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The Catawbas' Final Battle: A Bittersweet Victory

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COMMENT

THE CATAWBAS' FINAL BATTLE: A BITTERSWEET VICTORY

*Lynn Loftis**

The End

Dateline: Washington D.C., October 27, 1993 — President Bill Clinton signed into law a bill ending a battle between the Catawba Indians and the State of South Carolina that began with the advent of European settlers into the Catawbas' native land over four hundred years ago.[1] At the heart of the dispute was a 144,000-acre tract of land located in York and Lancaster counties of South Carolina.[2] The settlement provides that the Catawba Tribe will relinquish all claims to their aboriginal lands[3] with an estimated value of over $2 billion,[4] in return for a $50 million cash settlement.[5]

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1. Catawba Indian Tribe of South Carolina Land Claims Settlement Act, Pub. L. No. 103-116, 107 Stat. 1118 (1993) (codified at 25 U.S.C. § 941 (Supp. V 1993)); *see* Mike Smith & Chris Burrit, *Region in Brief*, ATLANTA J. & CONST., Oct. 28, 1993, at A1.

Rep. John Spratt (D-S.C.) was one of the leading negotiators in the settlement. Representative Spratt's ancestor, Kanawha Spratt, was the first white man to lease part of the reservation from the Catawbas. Lyn Riddle, *South Carolina Settling Catawba Claim*, N.Y. TIMES, Nov. 15, 1992, § 8, at 1. Representative Spratt currently owns 810 acres of land within the area of former dispute. 138 CONG. REC. H6657-01 (daily ed. July. 27, 1992) (statement of Rep. Spratt). At least one report has credited Representative Spratt with causing the administration to change its former position against the Catawba settlement. Only hours before a cliffhanger vote on President Clinton's budget, the administration reversed its position in support of the settlement. Spratt then voted for Clinton's budget, which passed in the House 218-216. Robert Rankin & Brigid Schulte, *Deals Kept House Dems in Line*, ARIZ. REPUBLIC, Aug. 7, 1993, at 1.

2. CATAWBA CLAIM AREA MARKET EVALUATION 2 (1978) [hereinafter CATAWBA CLAIM], *reprinted in Settlement of the Catawba Indian Land Claims: Hearing on H.R. 3274 Before the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. 329, 331 (1979) [hereinafter *Hearing on H.R. 3274*]; *see also* Catawba Indians v. South Carolina, 718 F.2d 1291, 1293 n.2 (4th Cir. 1983) (*Catawba I*), *aff'd*, 740 F.2d 305 (4th Cir. 1984) (*Catawba II*), *rev'd and remanded*, 476 U.S. 498 (1986) (*Catawba III*).

3. "Aboriginal lands" includes the land granted to the Catawbas through treaty in 1760 and 1763 which became the source of later dispute between the Catawbas and the state of South Carolina. The disputed land lied within the Catawba's aboriginal territory. Catawba Indians v. South Carolina, 476 U.S. 498, 522 (1986) (*Catawba III*) (Blackmun, J., dissenting).

4. Don B. Miller, *Catawba Tribe v. South Carolina: A History of Perseverance*, NARF LEGAL REV. (Native American Rights Fund, Boulder Colo.), Winter/Spring 1993, at 3, 10 (vol. 18. no. 1) [hereinafter Miller]. In 1979, the land in controversy had a value of approximately $1.2 billion. CATAWBA CLAIM, *supra* note 2, at 4, *reprinted in Hearing on H.R. 3274*, *supra* note 2, at 333.

5. *Catawba Tribe Approves Settlement with South Carolina*, NARF LEGAL REV. (Native

The search into the Catawba Nation seemed to promise the uncovering of a grave injustice — that of Indian people being forced to relinquish their sovereignty for cash. Analysis failed to produce the expected quick and brutal blow. Instead, a slow and steady attack on the Catawbas was revealed which was perhaps more cruel.

While the settlement is one of the largest of its kind in U.S. history,[6] an examination of the battle between the Tribe and South Carolina reveals a bittersweet victory not only for the Catawbas but for all Indian people, for the struggle has again revealed how Indians are denied what is theirs by a government which acts like a childhood bully. The bully holds out the desired object he knows the other child wants; yet in the end the bully cruelly deprives. For years, the United States and the South Carolina governments have promised the Catawba people land and assistance, but in the end have never delivered. Seemingly, the kinder course of action would have been to tell the Catawbas they could not "play" from the start, so their pain could begin and end. Instead, the government has teased the Tribe into a game of deprivation for over two hundred years. Clearly, the government never had any intention of losing.

Examination will show that the settlement will benefit the Catawba people. However, that same examination more pronouncedly reveals the frustration and injustice the Catawbas faced at every stage of the protracted battle. To understand the Catawbas' plight it is necessary to return to the beginning, to a time when the Catawbas looked at the white men who visited their lands as nothing more than visitors.

The Beginning

The year 1540 brought the first known advent of European travelers into the land which was later to be known as Catawba Country.[7] Over the next century-and-a-half the Indians inhabiting the land peacefully coexisted with European settlers and slipped easily into the Atlantic trade system.[8] These Indians inhabited land next to the Catawba River and were referred to by different names, such as the Succa, Suttirie, Charra, and Nassaw.[9] Shortly

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American Rights Fund, Boulder Colo.), Winter/Spring 1993, at 1 (vol. 18. no. 1) [hereinafter *Settlement*].

6. *Congress Settles Indian Land Claim — 153 Years After Breaking Treaty with the Tribe According to Catawba*, PR NEWSWIRE, Oct. 12, 1993, *available in* LEXIS, Nexis Library, Current File.

7. DOUGLAS BROWN, THE CATAWBA INDIANS 39-40 (1966); POLLY DAMMANN ET AL., A HISTORY OF THE CATAWBA TRIBE AND ITS RESERVATION LANDS 1540-1959, at 6 (1978), *reprinted in Hearing on H.R. 3274*, *supra* note 2, at 135, 141; JAMES H. MERRELL, THE INDIANS' NEW WORLD: CATAWBAS AND THEIR NEIGHBORS FROM EUROPEAN CONTACT THROUGH THE ERA OF REMOVAL 8 (1989).

8. MERRELL, *supra* note 7, at 36-37.

9. *Id.* at 92. Tribes classified as part of the Catawba Nation include: the Catawba Proper

after the turn of the eighteenth century, Europeans began referring to the various Indian tribes as "Catawbas."[10]

The Catawbas faced Indian enemies from both the north and the south. The Westos and Iroquis tribes attacked frequently.[11] The Catawbas also faced the traumas of disease.[12] However, the Catawbas had little difficulty with the Europeans because the chain of trade created a bond of peace.[13] Although outwardly peaceful towards the Catawbas, the Europeans were waging a silent war by encroaching on the Indians' land and making the Indians dependent on Anglo trade. The Catawbas could not as easily defend themselves from this subtle attack.

The bands of Indians which were called the "Catawbas" did not have a defined system of communication or self-regulation.[14] Around 1720, as a response to the colonies' desire to deal with a unified group along with continued hostile Indian attacks, these tribal bands were forced to unite into one nation with a defined system of rules and responsibilities.[15] Though unified, the Catawbas differed from the traditional European notion of Indians. The Catawbas did not adorn themselves with long headdresses and often lived in log cabins.[16]

In the 1720s, the Catawbas had more Indian enemies than they could handle.[17] Disease, the nation's "greatest Enemie," lowered the Catawbas' ability to defend against the Indian warriors and colonists.[18] To solve their problems, the Catawbas set out to make friends with the Anglo-Americans.[19] The Catawbas entered into social agreements and trading agreements with the whites, which only heightened the Catawbas' dependence on Europeans.[20] The markings of white society within the Catawba community, such as scarlet

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(Katahba, Issa, Iswa, Ushery, Yse, Usi, Esau, Essawee, Esaugh, Esaw), the Chewah, the Waterees, the Eeno, the Congaree, the Natchez, some Yamasee, the Coosahs, the Sugarees, the Waxhaws, the Santees, the Pedees, the Watteree-Chickanees, the Shakori, the Sissipahaws, the Keyauwees, the Sewees, the Waccamaws, the Woccons, the Etiwaws, the Tutelos, and the Saponis. DAMMANN ET AL., *supra* note 7, at 2 n.2, *reprinted in Hearing on H.R. 3274*, *supra* note 2, at 137; *see also* BROWN, *supra* note 7, at 3-4.

10. MERRELL, *supra* note 7, at 92-94; CHARLES HUDSON, THE CATAWBA NATION 5 (1970).

11. MERRELL, *supra* note 7, at 41; *see also* BROWN, *supra* note 7, at 168.

12. MERRELL, *supra* note 7, at 43.

13. *See id.* at 32-40.

14. *See id.* at 112-13.

15. *Id.* at 113-14.

16. Jim Hoagland, *South Carolina Catawbas Seek Tribal Identity; Western Traditions Borrowed in Drive For Land and Money*, WASH. POST, Apr. 23, 1978, at D3.

17. MERRELL, *supra* note 7, at 135.

18. *Id.* at 136.

19. *See id.* at 143.

20. *See id.* at 150-56.

coats, made it obvious that the "native leaders no longer fully controlled their own or their society's destiny."[21]

In 1729, South Carolina's governor launched a township scheme around the frontier settlement of Pine Tree Hill. The streams of settlers "flowed swiftly toward the very heart of the Nation."[22] By 1755, the Catawbas no longer had to go to the colonial settlements; the settlements had come to them. The Nation was completely surrounded.[23] The close proximity caused problems. Theft, trespass, livestock control, and land use differences combined to create tension between the Catawbas and their Anglo neighbors.[24] Compounding the Catawbas' problem of adjustment, encroaching settlers brought black slaves that showed the Catawbas the racial realities of colonial American life.[25]

Still, in 1759, twenty percent of the Catawba nation went north with His Majesty's forces to fight the French.[26] "Despite the signs of friendship, the shadow of conflict remained."[27] Smallpox further depleted the Indian tribe, killing approximately a thousand Catawbas, reducing the tribe's size to a mere five hundred.[28] "The epidemic, important as it was in signaling a new direction in Catawba history, was no more than the first step on a long, hard road, the Nation's own trail of tears."[29]

The Catawba Trail of Tears

During July 1760, what was left of the Catawba tribe met with the Crown Superintendent of Indian Affairs at Pine Tree Hill and struck a deal. The Pine Tree Hill Treaty provided that the Catawbas would relinquish their claims to a circular tract of land sixty miles across where the Indians currently lived, in return for clear title to fifteen square miles of land and a promise that a fort would be built in the Nation.[30] It is this fifteen-mile tract of land which later became the source of dispute between the Catawbas and South Carolina. When asked why the Catawbas would bargain to be removed to land when so many other tribes had fought against removal, the chief of the Catawbas replied that planters pushing onto the Nation's territory "will not be stopped . . . for they say they will continue to do so unless we show them a paper to restrain them."[31]

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21. *Id.* at 156.
22. *Id.* at 171.
23. *See id.* at 171.
24. *See id.* at 182-87.
25. *Id.* at 181.
26. *Id.* at 192.
27. *Id.* at 193.
28. *Id.* at 193-95.
29. *Id.* at 196.
30. *Id.* at 198; *see also* Miller, *supra* note 4, at 4.
31. MERRELL, *supra* note 7, at 200.

