Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Stephen Neuwirth to Jack Quinn; re: Seminole Tribe Ruling (1 page)	ca., April 1996	P5 6195 Dup.
002. memo	Jack Quinn to POTUS; re: Supreme Court Ruling on State Sovereign Immunity (2 pages)	05/1996	P5
003. memo	Jack Quinn to POTUS; re: Supreme Court Ruling on State Sovereign Immunity (2 pages)	05/1996	P5
004. memo	Jack Quinn to POTUS; re: Supreme Court Ruling on State Sovereign Immunity (2 pages)	04/15/1996	P5
005. memo	Jack Quinn to POTUS; re: Supreme Court Ruling on State Sovereign Immunity (1 page)	04/1996	P5
006. note	Stephen Neuwirth to Jack Quinn; re: Seminole Tribe Ruling (1 page)	ca., April 1996	P5 6195
007. memo	Jack Quinn to POTUS; re: Supreme Court Ruling on State Sovereign Immunity (2 pages)	04/1996	P5
008. memo	Jack Quinn to POTUS; re: Supreme Court Ruling on State Sovereign Immunity (2 pages)	04/1996	P5

COLLECTION:
Clinton Presidential Records
Counsel's Office
Stephen R. Neuwirth (Subject File)
OA/Box Number: 378

FOLDER TITLE:
Seminole Tribe [1]

Jimmie Purvis
2006-0197-F
jp199

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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Jack:

I have received your comments about the Seminole Tribe memo, and I understand from Kathy Wallman that you are still concerned about the relationship between (1) state vs. state official and (2) monetary damages vs. declaratory or injunctive relief. Your comments also ask why the issue of monetary relief is relevant, since the Seminoles' claim was "to enforce the Indian Gaming Regulatory Act."

As you may recall from the first draft of the memo I sent you, the Court did more than rule that Congress does not have authority under the Indian Commerce Clause to create a private right of action to enforce the Indian Gaming Regulatory Act. The Court also expressly overruled an earlier decision which had held that the Commerce Clause authorized Congress to create a private right of action against states for monetary damages under CERCLA. This was not dicta. The Court said overruling the earlier case was necessary to its decision here.

Thus, the Court made clear that, in the context of statutes passed under the Commerce Clause (such as many environmental statutes), states have sovereign immunity from private suits for any type of relief -- monetary, declaratory or injunctive.

At the same time, the Court also made clear that Congress does have power under the Commerce Clause to authorize certain suits against state officials. The Court has held in the past that, in the context of Commerce Clause legislation, private parties may sue state officials for declaratory or injunctive relief to enforce a federal statute. Such declaratory or injunctive relief can include a prospective requirement that a state expend funds. But the law is also quite clear that a private party may not sue state officials to obtain payment of *past* damages.

What does this mean for environmental litigation? I have been advised by DOJ that the majority of private suits to cause state enforcement of federal environmental statutes are suits against state officials for declaratory or injunctive relief. Nothing in Seminole Tribe appears to restrict such suits. However, certain statutes, such as CERCLA, do contemplate private claims directly against states for past monetary damages -- such as clean-up contributions that a state failed to make. Seminole Tribe may effectively preclude such private claims for monetary damages, because current law suggests that a state official cannot be sued to obtain payment of damages by the state. DOJ is currently analyzing how significant an impact this restriction is likely to have on private enforcement of federal environmental statutes.

I hope that this clarifies these issues. If this explanation seems helpful, I will prepare a new draft of the memo that incorporates this approach, as well as the other comments you gave me.

