OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-782

TITLE SOUTH CAROLINA, ET AL., Petitioners V. CATAWBA INDIAN TRIBE OF SOUTH CAROLINA

PLACE Washington, D. C.

DATE December 12, 1985

PAGES 1 thru 43

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IN THE SUPREME COURT OF THE UNITED STATES

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SOUTH CAROLINA, ET AL, :

Petitioners :

v. : No. 84-782

CATAWBA INDIAN TRIBE :

OF SOUTH CAROLINA :

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Washington, D.C.

Thursday, December 12, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 o'clock a.m.

APPEARANCES:

JAMES D. ST CLAIR, ESQ., Boston, Massachusetts, on behalf of the Petitioners.

DON BRANTLEY MILLER, ESQ., Boulder, Colorado, on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

THE CHIEF JUSTICE: Mr. St. Clair, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES D. ST. CLAIR, ESQ.

ON BEHALF OF PETITIONERS

MR. ST. CLAIR: Mr. Chief Justice, and may it please the Court:

This is an Eastern Indian land claim case, under the commonly known or called statute, the Non-Intercourse Act, the first part of which was 1790 and there were sections or additions thereafter from time to time.

The land here in question consists of approximately 144,000 acres in the State of South Carolina embodying the city of Rock Hill, the town of Fort Mill and a number of other smaller communities in Lancaster and York Counties and perhaps even part of Chester County.

The case arises despite the fact that this claim is made in the face of a Termination Act, so-called, Catawba Termination Act of 1959. It seems important that in order to interpret that act as it is applicable or not to the facts of this case, that we should address perhaps the congressional policy that

prevailed in the late 1950's and '60s, the late 1950's and early 1960's with respect to the status of Indians and Indian tribes and the larger society in this country.

During those period of years, sometimes referred as the termination period, it was the express policy of the Congress to eliminate the Indian reservations, to eliminate the difference between Indians, tribal Indians and Indian tribes in the larger society, and that Congress directed effective steps to be sure that that elimination ultimately was culminated.

Pursuant to that policy the House of Representatives directed that a report after investigation be made with respect to what tribes could be considered to be appropriate for assimilation in the larger society. The Catawba Indians, who are the respondents in this case, were early on recognized as a group that was so advanced that they could safely be assimilated into the larger society.

Pursuant thereto, the Congress enacted the so-called Catawba Termination Act as one of 12 termination acts enacted by Congress during this period of time. The specific legislative history is also important to the construction to be applied to the Termination Act as it pertains to the facts of this case.

In addition to being designated as ready for

assimilation, the Catawbas themselves had requested that they be relieved from the burden of federal supervision as they then viewed it, and participated by resolution and otherwise in fostering legislation that they felt was oppressive to them under the circumstances.

Ultimately the congressmen from that area, Congressman Temple, introduced an act which became ultimately the Termination Act for the Catawbas, but only after reviewing it with the tribe, having the tribe approve the concept of terminating the federal relationship with their group, and ultimately after the Act was passed by the Congress, an explanation was sent to te Catawbas, and that explanation made it very clear that the relationship between the federal government and the Catawbas was at an end.

Perhaps it might be worth our while to look at the joint appendix on page 137. This is an explanation that was sent to the Catawba Indians, and I suggest it contains not only the intent behind the statute but also underlines the Catawba Indians' understanding of what was happening.

In the middle of page 137, this explanation sent to the Catawbas states, Section 5 revokes the tribal constitution, and that in fact did happen in 1962, which means that the tribe will no longer exist as

a federally recognized organization. In addition, just as the tribe no longer will be a legal entity, it shall be governed by federal laws which refer to tribes so the individual members will no longer be subject to laws which apply only to Indians.

Nothing in the Act prohibits those interested in organizing under State law to carry on any of the non-governmental activities of the group. I submit it would be difficult to express in the English language any intention on the part of Congress in the understanding on the part of the Catawbas that their relationship with the federal government was totally and completely terminated without question.

QUESTION: Mr. St. Clair, is there a common law restraint against alienation by Indian tribes in their tribal lands?

MR. ST. CLAIR: I think, Justice O'Connor, I think in Oneida 2, this Court recently discussed an underlying common law.

QUESTION: That was my understanding, and so what I want to ask you is, do you think the statute here, Section 935, affected the common law restraints against alienation, because by its terms it says that statutes of the United States that affect Indians will be inapplicable.

Now, what about any common law restraint?

MR. ST. CLAIR: If Your Honor please, I think the answer is as follows. There indeed is recognized a common law with respect to limitations on transfers of aboriginal titles by Indians. It's the law of the United States, incidentally.

That is embodied in the Non-Intercourse Acts, so it's clear from a point of view of what Congress had in mind, that the Non-Intercourse Acts embody now the common law as it relates to these Indians, no longer shall be applicable because the statute embodying that common law is ruled out of having any application.