The Crown then, in the Proclamation of 1763, prohibited the issuance of survey warrants or patents on any lands reserved to Indians or the purchase of such lands. Still, white settlers continued to move west.[32] The Catawbas became increasingly dissatisfied with the Crown's failure to uphold the 1763 Proclamation and the 1760 Pine Hill Treaty. The King determined that in order to secure the southwestern frontier, a treaty was needed between the Crown and the five major tribes in the southeast[33] to assure the Indians' allegiance to the Crown.[34] A new treaty was negotiated which seemingly accomplished both the King and the Catawbas' goals. In 1763, the Treaty of Augusta was signed, in which the Catawbas reaffirmed their assent to the fifteen-mile reservation in return for the Crown's renewed promise to uphold the 1760 Treaty.[35] In other words, the 1763 Treaty reinstated and ratified the 1760 Treaty.

After the signing of the Treaty of Augusta, the fort promised to the Catawbas in 1760 was finally built; yet it stood as a cruel joke on the Nation. No promises had ever been made that the fort would be manned or maintained. Neither trappers or troops ever moved in and when the Catawbas requested that something be done, the colony invited the Indians to build houses themselves. By the end of the century, the fort had fallen into disrepair.[36] Again, the bully taunted the child, "You can have your toy but we won't play with you."

Even though the Indians had clear title to their land, the settlers continued to attack that title in subtle ways. Whites began acquiring long term leases on the Catawbas' new property in direct violation of the Proclamation of 1763, the Treaty of Augusta, and South Carolina's colonial law of 1739.[37] Eventually, the settlers subleased the property to the point where the Catawbas could not successfully collect rent.[38] Subleasing, coupled with fraudulent

32. Mark Ulmer, *Tribal Property: Defining the Parameters of the Federal Trust Relationship Under the Non-Intercourse Act:* Catawba Indian Tribe v. South Carolina, 12 AM. INDIAN L. REV. 101, 116 (1985).

33. The Treaty of Augusta was negotiated with the Creeks, the Choctaws, the Cherokees, the Chickasaws, and the Catawbas. Miller, *supra* note 4, at 4; *Hearing on H.R. 3274*, *supra* note 2, at 101 (statement of Gilbert Blue, Chief, Catawba Tribe of Indians of South Carolina).

34. *Hearing on H.R. 3274*, *supra* note 2, at 101 (statement of Chief Blue); *see also* Ulmer, *supra* note 32, at 116 n.68.

35. Miller, *supra* note 4, at 4; *Hearing on H.R. 3274*, *supra* note 2, at 101 (statement of Chief Blue).

36. MERRELL, *supra* note 7, at 198.

37. Ulmer, *supra* note 32, at 116. South Carolina enacted a statute in 1808 which invalidated leases on Indian lands unless the lease was for less than 99 years and witnessed by the Commissioner. *Id.* at 116-17 n.73.

38. By the 1830s, nearly all the reservation land had been leased to non-Indians in violation of state and federal law. *Id.* at 116.

practices on the part of colonial agents appointed to collect the Indians' rents, effectively terminated the Catawba's ability to profit from leaseholds.[39]

Still, the Catawbas continued to extend their loyalty to their white neighbors. The tribe joined the American colonists in war, this time against the Crown. As a reward for their patriotism, the new American republic took title to the Catawbas' land from the Crown and ceded it back to the tribe, thus ratifying the 1760 and 1763 treaties.[40] However, the Catawbas' plight did not improve. Settlers continued to encroach on Catawba land.[41] Frustrated, the Catawbas made a plea to the South Carolina legislature: "I fought against the British for your sake, the British have disappeared, and you are free, yet from me the British took nothing nor have I gained any thing by their defeat."[42] The legislature did nothing.

The U.S. Constitution was adopted in 1788 and shortly thereafter the First Congress enacted the Indian Non-Intercourse Act of 1790.[43] The Non-Intercourse Act provided that no state or individual could acquire any interest in Indian lands without the consent and participation of the federal government.[44] Subsequently, South Carolina enacted a law which allowed the leasing of Catawba land in direct violation of the Non-Intercourse Act.[45] The federal government had never granted its consent for the leasing.[46] Of course, the encroachment continued.

As the century ended, the Catawbas' proud demeanor was showing signs of wear.

> Once proprietors of the . . . [region], they now existed only on the sufferance of people inclined to cheat them as often as protect them, mock them as readily as befriend them. It was a sad state, requiring more quiet resignation than open resistance, smiles in place of frowns, submission to the humiliations dished out. . . . Yet compared with the scores of other Indian peoples that entered

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39. *See* MERRELL, *supra* note 7, at 223-24.

40. *Id.* at 223.

41. Miller, *supra* note 4, at 4.

42. MERRELL, *supra* note 7, at 218.

43. Act of July 22, 1790, ch. 33, 1 Stat. 137 (codified at 25 U.S.C. § 177 (1988)).

44. *Id.* § 4, 1 Stat. at 138 (codified at 25 U.S.C. § 177 (1988)). The Act states in relevant part: "No purchase, grant, lease, or 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." *Id.*; *see also* Catawba Indian Tribe v. South Carolina, 718 F.2d 1291, 1294 n.7. (4th Cir. 1984) (*Catawba I*). Transactions in violation of the Non-Intercourse Act are void. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 152-80 (Rennard L. Strickland et al. eds., 1982) [hereinafter COHEN].

45. *Hearing on H.R. 3274*, *supra* note 2, at 102-03 (statement of Chief Blue).

46. *Id.* at 28, *reprinted in Hearing on H.R. 3274*, *supra* note 2, at 102-03; *see also* Catawba Indians v. South Carolina, 865 F.2d 1444, 1446 (4th Cir. 1984), *cert. denied*, 461 U.S. 906 (1989) (*Catawba IV*).

> the eighteenth century with Catawbas but did not live to see the nineteenth, the Nation's fate does not seem so bad.[47]

The beginning of the nineteenth century revealed the Catawbas' plight as one of poverty and oppression. By 1826, only 30 families were said to be living on the reservation,[48] yet still the Catawbas endured. The Nation maintained a close family structure and a culture in which women played a dominant role.[49] Interestingly, all members of the tribe wore a silver nose ring, often with a tiny silver heart dangling from it.[50]

The strength of the Catawba spirit is reflected in the story of John Nettles. Missionaries, no matter how hard they tried, could not divorce the Catawba people from their culture. Many projects were undertaken to "Christianize" the Indians.[51] The College of William and Mary's program was the most famous.[52] The administration of William and Mary brought young Indians to the college to instruct them in the art of being an Englishman, so they could then return and educate their tribe. The Catawbas sent a young John Nettles, who graduated from the three-year course with high honors.[53]

Shortly before Nettles was to return home, he went to a tavern and was later found passed out drunk in the street. The college was mortified that the hope of the Catawba Nation would jeopardize his future. Soon, Nettles did return home but did not live up to the college's expectations.[54] John quickly reassimilated into Catawba ways. The missionaries project had failed. Still, John's education benefitted the tribe because John was able to serve as a liaison between the tribe and the Americans.[55] When John grew old, the Catawbas requested they be allowed to send more youths to be taught to read and write, but wanted no part of the missionaries' "Christianizing."[56] No matter how intertwined the Catawbas' lives became with the whites, the Catawba spirit and culture remained.

In 1840, the Catawbas again had to bow to whites who had encroached on their lands. Settlers who had leased land from the Catawbas since the 1760 Treaty went to the South Carolina legislature and mounted an attack to have title passed to them. South Carolina's governor observed that "the conduct of our State, towards the Indians, has, from the beginning been a pleasing feature in her history," while at the same time noting that the lands in question were

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47. MERRELL, *supra* note 7, at 225.
48. DAMMANN ET AL., *supra* note 7, at 45-46, *reprinted in Hearing on H.R. 3274*, *supra* note 2, at 180-81.
49. MERRELL, *supra* note 7, at 235-37.
50. *Id.* at 229.
51. *Id.* at 240.
52. *Id.*
53. *Id.*
54. *Id.* at 240-41.
55. *Id.* at 241-42.
56. *Id.* at 242.

"among the most fertile in the State" and that "the State is deriving no revenue from a productive section of her territory."[57] As author James Merrell stated, the governor's goal was clear: "treat the Indians fairly, but get them out."[58]

When the situation looked hopeless, the Catawbas said they would negotiate; the result was the 1840 Treaty of Nation Ford.[59] The treaty provided that the Catawbas would give up all their lands in return for South Carolina's promise to buy $5000 worth of land to the Catawbas' liking (and if less than $5000 was spent on the new land, the Catawbas would receive the difference). Additionally, the agreement provided for $2500 to be given to the Catawbas when they left their current land and, additionally, $1500 a year for the next nine years.[60]

South Carolina failed to abide by the terms of the agreement and the Catawbas wandered homeless for two years before a new reservation was finally located.[61] In 1842, 630 acres were selected approximately eight miles east of Rock Hill, South Carolina.[62] The Catawbas were pleased with the choice because the selected tract was within the boundaries of their first reservation given away in the 1760 Treaty.[63] The Catawbas continue to reside on the 630-acre tract today.

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57. *Id.* at 247.

58. *Id.*

59. An Indian agent explained, in a report to the Governor of South Carolina:

> They were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of their lands and leasing out the poorer portions to the white men. This state of things went on til the whites got King's Bottom, the last spot of the reservation. The poor Indians then felt their distress beginning, and run from house to house for the rents of their lands, which they had leased out to the white people, which was generally paid in old horses, old cows, or bed quilts and clothes, at prices that the whites set on the articles taken. This brought on a state of starvation and distress.
>
> Under this state of things, they wandered from place to place, begging, til 1839, when they proposed a treaty with the State, and relinquished all their rights and interest of this domain to the State of South Carolina. There were many efforts made previous to this by former Governors, to effect a treaty with the Catawba Indians, but always failed. They were then driven to it by being surrounded by white men, cheating them out of their rights, and partaking of the vices of the whites and but few of their virtues, which is a distress to me.