Steve

cc: Kathy Wallman

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Marcia Hale & Emily Bromberg to Leon Panetta et al; re: Indian Gaming National Governors' Association (1 page) released on 2/4/10, NLMS 2008-122	12/04/1996	P5
002. memo	Bruce Babbitt to Leon Panetta; re: Response to Seminole Tribe of Florida v. Florida (3 pages) released 2/4/10, NLMS 2008-122 on	04/08/1996	P5
003. note	Stephen R. Neuwirth to Jack Quinn; re: Seminole Tribe Ruling (1 page)	circa., April 1996	P5 6195 Dup
004. memo	Jack Quinn to POTUS; re: Supreme Court Ruling on State Sovereign Immunity (2 pages)	04/1996	P5
005. memo	Jack Quinn to POTUS; re: Supreme Court Ruling on State Sovereign Immunity (1 page)	04/1996	P5
006. memo	Elena Kagan to Harold Ickes; re: Seminole Tribe v. Florida (3 pages)	03/31/1996	P5 6196

COLLECTION:
Clinton Presidential Records
Counsel's office
Kathy Wallman (Subject File)
OA/Box Number: 849

FOLDER TITLE:
Indian Gaming

Jimmie Purvis
2006-0197-F
jp202

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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Freedom of Information Act - [5 U.S.C. 552(b)]

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File: Indian gaming

6110

THE WHITE HOUSE

WASHINGTON

March 31, 1996

MEMORANDUM FOR HAROLD ICKES

FROM: ELENA KAGAN EK

CC: JACK QUINN, KATHY WALLMAN

SUBJECT: SEMINOLE TRIBE V. FLORIDA

Kathy Wallman asked me to give you a brief summary and analysis of the recent Supreme Court decision in Seminole Tribe v. Florida. In that case, the Court invalidated, as an incursion on state sovereignty, a provision of the Indian Gaming Regulatory Act (IGRA) permitting tribes to sue States in federal court for failing to negotiate in good faith toward the formation of gaming compacts. The practical significance of the decision for Indian gaming is very uncertain. Also uncertain is the effect of the decision on other kinds of enforcement actions brought against the States.

Background and holding

IGRA provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. The Act imposes on the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty.

In accordance with the Act, the Seminole Tribe sued the State of Florida for refusing to engage in good-faith negotiations over a gaming compact. The State argued that the suit violated its Eleventh Amendment right to sovereign immunity from suit in federal court.

The Court accepted the State's argument, reversing a recent decision to hold that neither the Commerce Clause nor the Indian Commerce Clause grants Congress the authority to abrogate the sovereign immunity of the States. Thus, Congress cannot subject a State to private suit in federal court for violating a statute (like IGRA) enacted pursuant to the Commerce Clause or Indian Commerce Clause.

Implications for Indian Gaming

As a preliminary matter, it should be noted that Seminole Tribe has no effect at all on already existing gaming compacts. Nor does it prevent willing States from entering into compacts in the future. The decision makes a difference only when a State and tribe have reached impasse regarding a compact.

It is unclear, however, exactly what difference the decision makes. One possibility is that the tribe now has no recourse at all when a State refuses to negotiate in good faith; on this understanding, the State's obligation to engage in good-faith negotiations, which is at the very heart of IGRA, becomes wholly unenforceable. A second, very different possibility is that the tribe now has the ability to go straight to the Secretary of the Interior for a remedy; with the federal courts out of the picture, the Secretary himself determines whether a State has acted in bad faith and, if so, what remedy (up to and including the imposition of compact terms) is appropriate. Doubtless there are other possibilities in between these two.

The Department of Interior is currently considering what view to adopt on this issue. Interior believes that in the next few months, several tribes will allege bad faith on the part of States and petition the Secretary for relief. Interior intends to present an options paper to the White House this week on what to do in such cases: whether to set up a remedial mechanism within the Department to handles allegations of this kind, and, if so, how that mechanism would operate.

Broader Implications

The Court's holding potentially affects any private suit brought against a State in federal court that alleges a violation of a statute enacted under Congress's Commerce Clause power. For example, the decision may bar an individual from suing a State in federal court for violating environmental laws, antitrust laws, or copyright and patent laws. Some of these laws will remain enforceable by individuals in state court, subject to whatever sovereign immunity defenses the state court chooses to recognize. But some of these laws give exclusive jurisdiction to the federal courts, so that no alternative forum is available.

