve eastern Indian land claims in the future, legislation could be enacted to establish a process through which the federal government would facilitate the negotiation of tribal land claims among affected parties. This process would replace the courts' current involvement in the resolution of land claims. Because federal and state contributions of land and money have been a component of settled claims in the past—and may be necessary in the future—federal and state government representatives should participate in negotiations. To implement the process, the Secretary of the Interior, for example, could designate a nonfederal mediator or facilitator to guide and promote discussions among the affected parties. A time limit for reaching a negotiated settlement—a 2- or 3-year period, for example—could be imposed, and the facilitator could be required to file a report with the Congress recommending legislation to formalize a negotiated settlement, if reached, or identifying areas of agreement and disagreement if a settlement could not be reached. In the latter case, the Congress could decide whether to resolve the unsettled issues through legislation.

Finally, all of the above actions could be combined into a comprehensive approach for resolving eastern Indian land claims. Such an approach would appear to be more expeditious and less costly than the current approach of trying to resolve these claims in the courts. Moreover, it would reflect the premise that sufficient federal interest exists in resolving these claims to provide a legislatively created forum for this purpose. This approach would also minimize the adverse effects that the present approach has on the current landowners. Unlike the 1982 legislative proposal, this approach would leave the resolution of land claims to the parties but would afford them federal guidance and support.

Agency Comments

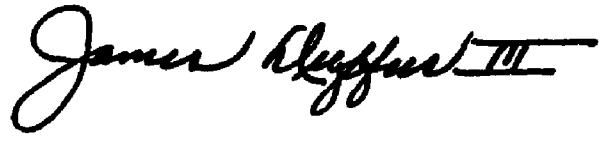
We discussed the contents of this report, and in particular our legislative alternatives for addressing eastern Indian land claims, with the Counselor to the Secretary of the Interior and officials from Interior's Office of the Solicitor and BIA. These officials indicated they were unable to offer any comments at that time because the contents of the report would require careful departmental consideration before offering comments. As you requested, we did not seek written agency comments on a draft of this report.

Scope and Methodology

In conducting our work, we searched court cases and documents covering the period from January 1970 to January 1994 to identify eastern Indian land claims. We also reviewed published articles and other written documents that discussed the Indian Nonintercourse Act of 1790 and Indian land claims stemming from the act's provision for congressional approval of transfers of Indian land. In addition, we discussed various issues associated with eastern Indian land claims with officials in the Department of the Interior's Office of the Solicitor and with other persons we identified from academia and the legal profession who were knowledgeable about this subject. We performed our work between November 1993 and May 1994 in accordance with generally accepted government auditing standards.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will make copies available upon request. I can be reached at (202) 512-7756 if you or your staff have any questions. Major contributors to this report are listed in appendix I.

Sincerely yours,



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