B.S. Massey, Indian Agent, Report to the Governor of South Carolina on the Catawba Indians (Dec. 12, 1853), *in* Miller, *supra* note 4, at 5.

60. MERRELL, *supra* note 7, at 249.

61. *Hearing on H.R. 3274*, *supra* note 2, at 103-04 (statement of Chief Blue); *see also* Ulmer, *supra* note 32, at 117.

62. *Hearing on H.R. 3274*, *supra* note 2, at 28-29 (statement of Chief Blue). The 630-acre tract represents less than one-half of one percent of the Catawbas' aboriginal lands which were taken from them in the 1760 Treaty of Pine Hill. *Id.*

63. *Id.*

The 1840 Treaty of Nation Ford plunged the Catawbas into deeper poverty.[64] Rents were no longer collected and South Carolina failed to pay the Catawbas the money it had promised.[65] The legislature decided any difference between the purchase price of the new reservation and the $5000 which was earmarked for land acquisition should not be returned to the Catawbas. Additionally, the $2500 which South Carolina promised to pay the Catawbas when they left their lands was never paid, and also for the first two years after the agreement, the Catawbas never received the promised $1 500 annual payment. Subsequently, the Catawbas received limited annual payments usually in the form of goods.[66]

Compared with other Indian tribes, the Catawbas seemed fortunate.[67] Still, the Nation "had signed away the last acre of land they could call home. With

64. MERRELL, *supra* note 7, at 254.

65. *See* DAMMANN ET AL., *supra* note 7, at 48-50, *reprinted in Hearing on H.R. 3274, supra* note 7, at 183-86. In future litigation, the Catawbas claim that the 1840 Treaty was invalid because: (1) the federal government never consented and therefore the 1840 Treaty violated the Non-Intercourse Act of 1790; and (2) South Carolina failed to abide by the terms of the Treaty. As part of the second argument, it is noted that not only did South Carolina fail to pay the Catawbas the $2500 payment upon moving off their lands and a substantial portion of the nine $1500 annual payments, but also that South Carolina failed to spend the required $5000 on land, or in the alternative, transfer the difference between $5000 and the purchase price to the tribe.

In a letter from Indian agent White to South Carolina's governor, White states that "[t]his land cost $2,000 for which a conveyance was made to myself as their agent and filed in the executive office." South Carolina claimed it utilized most of the $5000.

> The State contends that based on these purchases, the terms of the Treaty of Nation Ford were substantially honored. The State's position appears to be wholly unsupportable for several reasons. First, the December 18, 1840 Act of the South Carolina legislature which ratified the Treaty of Nation Ford expressly provided that the money authorized therein could only be used to purchase new reservation lands as described in the agreement. Second, in order to sustain the State's view, it is necessary to conclude either that the Catawba Indians conveyed their lands in 1840 for an unconscionably low price or that the State, two years later, acquired 650 acres of the former reservation of 144,000 acres for an exorbitantly high amount. Third, the Governor of South Carolina reported in 1843 to the South Carolina legislature that the treaty had not been carried out and that an informal 'experiment' had been developed which would allow the Catawba Indians to reside on a farm or their old reservation.

Id. at 49-50, *reprinted in Hearing on H.R. 3274, supra* note 2, at 184-85.

66. MERRELL, *supra* note 7, at 254-55.

67. As James Merrell stated:

> This was, after all, the Age of Indian Removal, and for most peoples removal did not mean wandering off to a Cherokee town or some other "thinly populated" area they fancied; it meant being uprooted at bayonet point and prodded a thousand miles west. No doubt more than one Cherokee, Creek, Choctaw, or Seminole would gladly have traded places.

Id. at 249-50.

it went something impossible to define yet infinitely precious, so precious that Catawbas have been trying ever since to get it back."[68]

The State wanted the Catawbas gone but could not seem to bring themselves to sell the reservation and exile the Tribe. The Catawbas had been loyal to the State consistently over the years.[69] Perhaps the reason the Catawbas were allowed to remain was because the state expected that the tribe would die out on its own.[70]

However, the Catawbas quietly survived the next century. The manufacture of clay pottery became increasingly important to the nation's economy.[71] The men of the tribe continued to hunt and often sought jobs as paid laborers.[72] As always, the Catawba ways remained, even though oppression abounded.

The year 1880 began a hundred-year period during which the Catawbas went to the federal and state legislatures time after time in an attempt to regain the land that had been taken from them. The tribe asserted that the 1840 Treaty of Nation Ford was void because it violated the Indian Non-Intercourse Act.[73] The federal government never participated in or approved of the 1840 Treaty as the Non-Intercourse Act required.[74] In the alternative, the Catawbas claimed possession of the fifteen-mile tract of land because South Carolina failed to uphold the terms of the 1840 Treaty.[75] Under either theory of recovery the result was the same — the 1840 Treaty was void and therefore the 1760 Treaty (ratified by the 1763 Treaty and adopted by the U.S.) was still in effect. Accordingly, the Catawbas were either entitled to rentals from the fifteen-mile tract of land they received through the 1760 Treaty or the possession of that land.

The Catawbas submitted their claim to the Bureau of Indian Affairs (BIA) in 1905. The BIA told the Catawbas that they were not entitled to federal protection and must seek redress through the State of South Carolina,[76] the very party that the Catawbas' claim was against. In other words, the Catawbas were told that their opponent would now sit as judge in deciding their fate. Of course, South Carolina's Attorney General determined that the 1840 Treaty was valid and that South Carolina had fulfilled its requirements under the agreement.[77] In 1910, a commission was appointed by the South Carolina

68. *Id.* at 250.

69. *See id.* at 256.

70. *Id.* at 257. Additional factors were the Catawbas' reluctance to leave and the government's inability to find a host reservation. *Id.*

71. *Id.* at 267-77.

72. *Id.* at 267.

73. Miller, *supra* note 4, at 5. For a discussion of the Non-Intercourse Act, see *supra* notes 43-44 and accompanying text.

74. *See supra* note 44 and accompanying text.

75. *See supra* note 65 and accompanying text.

76. Miller, *supra* note 4, at 5

77. *Id.*

legislature to investigate the Catawba situation. The commission recommended that the State purchase additional land for the Catawbas. The legislature took no action.[78] In 1921, another commission was appointed which also recommended that additional land be purchased and again, the legislature failed to act.[79] In 1924, private businessmen of Rock Hill took it upon themselves to conduct a study and make recommendations to the legislature which echoed those recommendations that came before. Again, no action was taken.[80]

The Catawbas' chief appeared before the legislature on three different occasions over the next five years, asking that his people be given farms, homes, and citizenship.[81] The legislature did nothing. It was apparent the Catawbas would get no relief from South Carolina, so the tribe refocused its efforts on the federal government.

In 1930, the federal government recognized the Catawbas' plight as one of abject poverty, yet it took seven years for Congress to introduce legislation which would establish a Catawba rehabilitation program in cooperation with South Carolina.[82] Unfortunately, the legislation was never voted on because of the Interior Department's reluctance to "adopt any more Indians."[83] Three years later, a similar bill was defeated.[84]

After facing even more government rejection, the Secretary of the Interior finally approved a Memorandum of Understanding in 1943 between the Tribe, the State, and the U.S. Department of the Interior. The memorandum provided that South Carolina would acquire approximately $75,000 worth of land close to the existing 630-acre tract and would convey title to that land to the Secretary of the Interior.[85] The most important aspect of the agreement to understand for future developments is that this memorandum did not in any way affect the Catawbas' original 630-acre tract or the Catawbas' land claim based on the 1840 Treaty.

During the negotiations for the Memorandum of Understanding, South Carolina had initially attempted to make as a condition to the agreement the Catawbas' surrender of all possible land claims against the state based on the 1840 Treaty.[86] The Department of the Interior and the Catawbas both refused to condition the Memorandum of Understanding on the release of the claim. A letter from the Solicitor of the Department of the Interior to the Commissioner of Indian Affairs made this clear.[87] As Chief Blue explained,

78. *Id.*
79. *Id.*
80. *Id.* at 5-6.
81. *Id.* at 6.
82. *Id.*
83. *Id.*
84. *Id.*
85. Ulmer, *supra* note 32, at 118.
86. *Hearing on H.R. 3274*, *supra* note 2, at 106-07 (statement of Chief Blue).
87. The letter stated:

"It is thus apparent that none of the parties to the 1943 Memorandum of Understanding intended the establishment of the federal relationship to in any way affect the Catawba Tribe's existing claim arising out of the 1840 treaty."[88] Indeed, it is clear the Catawbas would not have entered into the Memorandum of Understanding without such agreement.[89]

The 1943 Memorandum provided that in return for South Carolina's promise to purchase land, the federal government would provide limited services to the Tribe in the areas of health, education, and economic development opportunities.[90] Pursuant to the agreement, South Carolina purchased 3434 acres of land at a cost of $70,000 and conveyed the title in trust to the Secretary of the Interior.[91] However, the state did not convey title

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> It is further noted that the requirement included in the original draft (of the memorandum of understanding) submitted on October 9 to the effect that the Catawba Indians promised 'to execute, in favor of the State of South Carolina, a release and quitclaim of all claims . . . against the State . . .' has been eliminated from the present draft. *This elimination is most desirable in that it avoids a procedure of doubtful legality which would have consisted in using a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts.*

DAMMANN ET AL., *supra* note 7, at 57 (citing BIA File No. 12,492), *reprinted in Hearing on H.R. 3274*, *supra* note 7, at 192 (emphasis added).

88. *Hearing on H.R. 3274*, *supra* note 2, at 107 (statement of Chief Blue).

89. *See* Catawba Indians v. South Carolina, 718 F.2d 1291, 1293 n.2 (4th Cir. 1983) (*Catawba I*), *aff'd*, 740 F.2d 305 (4th Cir. 1984) (*Catawba II*), *rev'd and remanded*, 476 U.S. 498 (1986) (*Catawba III*).