In many cases, however, there will be ways around the Court's ruling. First, Congress can condition the receipt of federal monies on a State's submission to suit in federal court. At least arguably, some current statutes authorizing citizen suits do so through exactly this mechanism; private suits brought in federal court under these statutes thus could go forward. Second, an individual usually can bring suit for injunctive relief against officials acting on the State's behalf, even if not against the State itself. The Court ruled that this option was not available in Seminole because by prescribing a detailed remedial scheme in IGRA, Congress implicitly had disallowed suits against state officials. But when a law does not create such a detailed remedial scheme -- and certainly when a law explicitly authorizes suits against state officials -- such suits provide a way to escape the Court's new understanding of the Eleventh Amendment.

Moreover, the Court's holding does not apply at all to actions against a State alleging a violation of the Fourteenth

Amendment or civil rights statutes enacted to enforce it. The Court reasoned that the Fourteenth Amendment, in any cases in which it applied, effectively overrode the Eleventh Amendment.

The Court's decision nonetheless has broad significance. The decision will doubtless stand in the way of at least some citizen suits brought to enforce federal law (as it barred the Seminoles' own lawsuit). And the decision, especially when viewed together with the holding last year that Congress lacked authority to prohibit guns near schools, indicates a serious effort by a bare majority of the Court to reorient the balance of power between the federal government and the States. It is highly unlikely that this case will be the last one to pursue that states'-rights agenda.

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001a. fax cover sheet	Michael Schattman to Lynn Cutler; re: Legal Opinion (1 page)	06/24/1999	P5	6197
001b. memo	Michael Schattman Richard Hayes; re: HUBZone Eligibility - Concerns Owned by Native American Indian Tribes or Community Development Corporations [2 pages missing] (14 pages)	06/04/1999	P5	6198 Dup

COLLECTION:
Clinton Presidential Records
Intergovernmental Affairs
Lynn Cutler (Subject File)
OA/Box Number: 17083

FOLDER TITLE:
5/12/99 Meeting w/POTUS and Tribal Leaders [2]

Jimmie Purvis
2006-0197-F
jp616

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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Fax Transmission Cover Sheet

6197

U.S. Small Business Administration

To: Lynn Cutler

Organization: The White House

Telephone: 456-5019 Fax: 456-2889

Date: 24 June 99 Time: 12:35 pm

Number of Pages (including this page): - 17 -

From: Mike Schattman

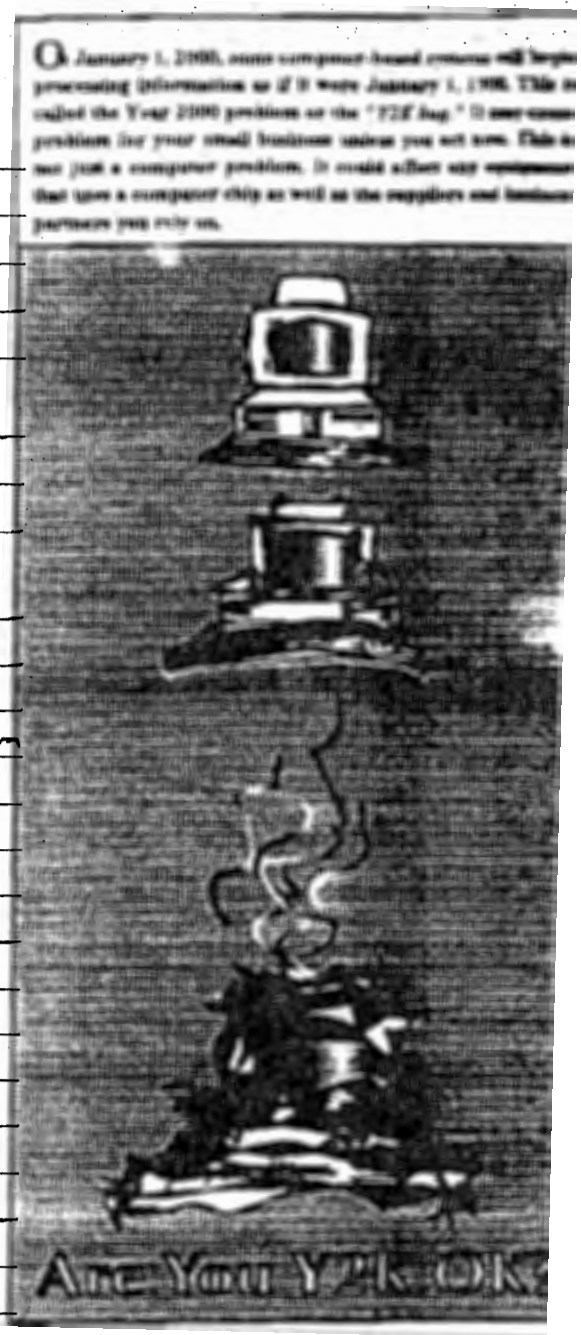
Office: Genl C. - SBA

Telephone: 205-6634 Fax: 205-6096

Message: The internal vetting of this opinion is completed at SBA.