And, may I read to you briefly what some of the Congressmen thought about what they were doing at this time.

QUESTION: Well, is your response that Section 935, even though it says, only statutes of the United States, means something more than that?

MR. ST. CLAIR: Yes, in this case, because the statute that we're interested in embodies and is a codification of the common law, so to in effect repeal that statute, you make that common law, what's embodied in that statute, non-applicable and clearly Congress had that in mind.

QUESTION: But if common law restraint exists

separate and apart from the statutory one, that argument --

MR. ST. CLAIR: I don't think it exists separate and apart. My point of view is that it embodies and incorporates and codifies the common law. So, to say that the Non-Intercourse Act, or Acts as the case may be, are non-applicable, you have said in substance that the common law, even, as it might otherwise have applied, is also non-appropriate for this purpose, and clearly that's what Congress had in mind.

For example, on page 11 of our brief, we quote briefly from the statement made by Senator Watkins, Chairman of the Senate Committee on Indian Affairs, relating to the termination policy of the Congress. "We do not want the government still in the Indian business by any implication whatsoever. If we have severed the cord which binds us to the Indians, or the Indians to us, we want it completely severed and not just a little strand left."

More briefly, Senator Anderson said, "Termination is a single term. I'm sure termination means termination and not continuance." Senator Church finally says, "An end is an end is an end." There can be no doubt, Justice O'Connor, in my view that Congress intended to sever all relations, common-law, statutory,

and otherwise, by this Termination Act as far as the federal government and the Catawbas was concerned.

QUESTION: Mr. St. Clair, Judge Butzner in his opinion for the majority of the Court of Appeals referred to something that happened, I guess before the enactment of the Act itself, where he says an Indian expressed concern about the tribes' treaty reservation claim against South Carolina but a Bureau BIA officer assured him that any claim the Catawbas had against the state would not be jeopardized by carrying out a program with the federal government.

MR. ST. CLAIR: Early in the 1900's, representatives of the Catawbas called upon representatives of the BIA, Bureau of Indian Affairs, and the record I think is only fairly interpreted to mean they said, what about our rights under the Non-Intercourse Act.

They revised -- they have no such rights. You are not a federally recognized tribe. You are in fact a state tribe. The federal government has no relationship with you whatsoever.

That was confirmed by an Indian agent to the Catawbas within this same period, early in the 1900's. For 75 years thereafter nothing further was done by the Catawbas with respect to their inquiry as to whether or

nct they had any claim.

You have to understani that prior to 1975, Mr. Justice Rehnquist, when the Passamaquoddy case was decided, no one understood that non-recognized tribes had a federal relationship for the purpose of the Non-Intercourse Act. That only came --that understanding came in 1975.

These Indians were looked upon as state Indians, and the Catawbas were looked upon as state tribes, and when they made inquiry about it, that was confirmed to them and apparently they accepted it because nothing was done for virtually 75 years.

A great deal --

QUESTION: Well, Judge Butzner apparently felt that comment was applicable in interpreting the meaning of congressional legislation, some assurance had been given to he Indians that if they made this deal with the federal government it wouldn't affect their claim against the state.

MR. ST. CLAIR: I think, if Your Honor please, the reference you are now making is a reference to the discussions previous to the memorandum of understanding of 1943, 43-odd years later.

QUESTION: He says this happened in 1958.

MR. ST. CLAIR: Well, also again in 1958. The

Catawbas have continuously since 1840, when South Carolina purchased their interests pursuant to the Treaty of Nations, contended that South Carolina had breached their agreement and that they had a claim against South Carolina.

What seems to us to be very clear is that the Court of Appeals below has interpreted a claim against South Carolina as being a non-intercourse claim. Of course, it is not so described.

The claim against South Carolina is not the way you describe a non-intercourse claim. A non-intercourse claim is like this one, against 27,000-odd people. It is clear in our view that what is being referred to by the Indians was a claim that they had persisted in, that South Carolina did not carry out its obligations under the 1840 treaty or when they acquired the Catawba lands.

And may it also be said that nothing has ever been done with respect to that claim by the Catawbas even until today. Carolina, of course, South Carolina, feels that they did not breach the agreement, and in fact over the years has done a great deal for the Catawba Indians.

It has been suggested by the respondents that, well, the claim against South Carolina is sort of a

shorthand way of contending that there is a claim under the Non-Intercourse Act, and they cite an exhibit in the record, Exhibit 14.

A careful reading of that does not support the suggestion, and furthermore it is not likely that the Catawabs had in mind a non-intercourse claim even as late as 1943 because neither the Indians nor the Congress nor the Department of Interior understood that a non-recognized tribe had any federal relationship that would justify a claim under the federal Non-Intercourse Act as appropriate.