90. Ulmer, *supra* note 32, at 118. The federal government did not want to enter into a guardian-wardship relationship with the Catawbas. A report of the Secretary of the Interior, dated August 27, 1959, stated:

> Efforts were made to bring the Catawba Indians under Federal jurisdiction during the 1930's when their plight was especially aggravated by the general depression. These efforts culminated in a memorandum of understanding approved on December 14, 1943, in which the Indians, the State, and the Bureau of Indian Affairs each agreed to take certain actions to alleviate the Catawbas' depressed economic condition. The agreement did not specify that the federal government was assuming guardianship of these Indians and neither the Indians nor the State ever claimed that the Catawbas were wards of the federal government.

DAMMANN ET AL., *supra* note 7, at 55-56, *reprinted in Hearing on H.R. 3274*, *supra* note 2, at 190-91 (Exhibit I).

On October 31, 1940, a memorandum from the Commissioner of Indian Affairs to the Secretary of the Interior, regarding the Catawba Indians closed as follows:

> We should also offer limited advisory help in order to improve the standard of State care of these Indians. There is no question of assuming Federal guardianship jurisdiction but merely of carrying out the apparent desire of Congress to give a small degree of aid to the State, coupled with expert advice.

Id.

91. Miller, *supra* note 4, at 7.

to the 630-acre reservation. South Carolina still retains title to the 630-acre plot to this day.[92]

"The hope created by the purchase of the new lands and eligibility for federal services soon turned to frustration as federal Indian policy took an abrupt about-face."[93] In the early 1950s, Congress decided that the government should terminate the trust relationships between Indian tribes and the United States as soon as possible.[94] Twelve termination statutes were enacted within roughly a fifteen-year period.[95] These statutes provided for federal restrictions on tribal lands to be removed. The tribal lands were either distributed to individual members or sold and the proceeds allocated to tribal members.[96]

Congressional termination policies coincided with the Catawbas' dissatisfaction over minimal federal government support[97] and the tribal members' inability to secure financing for farm operations and home improvements because their newly acquired lands were subject to federal restrictions on alienation.[98] The Catawbas had to have one or the other to survive — government aid or the ability to utilize their reservation for credit. Since it was apparent neither would be forthcoming under the current policies of the government, the Catawbas agreed that termination legislation should be enacted so they could freely alienate their lands.[99]

Again, an analysis of legislative reports show that the sole purpose of the termination act would be to undo only that relationship which the 1943 Memorandum of Understanding had created.[100] The 1943 memorandum only

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92. *See Catawba I*, 718 F.2d at 1293 n.4.

93. Miller, *supra* note 4, at 7.

94. *Id.* "Termination era" refers to the federal policy from 1953 to the mid-1960s of ending the federal government's supervisory responsibilities for Indian tribes. *Catawba I*, 718 F.2d at 1293 n.5; *see* COHEN, *supra* note 44, at 152-80.

95. Ulmer, *supra* note 32, at 125 n.117 (citing 25 U.S.C. §§ 564-565g (1988); 25 U.S.C. §§ 677-677aa (1988); 25 U.S.C. §§ 691-708 (1988); 25 U.S.C. §§ 721-728 (1988); 25 U.S.C. §§ 741-760 (1988); Act of Aug. 1, 1956, ch. 843, 70 Stat. 893, *repealed by* Act of May 15, 1978, Pub. L. No. 95-281, § 1(b)(1), 92 Stat. 246; Act of Aug. 2, 1956, ch. 881, 70 Stat. 937, *repealed by* Act of May 15, 1978, Pub. L. No. 95-281, §1(b)(2), 92 Stat. 246; Act of Aug. 3, 1956, ch. 909, 70 Stat. 963, *repealed by* Act of May 15, 1978, Pub. L. No. 95-281, §1(b)(3), 92 Stat. 246; Act of June 17, 1754, ch. 303, 68 Stat. 250, *repealed by* Act of Dec. 22, 1973, Pub. L. No. 93-197, §3(b), 87 Stat. 770; 25 U.S.C. §§ 931-938 (1988); 25 U.S.C. §§ 971-980 (1988); 72 Stat. 619); *see also* South Carolina v. Catawba Indians, 476 U.S. 498, 504 n.11 (1986) (*Catawba III*).

96. Miller, *supra* note 4, at 8.

97. *Hearing on H.R. 3274*, *supra* note 2, at 107-09 (statement of Chief Blue).

98. Ulmer, *supra* note 32, at 119.

99. *Hearing on H.R. 3274*, *supra* note 2, at 108 (statement of Chief Blue); *see also* HUDSON, *supra* note 10, at 100.

100. DAMMANN ET AL. *supra* note 7, at 59-60, *reprinted in Hearing on H.R. 3274*, *supra* note 2, at 194-95. The January 3, 1959, resolution of the Catawba General Council requested Congressman Hemphill to introduce legislation which would remove federal restrictions, but specifically stated that nothing in the Act should affect the status of any tribal claim against the

covered the new 3434 acres of land purchased for the Catawbas and the federal government's provision of limited services.[101] The Catawba Tribe only consented to agree to termination after being assured by the BIA that its longstanding claim against South Carolina would remain unaffected.[102] Therefore, after the termination act, the Catawbas still "owned" their 630-acre tract, just as they still possessed their land claim arising out of the 1840 Treaty.

On September 21, 1959, the Catawba Division of Assets Act[103] became law.[104] However, the termination act did not go into effect until 1962.[105]

State of South Carolina. *Id., reprinted in Hearing on H.R. 3274, supra* note 2, at 194-95. Congressman Hemphill had requested that the Department of the Interior draft the 1959 act in a manner which would "accomplish the desires set forth within the resolution." At the hearings before this Committee on July 27, 1959, the Associate Commissioner of Indian Affairs testified that the Department of the Interior had "drafted a bill along the lines that we thought the Indians had been discussing." *Id., reprinted in Hearing on H.R. 3274, supra* note 2, at 194-95.

The House and Senate reports on the bill indicate that its sole purpose was to simply undo that which had been done sixteen years earlier by the Memorandum of Understanding. *Id.* at 62, *reprinted in Hearing on H.R. 3274, supra* note 2, at 197. The legislative history of the 1959 Act shows that Congress sought only to remove federal restrictions from and distribute the 3400 acre reservation acquired in 1943. *Id., reprinted in Hearing on H.R. 3274, supra* note 2, at 197.

Congressman Hemphill's exact words were:

> Now therefore, BE IT RESOLVED that, in view of the benefits that will accrue to all the members of the tribe by the equitable distribution of the tribal assets . . . to accomplish the removal of Federal restrictions against the alienation of Catawba land . . . and do all those things necessary to accomplish the purposes of this legislation at no cost to the Catawba Indians or claim against their assets, *and that nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe.*

Id. at 59, *reprinted in Hearing on H.R. 3274, supra* note 2, at 194 (emphasis added).

101. *See* Catawba Indians v. South Carolina, 718 F.2d 1291, 1296-97 (4th Cir. 1983) (*Catawba I*), *aff'd*, 740 F.2d 305 (4th Cir. 1984) (*Catawba II*), *rev'd and remanded*, 476 U.S. 498 (1986) (*Catawba III*).

102. Miller, *supra* note 4, at 8. The BIA drafted a resolution for the Tribe consenting to division of the federal assets and, consistent with its assurances, included provision conditioning tribal consent on leaving the treaty claim unaffected.

> After securing the Tribe's resolution, the BIA and Congressman Hemphill assumed the role of speaking for the Tribe in the legislative process and throughout the entire legislative process, there was not another mention of the land claim. While the Congressmen and the BIA purported throughout the process to be acting only in accord with tribal wishes, the legislation they drafted did not expressly preserve the claim. However, the BIA, which drafted the bill, repeatedly told the Tribe and emphasized to Congress that it had been drafted to conform to tribal desires as expressed in the resolution. No tribal officials appeared at the hearings on the bill nor did the Tribe submit written testimony.

Id.

103. 25 U.S.C. §§ 931-938 (1988).

104. Miller, *supra* note 4, at 8. The Act provided for the preparation of a tribal membership roll, the tribal council's designation of sites for church, park, playground, and cemetery purposes, and the division of remaining assets among the enrolled members of the tribe. *Catawba I*, 718

The Division of Assets Act provided that the tribal membership roll would be closed and tribal property distributed among the tribal members.[106] The 3434 acre tract of land was sold and each Catawba family received approximately $1500.[107] "However, all did not go well. The federal termination program did not take the spiritual aspects of tribalism into account, and no thought was given to the effects of tribalism on the individual."[108] The Indian spirit could

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F.2d at 1294.

Section 935 of the Division of Assets Act provided that:

> The constitution of the tribe adopted pursuant to. . . this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.

25 U.S.C. § 935.

Section 936 of the Division of Assets Act provided that "[n]othing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina." *Id.* § 936.

105. *Catawba I*, 718 F.2d at 1294.

106. The Division of Assets Act provided

> for closing the membership roll, and for distributing all tribal property among the members in approximately equal shares. Members who have assignments of land from the tribe, or members of their families, are given the right to select the assignments as parts of their distributive shares. The remainder of the tribal property will be sold and the proceeds of the sale will be distributed. Any property that is not sold within 2 years will be conveyed to a trustee for liquidation and distribution. When the program is completed, the Catawba Indians will cease to be subject to the Federal indian laws, but their status and rights under South Carolina law will not be affected.

DAMMANN ET AL., *supra* note 7, at 61, *reprinted in Hearing on H.R. 3274*, *supra* note 2, at 196 (Exhibit I).

107. *Id.* at 60, *reprinted in Hearing on H.R. 3274*, *supra* note 2, at 195.

108. *Hearing on H.R. 3274*, *supra* note 2, at 465 (statement of Thomas J. Blumer, titled: *Two Points Concerning a Just Settlement of the Catawba Indian Land Suit of 1977* (n.d.)). Blumer argues that the government should not be allowed to terminate the Catawbas' tribal unit, citing several examples of Catawbas who spent their allotment money on clothing, moving expenses, speculation and drink. *Id.* at 465-68.

> A cash settlement for the Catawba Nation is not a fair solution to the tribe's future needs. Tribalism is still a strong force among the Catawbas. . . . In the future, as individual Catawba Indians have difficulties and need a home, they will naturally gravitate toward their reservation and their tribal government. Others will never leave the Catawba Tribe but will spend their entire lives in the community of their birth. Through the settlement of the Treaty of 1840, the Catawbas should be left prepared to assist tribal members, even those who do not have the foresight to see that a new reservation and education programs are in their best interest. Here is the only insurance policy the Catawbas can invest in for the future. One wonders what sort of a settlement the next generation of Catawba children will need. . . . They should be able to see the results in a new reservation and in educational

not be extinguished with a piece of paper. The Catawbas continued to need their culture to make them whole, just as they always had, as they faced the challenges of modern life.

Pursuant to the Division of Assets Act, the tribal constitution was revoked.[109] However, the tribal government, consisting of the tribal council, the executive committee, and Chief Gilbert Blue, remained intact.[110] The Catawbas continued to band together on their 630 acres.[111] Encouraged by successful settlements of other Indian tribes, the Catawba tribal leaders sought the assistance of the Native Americans Rights Fund[112] in 1975. The Tribe,

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advantages which will benefit their tribe. . . . Since the Catawba tribe exists as a viable unit, it must be protected by a wise federal government and not left without resources.

Id. at 468-69; *see also* HUDSON, *supra* note 10, at 100.

109. 25 U.S.C. § 935 (1988).

110. Ulmer, *supra* note 32, at 120.

111. The Catawbas continued to function as a cohesive unit.

In 1975, the Tribe incorporated under the laws of South Carolina as a non-profit corporation in order that it might participate in some of the federal categorical assistance programs which were becoming available for Indian tribes through various federal agencies other than the Department of the Interior. . . . Since 1975, the Tribe has administered a number of programs for the social and economic benefit of its members with assistance from both the State of South Carolina and the federal government. For the past several years, the Tribe has administered a program under the Comprehensive Employment and Training Act [CETA]. The Tribe conducts adult education classes and provides job placement services for tribal members needing employment. The Catawba reservation has been designated by the Economic Development Administration as an 'economic development area' and has recently opened a new tribal community center on the reservation which houses tribal offices, meeting rooms, kitchen facilities and a gym and shower complex. In addition to the CETA program, the Tribe has recently been approved to administer a program for elderly tribal members which will provide meals and other assistance, as well as a program which will provide meals for under-privileged children on and near the reservation.

In addition, the Tribe has for several years assisted in the development of the Catawba Pottery Association. The Association has approximately 20 members who make pottery in the traditional Catawba method, a method which has remained virtually unchanged since before the coming of the Europeans. The clay pits which our Tribe has used since before colonial times are located right across the Catawba River from the reservation. The Catawba Pottery Association assists tribal members in finding markets for their products and has received assistance form both the United States Department of the Interior and the State of South Carolina.

Hearing on H.R. 3274, *supra* note 2, at 109-11 (statement of Chief Blue).

112. *See Masthead*, NARF LEGAL REV. (Native American Rights Fund, Boulder Colo.), Winter/Spring 1993, at 16 (vol. 18., no. 1). It states the following:

The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian rights. The priorities of NARF are (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5)

with NARF's support, again turned to the federal government, which had so often disappointed them, to resolve the Tribe's land claim against South Carolina.[113] Legislation was drafted; yet in the end, again, nothing was done.[114]

Litigation

After the government refused to give the Catawbas relief, the Tribe was forced to seek redress in the courts. None of the injustice which the Catawbas had previously faced was as grave as that which lay before them. In the past, the Catawbas had dealt with individuals fighting over land which had understandably brought their own personal agendas to the struggle. Now, the Catawbas were to be cheated by a body which was supposed to be impartial, whose sole purpose was to interpret the law.

As a prelude to understanding the litigation, the Non-Intercourse Act, the scope of termination acts, and canons which apply to Indian law must be emphasized. These factors will combine to determine the fate of the Catawba people. As previously noted, the Non-Intercourse Act essentially provides that if the federal government does not consent to the acquisition of Indian lands, then the transaction is void.[115]

Furthermore, termination legislation does not terminate the existence of the affected tribes, but rather only alters the federal government's relationship with those tribes.[116] Clear and specific congressional action must exist to terminate tribal powers.[117] A tribe can be recognized by the United States for some purposes and not for others.[118]

Finally, the Supreme Court has enunciated canons of construction to be used in construing statutes that affect Indian tribes.[119] Most importantly,

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the development of Indian law.

Id.

113. This claim was based on the 1840 Treaty in which the Catawbas surrendered 144,000 acres in return for 630 acres and a small monetary payment. *See supra* note 59-60 and accompanying text.

114. Miller, *supra* note 4, at 8-10.

115. *See supra* notes 43-44 and accompanying text.

116. Catawba Indians v. South Carolina, 718 F.2d 1291, 1297 (4th Cir. 1983) (*Catawba I*), *aff'd*, 740 F.2d 305 (4th Cir. 1984) (*Catawba II*), *rev'd and remanded*, 476 U.S. 498 (1986) (*Catawba III*); *see also* Menominee Tribe of Indians v. United States, 388 F.2d 998, 1000-01, *aff'd*, 391 U.S. 404 (1968).

117. Charles Verhoeven, South Carolina v. Catawba Indian Tribe: *Terminating Federal Protection with 'Plain' Statements*, 72 IOWA L. REV. 1117, 1123-24 (1987).

118. In Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), the Court held that although the Menominee Tribe was no longer federally recognized, the Indian's hunting and fishing rights, conferred through prior treaty, would continue to be protected by the federal government. *Catawba I*, 718 F.2d at 1299-1300; *see also* Ulmer, *supra* note 32, at 129.

119. *Catawba I*, 718 F.2d at 1296. The Court rigidly applies canons of construction that are unique to Indian affairs. Verhoeven, *supra* note 117, at 1124-25.

congressional intent must be clearly expressed to abrogate or modify a treaty right, statute or a congressionally ratified agreement, and doubtful expression (ambiguities) should be resolved in favor of the Indians.[120] Furthermore, the reserved rights doctrine requires that treaties between Indians and the United States be interpreted not as grants to the Indians, but rather as grants from them.[121] Therefore, if a treaty or agreement does not address a right, that right is understood to be retained by the Indians.[122]

Within this framework of Indian law, the Catawbas began their next disappointing journey. In 1980, the Catawba Tribe filed suit in district court seeking possession of its 1760 Treaty reservation that granted the Catawbas the fifteen-mile tract of land in dispute.[123] The complaint named seventy-six defendants, including the State of South Carolina and corporate and individual landowners who represented the defendant class of landowners that laid claim to the land.[124] At the time of the initial filing, it was estimated that 30,000 people held title to the disputed land.[125]

The district court granted the State's motion for summary judgment. The court held that the trust relationship between the federal government and the Tribe had terminated with the 1959 Division of Assets Act, so the Catawbas were not entitled to protection under the 1790 Non-Intercourse Act.[126]

> Although there are many different Indian law construction rules, the substantive principles supporting them are similar. The government's first dealings with the Indians were through treaties and, thus, were the product of negotiation. The Indian tribes came to these negotiations with a culture radically different from the government with which they were dealing. They had no written language and the government's concept of property ownership was alien to the Indians. As the United States grew in power, the Indians became dependent on the federal government for protection and fair dealing. Recognizing the Indians' inferior bargaining position, the courts began to develop canons of construction that interpreted federal treaties and statutes liberally in favor of the Indians.

Id. (footnotes omitted).

120. Verhoeven, *supra* note 117, at 1125-26; *see also* Antoine v. Washington, 420 U.S. 194, 199-200 (1975); Mattz v. Arnett, 412 U.S. 481, 504-05 (1973); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968). In interpreting a congressionally ratified agreement between the federal government and an Indian tribe, the Supreme Court states that "[t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." Choate v. Trapp, 224 U.S. 665, 675 (1912).

121. Verhoeven, *supra* note 117, at 1125.

122. *See id.*; Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); *Menominee*, 391 U.S. at 412-13; United States v. Santa Fe Pac. R.R., 314 U.S. 339, 353-54 (1941).

123. *Catawba I*, 718 F.2d at 1291.

124. Miller, *supra* note 4, at 10.

125. *Id.*

126. *Catawba I*, 718 F.2d at 1295.

Therefore, the court reasoned that South Carolina's statute of limitations applied and barred the claim.[127]

The Catawbas appealed to the Fourth Circuit. The Fourth Circuit reversed the district court's opinion.[128] The court held that the 1959 Division of Assets Act did not affect the claim based on the land given to the Catawbas through the 1760 Treaty (ratified by the 1763 Treaty and adopted by the states) and taken away from them in the 1840 Treaty.[129] Also, the termination agreement did not end the trust relationship between the Tribe and the federal government arising out of the Non-Intercourse Act.[130] Therefore, South Carolina's statute of limitations did not apply to the claim because the Non-Intercourse Act controlled.[131]

The Fourth Circuit reasoned that the Non-Intercourse Act creates a fiduciary relationship between the federal government and tribes similar to the relationship of guardian and ward.[132] This trust relationship exists even though federal officials charged with supervision of Indian Affairs disclaim any responsibility for the Tribe. This relationship also exists in the absence of a federally recognized tribal government.[133] In other words, as a beginning presumption, the Non-Intercourse Act applied to the Catawbas.

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127. *Id.*

128. *Id.* at 1291.

129. *Id.* at 1300.

130. *Id.*

131. *Id.*

132. *Id.* at 1298-99. To establish a prima facie case for a violation of the Non-Intercourse Act, the tribe must prove four elements: (1) that it is or represents an Indian tribe within the meaning of the Non-Intercourse Act; (2) that the land in issue is covered by the Non-Intercourse Act as tribal land; (3) that the United States has never approved or consented to the alienation of the tribal land; and (4) that the trust relationship between the United States and the tribe, established by coverage of the Non-Intercourse Act, has never been terminated or abandoned. Epps v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979).

The Court in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), outlined the policy governing lands occupied by Indians:

> 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.

Id. at 667-68.

133. *Catawba I*, 718 F.2d at 1298-99.

The issue thus became whether the 1959 Division of Assets Act effectively terminated the relationship protected under the Non-Intercourse Act. The court recognized that Congress may terminate the trust relationship between the federal government and Indian tribes arising out of the Non-Intercourse Act through a plain and unambiguous intention to do so.[134] The court also recognized the canon of construction that any doubtful expression of legislative intent must be resolved in favor of the Indians.[135]

Since the Division of Assets Act was ambiguous as to the extent of termination, the court found it necessary to examine the Act's legislative history. The court recognized that during negotiations for the termination agreement, the Tribe expressed its desire, acknowledged by the government, that any land claim arising out of the 1840 Treaty would remain unaffected.[136] The legislative history of the 1959 Division of Assets Act showed that the termination agreement was only intended to end the federal supervision and assistance which arose under the 1943 Memorandum of Understanding.[137] Of course, under the canon of construction which construes ambiguities in favor of the Indians, all that would have been needed to reach this conclusion was a showing that the legislative history was unclear on the subject.