That did not come until later, and I guess what this case is all about is, try to transport the law as it developed in 1975 in Passamaquoddy back into the intentions of the Congress, the understandings of the tribe, and South Carolina. It simply does not wash.

If we look at the language of the statute, which is, I think, important in this case, it seems quite clear that as of the date of the termination that Congress in plain English terminated whatever relationship might exist between the federal government and between the tribe, or the group.

In 1943 there had been a memorandum of understanding entered into with the Bureau of Indian Affairs, the Federal Farm Agency, South Carolina and the

Catawbas. It was a contract. It was not legislatively initiated, and it provided for certain welfare or certain payments to be made to assist the Catawbas.

Part of that involved, however, the purchase of $75,000 worth of land, some 3,400 acres by the State of South Carolina, which was then given to the Secretary of Interior to hold in trust for the Catawbas.

The respondents, of course, argue, well, this whole case is nothing more than an effort to terminate that memorandum of understanding which was not legislatively enacted and did not require legislation to terminate. But it did have the appearance, at least, of a fiduciary or trust relationship between the federal government and the Secretary of the Interior, and the Catawbas because the Secretary held 3,400 acres in trust for them.

So, one understands under the circumstances that what Congress had in mind in this case was to be sure that all ramifications of that fact are eliminated by the Termination Act. No reference is made in the Termination Act to the memorandum of understanding which would seem, it's only purpose clearly would have been referenced in the Act, and the language did not support it because the language says, all statutes.

The memorandum of understanding was not even a

statute. It did not require a statute to terminate it. But the Termination Act did terminate that memorandum of understanding and any other relationships which may be implied from the fact that the federal government held land for the Catawbas in trust.

If we look at the language itself, and I think that with all due respect the Court of Appeals has violated probably some fairly well understood rules of grammar in their interpretation of the language which is set forth on page 2 of our brief, the new brief, and I think it's important that we examine in some detail, the first sentence says the constitution of the tribe, adopted pursuant to the Act of June 18, 1934, as amended, shall be revoked by the Secretary.

The reference to 1934 is the circumsaances of the memorandum of understanding. Part of that contract was that the tribe would have a constitution, and one was adopted pursuant to that.

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. This is obviously a compound sentence, the subject of which is, the tribe and its members.

However, the court below said, well, the next clause says, all statutes of the United States that

affect Indians because of their status as Indians shall be inapplicable to them, and they said, well, "them" means Indians.

It would seem to us clear that simple grammar would require "them" to refer to the subject matter of the sentence. But even more importantly, if you adopt the language as the respondents argued to the Court, you get a nonsense result, because then if that's to be an independent sentence, it says, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, the Indians.

Obviously, that proves too much. It means all statutes that relate to Indians no longer have any bearing. It cannot mean that. It clearly means that as to this tribe and its members, all the statutes no longer have -- will be applicable.

Then they say, to make it clear that the laws of the several states shall apply to them, again the tribe and its members, in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in the Act shall affect the status of persons as citizens of the United States. If there is any question -- but then an attempt in Congress to use a broad, sweeping legislative act to eliminate any vestige of

trustrelationship or federal responsibility for the Catawbas, it seems to me the adoption in this last sentence would prove the point.

QUESTION: Excuse me, can I interrupt you on your grammatical demonstration. The first time the phrase is used, early on, "The tribe and its members shall not be entitled to any special services from the United States for Indians because of their status as Indians," what do you think the antecedent of the first "their" is?

MR. ST. CLAIR: The members of the tribe...

QUESTION: So, the "their" referred to members of the tribe, why couldn't later "theirs" and "thems" also refer to members of the tribe?

MR. ST. CLAIR: Well, because "Indians" and "tribe" are used interchangeably in legislation such as this, and have been for many years in respect to other statutes. "Indians" and "tribes," we're talking about the same thing.

But, to take the second clause out and say, all Indians no longer have the benefit of federal regulation in substance, as I say, proves far too much.

QUESTION: Well, maybe you're right as a matter of overall -- in comparing it with another statute. It seems to me, if we just look at this

language, it's really ambiguous. You could read to them, either to refer to the members of the tribe board or both the tribe --

MR. ST. CLAIR: Well, all I can say is, even the Non-Intercourse Act uses Indians and tribes as being co-terminous, meaning the same thing. But quite aside from that, the second clause does not -- and the second one is what the Court of Appeals, Fourth Circuit, focused upon, does not do what that Court said it did.

There is no ambiguity that you can resolve in favor of the Indians, and the ambiguity renders it meaningless, and it was so broad, or viewed by Congress as being so broad that they wanted to be sure that citizenship was saved and that's why that last sentence was in there.

I would like to examine this case in the light of Oneida 2, the statute of limitations. It is our view, of course, that the statute at the least referred to state law for resolution of any dispute that might arise.