The Fourth Circuit further found that the Catawbas remained "Indians" for the purposes of the Non-Intercourse Act subsequent to the 1959 Division of Assets Agreement. The Supreme Court had defined a "tribe" as "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."[138] The Court has applied this definition to bring within the scope of the Non-Intercourse Act a tribe of Indians that did not have a federally recognized form of government.[139] Indeed, the Fourth Circuit recognized that the Catawbas, despite revocation of the tribal constitution, had continued as a body of Indians, united in a community under one leadership, and inhabiting a defined territory.[140]

Moreover, South Carolina itself had continued to recognize the Catawbas as a tribe by continuing to hold the 630-acre reservation in trust.[141] Furthermore, the Division of Assets Act provided for the continuance of some Indian projects.[142] "Clearly, the Congress did not intend the Division of

134. *Id.* at 1299; 25 U.S.C. § 177 (1988).
135. *Catawba I*, 718 F.2d at 1296.
136. *Id.*
137. *Id.* at 1297.
138. Montoya v. United States, 180 U.S. 261, 266 (1901).
139. United States v. Candelaria, 271 U.S. 432, 441-42 (1982).
140. *Catawba I*, 718 F.2d at 1298.
141. *Id.*
142. *Id. See also supra* note 104.

Assets Act of 1959 to end the Tribe's existence."[143] As a final point of support, the court noted that in at least one other termination act, Congress clearly terminated the federal trust relationship with respect to the affected tribe, something it did not do in the Catawbas' Division of Assets Act.[144]

The Fourth Circuit concluded by holding that the district court erred in finding South Carolina's statutes of limitations applicable to the claim because the Non-Intercourse Act and the supremacy clause preempt state law defenses such as the statutes of limitations.[145] Furthermore, the 1959 Division of Assets Act did not affect the Catawbas' claim. The 1959 Act "neither confirms the claim nor extinguishes it."[146] One year later, the Fourth Circuit reaffirmed its decision.[147]

The defendants appealed the Fourth Circuit's decision to the Supreme Court. The Supreme Court reversed and remanded the case, holding in direct opposition to the Fourth Circuit, that the plain and unambiguous meaning of the 1959 Division of Assets Act was to end all the Catawbas' federal protections, including that derived from the Non-Intercourse Act.[148]

The Court based its decision on the determination that there could be no alternative interpretation to section 935 of the Catawba Division of Assets Act, which provides:

> [T]he tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.[149]

The center of debate, and in fact the fate of the Catawba people, came to rest on the interpretation of these words. The question was whether the words "them" and "their" found in the second clause of the first sentence refer to the tribe and its members or the individual members only. This distinction is critical because federal protection is lifted and state law applied only to the subject of the second clause of the sentence (and *not* to the subject of the first clause). The Court found it was unmistakably clear that the words "them" and "their" in the second clause of the sentence meant both the tribe and the

143. *Catawba I*, 718 F.2d at 1298.

144. *Id.* at 1300. *Compare* 25 U.S.C. § 935 (1988) (Catawba Tribe, no explicit termination) *with* 25 U.S.C. § 980 (1988) (Ponca Tribe, explicit termination).

145. *Catawba I*, 718 F.2d at 1300.

146. *Id.* at 1301.

147. Catawba Indians v. South Carolina, 740 F.2d 305 (4th Cir. 1984) (*Catawba II*).

148. South Carolina v. Catawba Indians, 476 U.S. 498, 507 (1986) (*Catawba III*).

149. 25 U.S.C. § 935 (1988).

individual members, because "tribe and members" was used in the first clause of the sentence.[150]

Since the Court determined that the wording was crystal clear, the court reasoned that the legislative history of the 1959 Division of Assets Act, which showed that both Congress and the Catawbas intended to preserve the Catawbas' claim, did not need to be examined.[151] However, a closer examination of the wording shows, as the Fourth Circuit determined, that section 935 of the Division of Assets Act is not at all as "clear and unambiguous" as the Supreme Court found it to be. The Supreme Court reasoned "that the antecedent of the words 'them' and 'their'. . . is the compound subject of the first clause in the sentence, namely, 'the tribe and its members.'"[152] Thus, all clauses in the sentence refer to the tribe. However, the very fact that a question of interpretation exists is potent evidence of the Division of Assets Act's ambiguity.[153]

A stronger argument exists that the second clause only refers to individual tribal members.[154] If "them" and "their" meant the tribe and its members then the Court would effectively be adding the words "or tribes" to "Indians" in the second clause.[155] Further, the words, "such persons" contained in the second sentence refers to something in the preceding sentence. Most logically, "such persons" refers to the "them" in the last clause of the preceding sentence. Therefore, the words "such persons" only refers to individual Indians and not the tribe.[156] However, whichever interpretation is correct, this obvious ambiguity should have lifted the ban on the use of extrinsic evidence.[157]

Still, the Supreme Court found that no ambiguity existed and therefore the canon of construction granting any ambiguity in favor of the Indians did not apply. Accordingly, the Court reasoned that all federal protection had been terminated in 1959.[158] Therefore, the state's statute of limitations should apply.[159] The Catawbas were effectively denied their lands through a game of words.[160] Prior to this ruling, the court had refused to apply a state law

150. *Catawba III*, 476 U.S. at 506-07; *see also* Verhoeven, *supra* note 117, at 1128-30.

151. *Id.*; *see also Catawba III*, 476 U.S. at 506-07.

152. *Id.* at 506.

153. Verhoeven, *supra* note 117, at 1130.

154. *Id.* at 1129-30.

155. *Id.*

156. *Id.*

157. *Id.*

158. South Carolina v. Catawba Indians, 476 U.S. 498, 504 (1986) (*Catawba III*). Actual termination occurred in 1962 when Termination Act took effect.

159. *Id.* at 507.

160. Justice Blackmun observed in his dissent:

> When an Indian Tribe has been assimilated and dispersed to this extent — and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland. . . . the Tribe's claim to that land may seem ethereal,

time bar to a Non-Intercourse claim.[161] Although, the Court declined to consider whether the statute of limitations did in fact apply and remanded the case back to the Fourth Circuit to do so.

Luckily for the Catawbas, the Fourth Circuit once again reached a decision that kept their claim alive. The first consideration in the case was whether the Catawbas could satisfy section 15-3-340 of the South Carolina Code, which provides that "[n]o action for the recovery of real property . . . shall be maintained unless it appear[s] that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action."[162] Section 15-67-210 creates a presumption of possession if the plaintiff establishes legal title. Even though the Tribe had not been in possession of the disputed land since 1840, the Catawbas still had legal title which satisfied the statutes.[163]

The court then determined that only those landowners who could establish a ten-year continuous possession of their land between 1962, the effective date of the Division of Assets Act, and October 1980, the date the suit was filed, could successfully defend the Catawbas' claim.[164] South Carolina, in contrast

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and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive, or because the rights of innocent third parties must be taken into account in fashioning a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.

Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th century treaty lands, and because I agree with Justice Black that '[g]reat nations, like great men, should keep their word,' . . . I do not join the judgment of the court.

Catawba III, 476 U.S. at 527 (Blackmun, J., dissenting) (citations omitted).

161. Verhoeven, *supra* note 117, at 1122.

162. S.C. CODE ANN. § 15-3-340 (Law. Co-op. 1976), *quoted in* Catawba Indians v. South Carolina, 865 F.2d 1444, 1452 (4th Cir. 1989) (*Catawba IV*).

163. *Catawba IV*, 865 F.2d at 1448. The court reasoned:

Indian title is a creation of federal law. It is the title given to land occupied by Indians when the United States gained its independence from Great Britain and became the sovereign. Indian title includes a right to possession superior to that incident to fee simple title; where Indian title and fee simple title coexist, the fee simple interest operates merely as a reversionary right to possession which can take effect only when Congress extinguishes the Indian title. Indian title includes the right to exclude all others, including holders of fee simple title, through state law possessory actions such as ejectment and trespass. Indian title cannot be alienated except by Act of Congress; a purported conveyance of the possessory right, even if made by a tribe having such title, is void and no title passes. Except where Congress provides otherwise, claims based on Indian title are not subject to state law defenses such as statutes of limitations, adverse possession, or laches.

Id.; *see also* S.C. CODE ANN. § 15-67-210 (Law. Co-op. 1976).

164. *Catawba IV*, 865 F.2d at 1445.

to the overwhelming majority of states, does not allow "tacking" for adverse possession.[165] Therefore, the difficulty for the landowners laid in establishing their ten-year continuous possession. Quite possibly, those landowners that could not would lose their property.

The Fourth Circuit remanded the case to the district court to determine which claims were barred. The district court dismissed the overwhelming majority of the claims.[166] The biggest problem, however, came from the district judge's refusal to certify the total class of defendants who owned land in the fifteen-mile tract involved in the claim.[167] This refusal meant that if the Catawbas wanted to sue the approximately 62,000 individual owners, they would have to serve each defendant individually, and they would have to do so before October 1992.[168]

In the hopes that a settlement could be reached, the federal legislature stepped in and passed a bill which granted a one-year time extension on the statute of limitations.[169] At the same time, the Catawbas brought suit against the United States government for the breach of its promise to protect the Catawbas' land from the 1959 Termination Act.[170] Again, the Catawbas were told the statute of limitations barred the claim, which should have been brought by 1968 at the latest.[171]

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165. At least for the purposes of the statute in question. South Carolina does have a 20-year statute of limitations statute which allows tacking, but since the Catawbas filed their suit in 1980, 18 years after the Division of Assets Act became effective in 1962, the statute which allowed tacking did not apply. Catawba Indians v. South Carolina, 978 F.2d 1334, 1342 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993) (*Catawba V*); *see also Catawba IV*, 865 F.2d at 1452 n.7.

166. Miller, *supra* note 4, at 11. Twenty-nine landowners dismissed along with thousands of acres. On appeal, the Fourth Circuit reversed some of the claims and upheld others. *Catawba V*, 978 F.2d at 1349.

167. *In re* Catawba Indian Tribe, 973 F.2d 1133 (4th Cir. 1992).

168. Exactly 61,767 potential defendants existed. The district court's denial of class certification had the effect of starting the limitations "clock" which had stopped ticking in 1980 when the initial suit had been filed (18 years after termination). The denial meant that in twenty months, twenty years would have elapsed since the initial filing. Therefore, the defendants would have been able to use tacking to show adverse possession under a separate South Carolina statute which required a twenty year showing of adverse possession but which allowed tacking of adverse possession periods (as opposed to the 10 year statute used in prior court analysis which did not allow tacking). Telephone Interview with Don Miller, Attorney, Native American Rights Fund (NARF) (Oct. 27, 1993). Miller is the NARF attorney who has represented the Catawbas over the last 18 years, since the inception of formalized negotiations.