Lower courts in Non-Intercourse Act cases have said, although this Court has never been asked to rule, that failure on the part of Indians to establish their tribal existence under federal law prevents their satisfying the prerequisites of a prima facie case. If

that were applied by this Court in this case, the case would thus be over. The motion for summary judgment would be reinstated, and judgment for summary judgment would be reinstated.

However, we don't necessarily have to go that far. Under Oneida 2, it was made clear that if the statute of limitations is made applicable it will be applicable in this case. The law apparently, as analyzed in Oneida 2, was to the effect that if there is a federal statute of law that has no statute of limitations, you reference, then, the appropriate state statutes, unless of course federal policy indicates otherwise.

In this case the Termination Act performs as I view it, the function of disclosing or doing away with any federal policy that would stand in the way of referencing the state statute of limitations where the federal statute -- there is no federal statute of limitations.

So that, carrying Oneida 2 to the next step, as I think this case does, produces the opposite result. Congress clearly intended to remove any federal policy as it relates to the Catawbas from any federal significance. Therefore, there is nothing that stands in the way of applying the usual rule to find the state

statute of limitations, not only as a matter of analysis but of course, the Termination Act itself could be so read to reference the state statutes.

Now, under the state statute, it's easy to get lost unless you remember which part you are thinking about. They have a statute of limitations and they have a provision for adverse possession.

A plaintiff, in this case the respondent, has to show possession or record title within ten years of bringing the action, namely, this action.

QUESTION: Did the Court of Appeals pass on this state statute of limitations?

MR. ST. CLAIR: I don't believe they did, to this extent in any event. But if, by definition, this plaintiff who seeks trespass damages cannot establish possession or record title within ten years of commencement of this action, therefore this plaintiff cannot prevail under state law without even approaching the question of adverse possession. It's simply not appropriate or applicable.

The respondents try to mix those two up, and it's really quite simple, and accordingly, then, under the law of South Carolina, this action cannot prevail because it's barred. The statute began to run in 1962 when the Constitution was revoked. It expired in 1972.

This action was brought in 1980.

Finally, then, a few moments with Menominee. Great stress is laid on Menominee by the respondents. We thing Menominee is inappropriate in this case. The specific facts, I think, easily differentiate the two cases.

The Termination Act for the Menominee was in the context of a Public Law 280 issue before the same Congress, and this Court held that Public Law 280 should be read together with the Termination Act under Menominee.

In Menominee there was a treaty with the United States that remained in full force and effect at the time of the Termination Act. Public Law 280 preserved that treaty. Justice Douglas in Menominee said, well, reading those two together the Termination Act should not be construed as terminating the United States treaty for hunting and fishing rights, and furthermore the Termination Act only references statutes.

We have no treaty with the United States in this case. We have no treaty outstanding in full force and effect. We have no Public Law 280 statute to be read in materia with the statute, and I suggest that under these circumstances that the Menominees should be limited as the courts have decided cases arising under

the same circumstances, as being limited to its facts.

The case before this Court now is a clear expression of a Congressional intent in a period of enactment of terminating all vestiges of federal responsibility for and trust relationship between the Catawbas and the United States, and that terminated the rights if the Catawbas had any under the Non-Intercourse Act and even then under the common law, the intent of Congress being clear and the language of the statue being clear.

THE CHIEF JUSTICE: Mr. Miller.

ORAL ARGUMENT OF DON BRANTLEY MILLER, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. MILLER: Mr. Chief Justice, may if please the Court:

This case is before the Court on the defendant's motion for summary judgment which was based solely on the effects of the 1959 Act of Congress, and that motion necessarily assumed that as of 1959 the tribe's 1763 treaty plans were still under the full protection of federal law, and that the tribe's recognized Indian title had never been validly distrubed prior to 1959.

The principal issue decided by the court below, and the main issue to be decided here, is whether

Congress in 1959 intended to abrogate the special federal protections that applied to the tribe's 1763 treaty claim to 140,000 acres of land, in addition to lifting federal restrictions and transferring title to a particular 3,400 acres of land that were actually distributed pursuant to the Termination Act.

The legislative history of the 1959 Act provides a conclusive answer to that question. It shows that Congress did not intend to remove federal protections from the 1763 treaty lands.

What Congress intended to do, the legislative history shows, is enact legislation that was fully consistent with the expressed consent of the Catawba tribe, and tribal consent, the legislative history further shows, was contained in a tribal resolution that expressly conditioned the tribe's agreement upon leaving the status of its 1763 treaty claim unaffected.

At the congressional hearings on the 1959 Act, Congressman Robert W. Hemphill, the bill's sponsor, left absolutely no doubt that his was legislation designed solely to implement the expressed desires of the tribe as set forth in the tribal resolution of January 3rd, 1959, and I quote Congressman Hemphill's testimony before the Interior Committee:

"I refused to introduce a bill until the

Catawba Tribe requested it. On January 3rd, 1959 the Catawba Tribe passed the following resolution, and I ask permission to insert that resolution at this point as a part of the record. As a result of that resolution I asked the Bureau of Indian Affairs to assist me in the preparation of a bill, and I introduced the bill which is before you today."

And, after assuring the Committee that the bill represented, and again I quote, the expressed wishes of a great majority of the Indians, Congressman Hemphill summarized the situation to the Committee, and I quote: "We are frankly faced with this alternative: do what the Indians want or leave the situation in its present status."

Now, the Interior Department spokesman also described these events which led to the introduction of the bill before the House Committee, and he confirmed that the Department had drafted legislation for the Congressman, and I quote his testimony, along the lines that, "we thought the Indians had been discussing."

He also testified that the Interior Department had told the Congressman after drafting the bill, and I quote, that "before we could report favorably on the bill, we thought a specific bill should be presented to the Indians and explained to them in detail so that we

could be sure this was the type of program they wanted."

This was done at the March 28th meeting. Both the House and the Senate Committee reports leave no doubt that Congress intended to enact legislation that was fully consistent with the expressed agreement and consent of the tribe. Both refer specifically to the tribal concurrences given at that January 3rd meeting and the March 28th meeting about which both the Congressman and the Interior Department spokesman testified.

Now, the Congressman's and the Committee's concern for tribal understanding and consent is attributable at least in part to the fact that in 1959 we were approaching the end of the termination era, and a year earlier the old federal termiation policy of coercive termination of Indian tribes had been rejected. Indeed, the last three Acts of Congress, Termination Acts of Congress, provided for explicit tribal agreement and the earlier Termination Acts did not.

Now, the new federal termination policy held that no tribe would be terminated, in the words of Secretary of the Interior Seaton, and I quote, "unless such tribe or group has clearly demonstrated first that it understands the plan under which such a program would

go forward, and second, that the tribe or group affected concurs in and supports the plan proposed.

So, the tribe's understanding and the conditions upon which their consent was given are of extreme importance here. Now, what were the specific assurances and conditions upon which the Catawba tribal consent was based?

Well, in 1958, Interior Department officials had suggested to the Catawba tribe that federal restrictions be removed from their 3,400 acres of trust land that had been acquired only 16 years earlier, in 1943. And the reason for this was that the tribe had complained that a joint Department of the Interior and South Carolina Relief program which was carried out pursuant to this '43 memorandum of understanding wasn't working for the tribe.

The tribe was receiving minimal federal services, it couldn't productively use its land, and the BIA came down to tribal meetings and explained to the Catawba Indians that the services that it could provide were limited by the memorandum of understanding and that it didn't have any more money, it couldn't provide any more services to help them more productively use their land, and so it told the tribe that the only answer to their problem was to divide these tribal assets, remove

federal restrictions from them, and divide them among the members, but the Catawba tribal officials told the Bureau of Indian Affairs that they would not agree to such a division of the federal lands without their 1763 treaty claim being resolved first.

QUESTION: Where does that appear in the record, the 1763 claim being discussed at that time?

MR. MILLER: They did not --

QUESTION: They didn't identify it?

MR. MILLER: No, Your Honor. They identified it as the claim against the state.

QUESTION: Is there anything in those contemporaneous papers that indicates that what they were referring to was the 17683 claim?

MR. MILLER: There is nothing in the 1959 Act legislative history.

QUESTION: Or the minutes of the meeting of the tribe in March of '58?

MR. MILLER: No, Your Honor, but the record in this case does reveal quite clearly, we believe, that that was as Mr. St. Clair referred, the tribe's shorthand method of referring to its treaty claim, the word "claim" against the state.

In 1904 and 1909 the tribe had petitioned the Interior Department to get its land back, or assistance

in getting its land back, and it had based its claim on the Non-Intercourse Act, claimed that the 1840 treaty was void. Sandwiched in between those requests to Interior was 1907 request to the state to settle this claim, and in 1908 the State's Attorney General issued an opinion that was written in response to a tribal claim that the 1840 treaty was void.

These are found in the record in Volume 6, Federal Request of Exhibits 18 and 20 and the State's Attorney General's opinion at Exhibit 10. Now, more recent --

QUESTION: Any tribal claim against the state that might have arisen between 1909 and 1959?

MR. MILLER: There is none.

QUESTION: Nothing -- how about the 1943 transaction?

MR. MILLER: No, Your Honor, and in more recent times we know that the tribe was still talking about its 144,000 acre claim because in 1937, at the beginning of the events which led up to this memorandum of understanding, the state was seeking a final settlement of a claim against the State of South Carolina for $250,000, and the tribe felt pressured and they asked for assistance from a University of Pennsylania professor who wrote the Commissioner of

Indian Affairs on their behalf and characterized the State's proposed payment to the tribe as, and I quote, "a pittance for 144,000 acres."