169. Act of Aug. 11, 1992, Pub. L. No. 102-339, 106 Stat. 869.

170. Catawba Indian Tribe v. United States, 24 Cl. Ct. 24 (1991), *aff'd*, 982 F.2d 1564 (Fed. Cir.), *cert. denied*, 113 S. Ct. 2995 (1993).

171. Catawba Indian Tribe v. United States, 982 F.2d 1564, 1569-70 (Fed. Cir.), *cert. denied*, 113 S. Ct. 2995 (1993). The court determined that some of the claims were barred by Indian Claims Commission Act. "The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before that date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress." 25 U.S.C. § 70k (1988). The remaining claims were

In the meantime, the Catawbas had continued in their preparations for suits against the individual landowners. The Tribe remained hopeful a settlement would be reached, but negotiations stalled in 1991.[172] The Catawbas wanted more self-government and more money than the government offered.[173] In April 1992, NARF attorneys began their final preparations for suing and serving process on the 61,767 occupants of the disputed land. NARF had prepared for each party a stack of documents totaling over sixteen inches thick, including the pleadings, a service of process form, and a seal.[174] This extensive preparation renewed the interest in settling the dispute.[175] Finally, the negotiators came up with an agreement that was accepted by the Catawbas by a vote of 289-42.[176] On October 27, 1993, President Clinton signed the bill into law.[177]

The Settlement

The total value of the settlement is estimated to be between $80 and $90 million.[178] A total of $50 million in cash will be received over a five-year period; the federal government will contribute $32 million and the State of South Carolina and private sources will contribute $18 million.[179] The

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barred by the Tucker Act. "Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1988).

172. Miller, *supra* note 4, at 12.

173. *Id.*

174. *Id.* NARF had previously hired several large marketing firms to research the Tax Assessor's records. Through these records, all the current property owners were located.

175. Telephone Interview with Don Miller, *supra* note 168.

> Even though the state had a sympathetic judiciary, they couldn't prevent us from bringing our claims. The ball was on our side because we had a valid possessory right. Basically, the suit would have crippled the court system. We would have been enjoined from the actual service of process if we had filed the claims in court because the court was not at that time able to handle such a tremendous caseload and the law offices in town could not handle the number of claims, totaling 61,767.

Id. Also, the landowners of the area had for years been subjected to title problems because of the claim. Included among the affected was Heritage Park, home of Jim Bakker. A cloud on title insurance prevented several potential purchasers from negotiating to purchase Heritage Park. JoAnn Skoog, *National Notebook: Rock Hill, S.C.; Capitalizing on Land Values*, N.Y. TIMES, May 21, 1989, § 8, at 1; Steve Emmons, *Baker's Heritage USA Is Born Again*, L.A. TIMES, Feb. 15, 1991, § (View), at 1.

176. Telephone Interview with Don Miller, *supra* note 168.

177. Catawba Indian Tribe of South Carolina Land Claims Settlement Act, Pub. L. No. 103-116, 107 Stat. 1118 (1993) (codified at 25 U.S.C. § 941 (Supp. V 1993)). *See supra* note 1 and accompanying text.

178. *Settlement*, *supra* note 5, at 1. See appendix for summary of agreement.

179. *Settlement*, *supra* note 5, at 1. In addition to payments from the federal and state governments, the settlement provides for $1.4 million to be paid from title insurance companies, $500,000 from Duke Power Company, $500,000 from Crescent Resources, $2 million from York

remainder of the settlement will come from in-kind contributions from federal and state agencies.[180] The 1959 Division of Assets Act is repealed and the Catawbas are once again a federally recognized tribe.[181] In exchange, the Catawba Tribe has relinquished its land claim arising out of the 1840 Treaty of Nation Ford, the 1760 and 1763 Treaties, and any land claim based on aboriginal title.[182]

Under the settlement, the money the Catawbas receive will be placed into five different trust funds for: (1) land acquisition, (2) economic development, (3) social services and elderly assistance, (4) education, and (5) per-capita payments.[183] All of these funds will be managed on a permanent basis except for the per-capita payment trust fund. A minimum of $7.5 million will be placed into the per-capita payment trust for disbursement to individual tribal members.[184] Tribal membership will be determined by the Tribe's own requirements — descendance from a person listed on the 1961 federal roll.[185]

The settlement allows the Catawbas to purchase up to three thousand acres of additional reservation lands. The new lands will be sought within planning zones, close to the existing reservation. The substantial portion of these land purchases must be made within a ten-year period.[186]

Powers not set out for the Tribe in the settlement act reside with the State of South Carolina. The Catawba Tribe has jurisdiction over internal tribal matters but the State retains control over all criminal activity on the reservation. Although, the Tribe has the option of developing a tribal court with concurrent criminal jurisdiction over tribal members to the same jurisdiction exercised by a state magistrate court over misdemeanors and petty defenses. The Tribe may also elect to establish a civil court to hear matters arising in the reservation with concurrent jurisdiction with the State.[187] South Carolina exercises environmental regulatory jurisdiction over Catawba lands, and state health codes also apply. The Catawbas are also subject to state regulation in the areas of hunting, fishing, and water control and must adopt local building codes.[188]

Members of the Tribe will pay taxes on income earned on the reservation to both the federal and state governments. Most Indians do not have to make

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County, $250,000 from Lancaster County and other contributions from banks and individuals. The payments are to be made over a five- or six-year period. Riddle, *supra* note 1, § 8, at 1.

180. *Settlement*, *supra* note 5, at 1.
181. See appendix for summary of agreement
182. *Settlement*, *supra* note 5, at 1.
183. See appendix for summary of agreement.
184. See appendix for summary of agreement.
185. See appendix for summary of agreement.
186. See appendix for summary of agreement.
187. See appendix for summary of agreement.
188. See appendix for summary of agreement.

such payments to the state. Members' personal property is also subject to state tax. However, real property and the per-capita payments are exempt.[189]

The settlement provides the Catawbas only a limited opportunity to profit from games of chance. The Indian Gaming Regulatory Act does not apply on the reservation. The Tribe can operate bingo and video machines which are subject to state law. Although, the bingo stakes can be higher than otherwise permitted in the state and more games can be played per day.[190]

Chief Gilbert Blue expressed his approval of the settlement: "I feel like we're on the edge of a new day for the Catawba people. Nothing will replace the loss of our lands but this settlement is a tool that will allow us to create a better way of life for our children."[191] Of course, the settlement did not come without its critics. Those opposed to the agreement claim that the Catawbas are relinquishing too much of their sovereignty for cash.[192] The settlement did confer upon the Catawbas fewer rights than many other Indian tribes enjoy.[193] As previously outlined, the Catawbas have very limited jurisdiction over crimes and civil disputes arising on their lands under the settlement.[194] Also, the Catawbas have to pay state income taxes in addition to federal taxes.[195] The Tribe has also agreed to defer to state regulation in the areas of hunting, fishing, and water rights.[196] And, as stated previously, the Indian Gaming Regulatory Act does not apply on the Catawba reservation.[197]

On the issue of tribal sovereignty, Cherokee Chief Wilma Mankiller stated, "I believe that the rights of tribes . . . are inherent, and that when we talk about our rights as tribal people, we should be talking about the rights we have had since time immemorial."[198] Critics charge the Catawbas have bargained away those rights. However, as a practical matter, the settlement confers rights upon the Catawbas the government did not previously extend

189. See appendix for summary of agreement.

190. The Tribe can offer bingo stakes of up to $100,000 per game and can play an unlimited number of games, six days a week. See appendix for summary of agreement.

191. *Settlement*, *supra* note 5, at 1.

192. *See Tribe Votes to End Land Claim for $50 Million*, L.A. TIMES, Feb. 21, 1993, at 14.

193. *Id.*; Telephone interview with Don Miller, *supra* note 168.

194. See appendix for summary of agreement. "Most tribes are recognized by Congress as self-governing nations that operate within federal guidelines and are not controlled by state laws." *Tribe Votes To End Land Claim for $50 Million*, *supra* note 192, at 14. In the case of the Catawbas, extensive state supervision exists. *Id.*

195. See appendix for summary of agreement.

196. See appendix for summary of agreement.

197. See appendix for summary of agreement. However, the Catawbas don't want to operate gambling facilities because the Tribe is predominantly of the Mormon faith and the members do not believe in gambling. Lyn Riddle, *Tribe Gambles It Can Turn Profit Without Bingo*, L.A. TIMES, May 19, 1993, at 5.

198. *Settlement*, *supra* note 5, at 1.

to the Tribe.[199] Before the agreement, the Catawbas were not a federally recognized tribe and possessed little. Now, the Catawbas are a federally recognized tribe with powers of self-government and possess sufficient funds to effectively improve the Tribe and its individual members' lives.[200] The government-to-government relationship exists once again.

A Report Card

Don Miller, NARF attorney who has represented the Catawbas since the inception of the land claim eighteen years ago, concluded:

> Basically, the courts that decided our case get an F. They didn't care what the law said. They were result-oriented and intent upon dismissing this case. It was an embarrassment to the judicial system. I would have liked to receive more, but we were lucky to salvage what we did.[201]

Conclusion

Since the Europeans first visited Catawba country, the bands of Indians which became known as the Catawbas continuously offered their support and loyalty to their white neighbors. In 1760, the Catawbas gave up sixty miles of land in return for clear title to a fifteen mile tract. Still, white settlers encroached on their lands. In 1840, the Catawbas gave up their fifteen miles of land in return for 630 acres and minimal compensation.

However, the 1840 transaction was not approved of by the federal government as was required under the Non-Intercourse Act. Furthermore, South Carolina failed to abide by the terms of the agreement. Because the 1840 agreement was void, the Catawbas claimed entitlement to the return of the fifteen-mile tract of land.

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199. Telephone Interview with Don Miller, *supra* note 168.