So, clearly in 1937 the state was attempting to buy this 144,000 acre claim for the payment of money, and the state continued these efforts into the 1940's, into the negotiations that led up to the memorandum of understanding, and they were insisting in the early '40s that in return for their participation in this relief project that they would -- that this tribe would have to execute a release and quit claim against all claims against the State of South Carolina.

But again, the Interior Department and the tribe refused to agree to such an agreement, an extinguishment, as they had done in 1937. The state relented and that three-party agreement was signed by the parties in 1943 without the extinguishment of the claims provision that had been in earlier drafts of the agreement.

So, in 1959 when the tribe sought to insure that its claim would not be -- or its claim against the state would not be jeopardized and would remain unaffected, there was no mystery about what they were talking about.

All the parties knew, the federal government,

the Department of -- the State of South Carolina and the tribe had all dealt with this claim in a very serious fashion.

QUESTION: None of the contemporaneous documents specifically identify it?

MR. MILLER: They do not. It's instructive to examine exactly what the Bureau of Indian Affairs did assure the tribe in terms of arriving at their understanding, and when the tribe had said that they wouldn't agree to a division of assets without their claim against the state being resolved first, the BIA official assured them, and I quote his report, "that any claim the Catawbas had against the State of South Carolina would not be jeopardized by carrying out a program with the federal government," close quote.

QUESTION: What was the context of that assurance? Was it simply a BIA representative talking to the chief privately?

MR. MILLER: This was a member of the Council.

QUESTION: A member of the Council.

MR. MILLER: Yes. After the tribe had complained that the federal relief program wasn't working, the federal state relief program in the memorandum of understanding, the Interior Department proposed to them that, we'll remove federal

restrictions, and they sent a program officer to the reservation who visited the homes of the individual Indians and wrote a report about what each of those Indians had said and about what their feelings were about this program to divide the federal assets, and he filed that report. It's in the record of this case at Exhibit 53.

And, this tribal official who was assured that any claim wouldn't be jeopardized was not the only tribal official to raise the issue of the claim against the state to this BIA official.

QUESTION: But these were a series of individual conversations that the BIA official had with the various tribal members?

MR. MILLER: That's correct, but that carried over into the tribal resolution and the tribe's official action. Relying on these assurances that have been given at the individual meetings, the tribe endorsed the government's proposal for a division of the 3,400 acres in an official tribal meeting on January 3rd, 1959, and they enacted a resolution at that meeting which was drafted for the tribe by the BIA.

And the tribe -- and it's important to understand that they were not represented by counsel at any time during this legislative process, they expressly

conditioned their consent to the division of assets in their resolution in the following words. This is found in our brief at page 12 and 13, and the words of the tribe's resolution are, and I quote:

"That nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba tribe. Now, the tribe was later asked to approve a specific bill at the March 28th meeting that we have referred to, and both the BIA minutes and the tribal minutes of that March 28th meeting are especially revealing as to what the tribe was told and what its understanding was.

Congressman -- and I quote from the BIA minutes of that meeting with the tribe -- Congressman Hemphill advised the group that the proposed bill had not been introduced in the House and that he would not introduce the bill without the approval of the people. He then read the resolution passed in council on January 3rd, 1959, and continuing from the BIA minutes:

"Congressman Hemphill advised the group that on the date after receiving a copy of council resolution passed January 3rd, 1959, he proceeded in having legislation drawn up to carry out the intent of the resolution."

Based upon the Congressman's assurance the

tribe approved the introduction of this bill which contained the section at issue here, Section 5, as enacted, and significantly the tribal minutes of that March 28th, 1959 meeting refer to the bill not as a bill but as, and I quote, "the contract drawn up by the Bureau of Indian Affairs."

Your Honors, this legislative history leaves no doubt that the 1959 Act was enacted to carry out an understanding with the Catawba tribe. The tribe would agree to a division of the federally held lands and the cessation of minimum federal services on the condition that the Act would not affect the status of its 1763 treaty claim.

If Congress had intended to nullify the express condition upon which tribal consent had been based, why did it not notify the tribe? If Congress had intended to begin the running of a state statute of limitations, where was the notice that unless the tribe filed its claim within a period of years, its claim would be extinguished forever?

QUESTION: Well, the argument is that the notice is on the face of the statute itself.

MR. MILLER: I understand that, Justice O'Connor, and it's simply our position that that's not a very strong arument because the face of the statute

itself, the Act as it was enacted, is the act that was read to the Indians and assured by the Congressman and by the BIA that it did not -- that it carried out the intent of their resolution.

QUESTION: Well, even reading it in the way that South Carolina would read it, it didn't cut off the claim. It simply triggered the beginning of a period of sttute of limitations.

MR. MILLER: I understand that that's the way South Carolina would read it. But the notion that a statute of limitations could be applied to a claim of Indian title and merely affect the remedy of the tribe and not affect the status of the title itself is, we think, not supportable at all, particularly in light of Oneida 2.

A statute of limitations -- excuse me, the freedom from state statutes of limitations and time related defenses is a fundamental incident of Indian title. It's the very heart of the federal protective scheme for the protection of Indian land. And to lift that incident of title from a claim to Indian title would completely alter the status of the claim. It would change the very fundamental nature of the title itself.

We must remember that the 1959 Act --

QUESTION: I'm not sure I understand what you're saying. How does it change the nature of the claim?

MR. MILLER: Well, what I'm saying is that there are incidents of Indian title, one of which is the freedom from the operation of state law defenses basd upon the passage of time.

Another incident of Indian title would be --

QUESTION: Unless Congress had provided otherwise, which on occasion it has?

MR. MILLER: That's correct.

QUESTION: So the question is whether Congress provided otherwise here..

MR. MILLER: That's correct.

QUESTION: The language is rather clear. It isn't quite as easy as I think you're making it out to be.

MR. MILLER: Your Honor, when Congress has intended to apply a statute of limitations alone, it has expressly said so, as it did in 29 U.S.C. Section 2415.

QUESTION: But the purpose of Congress applying the statute of limitations -- it's a question of Congress withdrawing a status which prevented the state statute from running.

MR. MILLER: Well, I understand that that's

the issue, Your Honor, but the question is, from what lands was that status removed? Was it removed from 144,000 acres of treaty lands or was it removed only from that 3,400 acres that was actually distributed?

QUESTION: Well, I thought you were just making the argument that when Congress goes about applying a statute of limitations and -- it spells it out very specifically, but that's when the statute of limitations is imposed by Congress.

Here, all Congress is saying, if your opponents are correct, is that this status, particular status is withdrawn and one of the consequences of the withdrawal of that status is that the state statute now begins to run.

MR. MILLER: Well, taking that for a moment, then, the 1959 Act states that -- does not say, state statutes of limitation will apply. What it does talk about is the application of general state law, in Section 5, and if we apply the general state law here what we apply is a separate series of state statutes wholly apart from state statutes of limitations.

QUESTION: Are you suggesting that state statutes of limitations are not general state law?

MR. MILLER: Oh, no, Your Honor. The general application of state law would include the statute of

limitations, but it would also include the application of a separate series of state statutes which we lodged with the Court on December 10th, statutes which remain in full force today, which establish a state law scheme that expressly defeases the Catawbas of their title to the land, and grants fee simple title to the lessees who occupied the land back in the early 1800's.

So, these statutes, state statutes, wholly apart from the operation of state statutes of limitations, would mean that as a matter of state law the Catawbas had been defeased of their title since 1840 when the statute was enacted.

So, if we read Section 5 to apply to not only to the 3,400 acres --

QUESTION: Did the Fourth Circuit deal with the South Carolina statutes that were supplied to us recently?

MR. MILLER: It did not, Your Honor.

QUESTION: I don't recall that it did.

MR. MILLER: It did not, Your Honor.

QUESTION: And did you raise that in the Fourth Circuit? Was that argued there?

MR. MILLER: We did not argue this --

QUESTION: On behalf of the tribe?

MR. MILLER: We did not argue this point

specifically, that it would result in an immediate extinguishment. We did cite to this series of state statutes, primarily as historical background and the manner in which the tribe had lost possession of their reservation.

QUESTION: While you are interrupted, for just a second --

MR. MILLER: Yes, Your Honor.

QUESTION: The record has the list of the 61 people, members of the tribe who voted, I guess it was 47 to 17 in favor of this transaction, and you indicated that they were conscious of the 1763 treaty claim and expressly intended to preserve that at that time. Why do you suppose nobody asserted the claim any time, shortly after the transaction took place, if they were aware of it at the time?

MR. MILLER: Well, I can only surmise, Your Honor, these were unlettered people --

QUESTION: Each of them was entitled to about 2,000 acres of pretty valuable land.

MR. MILLER: They had been assured, Your Honor, that nothing in this statute would affect the status.

QUESTION: I understand, but even granting all that, assuming that to be true, it's still a little

difficult to understand why such a valuable claim which had a sort of dormant status would not have been discussed with somebody, to say, well, how about 2,000 acres.

MR. MILLER: Well, that's a claim to tribal title, Your Honor. The only lands that were distributed were the 3,400 acres.

QUESTION: I understand that, but I'm just puzzled, I mean, the human dimension of the case, why would these people who were intelligent enough to manage their own affairs be totally silent on taking some affirmative action to assert the claim at that time, when it was a matter of discussion as I understand your theory.