200. "Basically, the Settlement is Public Law 280 plus." Telephone Interview with Don Miller, *supra* note 168. For a discussion of Public Law 280 see COHEN, *supra* note 44, at 363. Currently, 65 families make up the Tribe. Mike Toner, *Most of the World's Languages Saying Goodbye Forever; TV Tongue-Ties Global Village*, ATLANTA J. & CONST., Mar. 17, 1991, at A1. In total, the Catawbas have 1300 members. Christina Connor, *It'll Get Better, Catawba River Indians Say*, L.A. TIMES, Dec. 5, 1993, at A1. Perhaps the saddest right lost for the Catawbas through the legislation has been access to the clay-pits which Catawbas have used for centuries to produce their pottery. "King's Bottom" lies across the Catawba River from the reservation and until recently the owners of the land had allowed the Catawbas access to the pits. After being named as a defendant in the Catawbas' lawsuit, the owner of the clay-pits revoked the permission and now that the Catawbas' claim to the clay lands has been relinquished through settlement, the only hope the Catawbas have of regaining access to the pits is through the voluntary sale to the Catawbas of the land. *Indians Gain Land, But Lose Pottery Clay*, WASH. TIMES, Sept. 14, 1992, at A2.

201. Telephone Interview with Don Miller, *supra* note 168.

In 1943, the federal government recognized the Catawbas' deteriorating condition. The federal government and South Carolina then entered into an agreement with the Catawbas for the federal government to provide limited services to the Catawbas and for South Carolina to purchase additional lands to be held in trust for the Tribe. South Carolina attempted to condition the agreement on the Catawbas' release of all land claims arising out the 1760 and 1840 agreements, but neither the federal government nor the Catawbas allowed the claim's release to be part of the agreement. Pursuant to the 1943 agreement, South Carolina did purchase 3434 acres of land for the Catawbas and conveyed title to that land to the federal government.

In 1959, the federal government decided to terminate the relationship it had created with the Catawbas in 1943. The tribal constitution was revoked and the 3434 acres purchased through the 1943 agreement was sold and the proceeds distributed to individual tribal members. However, the Catawbas' 630-acre tract remained unaffected. South Carolina continues to hold title to that land in trust for the Tribe.

Between 1975 and 1979, the Catawbas tried repeatedly to obtain the legislature's assistance in settling their claim, but in the end, nothing was done. The Catawbas were forced to take their struggle to the courts. In 1980, the first Catawba suit was filed. Ultimately, the Supreme Court decided that the 1959 termination agreement had ended the trust responsibility between the federal government and the Catawbas based on the "unmistakably clear" meaning of an unclear sentence. The Fourth Circuit then determined that South Carolina's statute of limitations would allow the Catawbas to bring a claim, but only against those landowners who could not show a ten-year continuous possession between 1962, when the termination act took effect, and 1980, when suit was filed.

It then became clear that the only way the Catawbas could recover anything was to individually sue each landowner that currently held possession of the land in dispute. On practically the eve of the scheduled filing date, a settlement was reached. Many benefits will result to the Tribe and its people as a result. However, in reflection, the Catawbas' plight cannot be called a victory.

The Catawbas struggled for over two hundred years to have their land returned to them. Of the five treaties the Tribe entered into with the government, the only one which the government upheld was the termination agreement. The courts enforced the termination agreement beyond the scope of the act's own terms. In the end, the Catawbas lost their claim to land worth over $2 billion and were left with less than one-half of one percent of their former lands. The reward was limited sovereign powers and $50 million — inadequate compensation for such a tremendous loss, yet perhaps the best the Catawbas could hope for.

APPENDIX

"Summary of the Agreement in Principle to Settle the Land Claim of the Catawba Tribe of South Carolina," *NARF Legal Rev.* (Native American Rights Fund, Boulder, Colo.), Winter/Spring 1993, at 3 (vol. 18, no. 1). Reprinted with permission.

Restoration

The trust relationship between the Tribe and the United States will be restored, the Tribe will become a federally-recognized Indian Tribe and it and its members will be eligible for Federal Indian services, including education, health, social services, and housing. The 1959 Termination Act will be repealed.

Tribal Trust Funds

Over a five-year period, the Federal Government and State of South Carolina will contribute $50 million to be placed into five trust funds: a Land Acquisition Trust, an Economic Development Trust, a Social Services and Elderly Assistance Trust, an Education Trust, and a per Capita Payment Trust. The Secretary of the Interior will manage and invest the trust funds unless the Tribe chooses to use private sector investment managers with proven competence and experience. Generally, the Tribe will determine how much money will be placed in each trust fund, except that the Agreement requires $7.5 million to go to the per capita payment fund and $6 million to go to the Education Trust. Except for the per capita payment fund, the trust funds are set up to be permanent funds. With some limitations, the Tribe may transfer money among trust funds and the Secretary or private investment manager is required to provide the Tribe an accounting at least annually.

Expanded Reservation

The existing reservation may be expanded to 3000 acres, plus an additional 600 acres of undeveloped land (flood plains or wetlands, for example). Another 600 acres could be added to the reservation with the approval of the Secretary of the Interior, county councils and the State Legislature, bringing the maximum reservation size to 4200 acres.

The additional land must be purchased from willing sellers with two defined areas close to the existing reservation, and will be bought by the Tribe from money in the Land Acquisition Trust. The Secretary of the Interior and a professional land planning firm will assist the Tribe in developing a reservation development and land acquisition plan. The Tribe is required to make every effort to buy land that borders the existing reservation, but if that is not possible, the Tribe may buy lands in up to three non-contiguous tracts if they are reasonably close to the existing reservation, within the two defined zones, and the county councils and the Governor approve the Tribe's plan for

such a configuration. If land cannot be purchased within the two defined zones, the Tribe may buy reservation land in an undefined third zone to be proposed by the Tribe if the Secretary and the State and local governments approve.

The Tribe will coordinate its planning activities with the City of Rock Hill, York and Lancaster Counties, and the State of South Carolina to ensure that the expanded reservation has access to roads and sewage treatment. Major land purchases for the reservation must be completed within 10 years of the final settlement payment: some minor purchases to round out or connect non-contiguous reservation tracts may be made for 20 years after the final settlement payment. The Tribe may buy and sell non-reservation land without restriction. Such land would have the same tax and legal status as any other land in the State, but would be eligible for federal grants and other Indian services and benefits.

Tribal Government, Jurisdiction and Governance

The Tribe may organize its government under the Indian Reorganization Act if it chooses and the Indian Civil Rights Act will apply. The governmental powers of the Tribe are those that are expressly set out in the Agreement in Principle, and powers not set out for the Tribe reside in the State. The Tribe will have jurisdiction over internal tribal matters, including the powers: 1) to zone and regulate the use and disposition of tribal property; 2) to define laws, petty crimes and rules of conduct applicable to members of the Tribe while on the reservation, supplementing but not supplanting criminal laws of the State of South Carolina; 3) to regulate the conduct of businesses located on the reservation; 4) to levy taxes; 5) to grant exemptions or waivers from any tribal laws, tribal regulations, or tribal taxes, except the Tribal Sales and Use Taxes, otherwise applicable on the reservation, including waivers of the jurisdiction of any tribal court; 6) to adopt its own form of government; 7) to determine its own membership; 8) to charter tribally-owned economic development corporations and enterprises; and 9) to exclude non-members from its membership rolls and from the reservation, except on public roads, the Catawba River, and public or private easements. The Tribe will possess the same immunity from suit as cities and counties possess in South Carolina and will be required to carry the same level of liability insurance as cities and counties are required to carry.

The State will continue to exercise criminal jurisdiction over Indians and non-Indians on the Tribe's reservation. If the Tribe desires, it may provide in its Constitution for a tribal court with concurrent criminal jurisdiction over tribal members only that is limited to the same jurisdiction exercised by a state magistrate's court over misdemeanors and petty offenses that would be specified in ordinances adopted by the Tribe. The Tribe has the option of employing tribal police officers if they receive the same training as Sheriff's

deputies and are cross-deputized by the York and Lancaster County Sheriffs Departments.

The Tribe may also elect to establish a civil court. The tribal court's civil jurisdiction would be limited to matters arising on the reservation and would be concurrent with the civil jurisdiction of the State in most circumstances. With some limitations, the tribal court would have jurisdiction over cases involving the Tribe or its members in the following areas: 1) contracts made or to be performed on the reservation; 2) cases involving injury caused by negligence (non-Indians could have their cases removed to State court); 3) internal matters of the Tribe; 4) domestic relations where both spouses to the marriage are tribal members; 5) enforcement of tribal laws regulating conduct on the reservation; and 6) cases arising under the Indian Child Welfare Act. Most tribal court cases would be appealable to state court and the Tribe would have the ability to waive the authority of the tribal court.

The State will have environmental regulatory jurisdiction and state health codes will apply on the new reservation. The Tribe agrees to adopt local building codes and hunting, fishing, and water rights will be subject to state regulation.

Taxation

The Tribe, the tribal trust funds, and tribally owned enterprises will be non-taxable for federal income tax purposes like other federal tribes, an its income will be non-taxable by the State for 99 years. Federal trust lands will be exempt from real property taxes, and improvements on the land will be exempt from real property taxes for 99 years. The Tribe will make substitute payments to support its children in the public schools. The State will not tax any sales occurring on the reservation, but the Tribe agrees to impose and collect a sales tax equal to the State's sales tax. Purchases by the Tribe in its governmental capacity will be exempt from State sales and will be exempt from State sales and use taxes for 99 years. The Tribe will have the same Federal tax treatment as other Federal tribes under the Indian Tribal Government Tax Status Act and will be able to issue bonds to finance certain projects.

Members of the Tribe, like members of other Federal tribes, will pay Federal tax on income earned on the reservation. Unlike members of other Federal tribes, they will also pay state income taxes on income earned on the reservation, unless they work for the Tribe performing governmental functions, in which case they will not pay state income taxes for 99 years. Per capita payments will be exempt from state and federal income taxes. Income from the sale of pottery and artifacts made by members of the Tribe on or off the reservation will be exempt from sales and use taxes. Members' homes will be exempt from property taxes for 99 years. Members' personal property, such as cars and boats, will be subject to state tax.

Games of Chance

The . . . [settlement] gives the Tribe the option of having bingo and video machines. Generally, state law would govern any gaming on the reservation and only those gaming activities that are permitted by State law would be permitted on the Reservation. However, the Tribe would be permitted to sponsor much higher stakes bingo games ($100,000) more frequently (unlimited number of games, six days a week) than is permitted other bingo operators in the State. The State would tax tribal bingo proceeds at a rate of 10% of gross — a tax rate slightly lower than that paid by other bingo operators in the State. The Indian Gaming Regulation Act would not apply on the Catawba Reservation.

Tribal Membership

The Tribe's membership will be determined by the Tribe, and the settlement legislation will incorporate the Tribe's own membership requirements, that is, descendance from someone listed on the 1961 Federal roll. The minimal state services and tax exemptions for individuals and the Tribe that will cease after 99 years will have no effect on the Tribe's membership, its federal relationship, or it eligibility for federal services.