MR. MILLER: It was a matter of discussion, and they were assured that this wouldn't have a thing to do. Surely, their understanding must have been, Your Honor, that this Act of Congress, if we distributethis 3,400 acres and go along with the federal government, it isn't going to have any effect upon our ability to pursue this claim at some time in the future.

QUESTION: Why would they wait so long to pursue it? That's what I'm trying to --

MR. MILLER: From 1959 to now?

QUESTION: Yes. If it was then a matter of

tribal discussion and a critical part of their negotiations, it just puzzles me that they would say, well, okay, we've got this claim. Let's put it back on the back burner and let it sit, at that time. It's such a terribly valuable claim.

QUESTION: Could it be they didn't have legal advice?

MR. MILLER: They didn't have legal advice until 1975, Your Honor.

QUESTION: I understand that.

MR. MILLER: Their claim had survived. They had continued to talk about it for generations and generations, and in their view -- and it had been treated as a viable claim by the Department of the Interior, the Senate Committee had heard testimony about the claim in the 1930's, the state was trying to settle the claim with them back in the early 1900's, and was still trying to settle the claim in 1943.

It had been -- they thought it would survive, and it had been treated as viable by -- off and on by the Interior Department and the state for many years.

QUESTION: It just seems puzzling to me that when a Congressman is dealing with them about a statute they wouldn't say, by the way, we would like this 144,000 acre transaction cleaned up at the same time.

That's what puzzles me. Even they don't have a lawyer, they're talking to people who are interested in their affairs and I just find it hard to understand.

MR. MILLER: Well, the focus of that 1959 act was very narrow. It was intended to relieve the federal government and it was proposed by the federal government to relieve them of the obligations that they had undertaken in 1943. And that was the sole purpose, was to divide that 3,400 acres and return the state and the tribe to its pre-1943 status, and part of that status was that this claim was unresolved and nobody had intended to resolve it when they entered into the '43 agreement and they expressly left it outside of the scope of matters in 1959.

QUESTION: We'll resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock noon, the case in the above entitled matter was recessed, to reconvene at 1:00 o'clock p.m. this same day.)

AFTERNOON SESSION

(12:59 p.m.)

THE CHIEF JUSTICE: You may resume, Mr. Miller/

MR. MILLER: Thank you, Your Honor.

Finally, even if we assume the correctness of Petitioner's argument that Section 935 applies state law to all federal statutory claims of the tribe, the Catawbas still have a live federal common law cause of action, as construed by the Petitioner, Section 935 does no more than apply state law to all federal statutory claims.

As this Court held in Oneida 2, tribes have a complete cause of action under the federal common law.

QUESTION: Did the complaint base a cause of action on the common law?

MR. MILLER: Yes, Your Honor, yes. And Oneida 2 also held that the common law right of action, as a general proposition, is free from state law defenses based upon the passage of time. Since Section 935 does not alter that general rule respecting the Catawbas, the federal common law right of action survives the 1959 Act, free of state statutes of limitations.

In short, the Catawbas' federal common law right of action is indistinguishable from that affirmed in Oneida 2.

In conclusion, the State would have this Court finally resolve this long-standing dispute between the State and the tribe, entirely in the State's favor on the strength of the statute that does not even mention this claim and without a court of law ever having had an opporunity to consider the merits of the tribe's claim.

What the Catawba tribe bargained for and received in 1959 in exchange for its consent for the division of the federal assets were assurances that te 1959 Act would not affect the tribe's opportunity to have its day in court. If Congress had intended to revoke the specific assurances upon which tribal consent had been obtained, itmost surely would have said so.

Thank you.

THE CHIEF JUSTICE: Mr. St. Clair, do you have anything further?

MR. ST. CLAIR: Very briefly. I think I have something.

ORAL ARGUMENT OF JAMES D. ST. CLAIR, ESQ.

ON BEHALF OF THE PETITIONER

THE CHIEF JUSTICE: You have two minutes remaining.

MR. ST. CLAIR: I would only state, if Your Honors please, that lest there be any doubt about what the Indians were told, there is a plebiscite that was held after written notice to each of the members of the

tribe, which notice made it very clear that all of their rights under federal law were extinguished, and thereafter they could organize under state law if they desired, for non-governmental purposes.

That's set forth at 137, appendix. In any event, whatever action they had as a result of this Act of Congress, it was then to be dealt with under state law and Justice Stevens, if I may, your concern about what happened and why the delay, at this time before 1975 state Indian tribes were not thought to have any rights under the Non-Intercourse Act or under federal law.

It was only after Passamaquoddy in 1975, when my brother was engaged to represent these people, did it then appear that perhaps non-recognized tribes would have some rights under the Non-Initercourse Act.

Thank you very much.

THE CHIEF JUSTICE: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:02 o'clock p.m., the case in the above entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-782 - SOUTH CAROLINA, ET AL., Petitioners V.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)