The program office should now be accepting HUBZone applications from tribes for processing. Although promised, no legislation has been introduced to date by any member. We believe that SBA's legislative package (which includes corrective legislation) will be out this week. I think that a legislative fix is still needed just to protect us in the event of litigation. Nevertheless, we should be able to use this opinion to give you some progress to point at in the coming months.

Please call if you have any question.



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001. memo	Michael Schattman to Richard Hayes; re: HUBZone Eligibility - Concerns Owned by Native American Indian Tribes or Community Development Corporations (16 pages)	06/04/1999	P5 6198
002a. fax cover sheet	Mike Schattman to Lynn Cutler; re: Legal Opinion from SBA (1 page)	06/24/1999	P5 6197 Dup
002b. memo	Michael Schattman to Richard Hayes; re: HUBZone Eligibility - Concerns Owned by Native American Indian Tribes or Community Development Corporations (16 pages)	06/04/1999	P5 6198 Dup

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Mary Smith (Subject File)
OA/Box Number: 16170

FOLDER TITLE:
Native American Demonstration Projects [4]

Jimmie Purvis
2006-0197-F
jp661

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

6198

OFFICE OF GENERAL COUNSEL

MEMORANDUM

DATE: June 4, 1999

TO: Richard L. Hayes
Associate Deputy Administrator for
Government Contracting and Minority Enterprise Development

FROM: Michael D. Schattman
General Counsel

RE: HUBZone Eligibility: Concerns Owned by Native American Indian Tribes or Community Development Corporations.

Your staff has requested our views on whether business concerns owned or controlled by a Community Development Corporation ("CDC") or a Native American Indian Tribe ("Tribe") can qualify as HUBZone small business concerns under the HUBZone Act of 1997 ("HUBZone Act" or "Act"), Pub. L. No. 105-135, § 601 et seq. (codified at 15 U.S.C. § 657a). We conclude that a small business concern owned or controlled by a CDC is not an eligible HUBZone small business concern. We conclude, however, that a small business concern owned or controlled by a Tribe is an eligible HUBZone small business concern.

In addition, we have considered the provisions for Alaskan Native Corporations ("ANCs") in our regulations to ensure appropriate treatment, since confusion exists as to why ANC-owned small business concerns are eligible under our regulations. We conclude that our existing regulations for ANCs are legally correct.

The reasoning for our conclusions is set forth below.

A. Are Small Business Concerns Owned or Controlled by CDCs Eligible for the HUBZone Program?

The HUBZone Act was enacted to provide "Federal contracting assistance to qualified HUBZone small business concerns," inter alia. 15 U.S.C. § 657a(a). A HUBZone small business concern is one *"that is owned and controlled by 1 or more persons, each of whom is a United States citizen"* Id. § 632(p)(3) (emphasis added).

The HUBZone Act does not define the term "person." Section 1 of Title 1, entitled "Rules of Construction," does define the term "person." That section states that when "determining the

meaning of any Act of Congress, unless the context indicates otherwise," the word person "includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. A CDC is a corporation. Thus, for federal statutory purposes, including the HUBZone Act, a CDC is a "person."

According to the HUBZone Act, however, each "person" that "owns and controls" a HUBZone concern must *also* be a "United States citizen." 15 U.S.C. § 632(p)(3). The HUBZone Act does not define the term "United States citizen." There is nothing in 1 U.S.C. § 1 defining either the term "citizen" or "United States citizen." Therefore, it is unclear from the text whether a corporation such as a CDC can be deemed a U.S. citizen for purposes of the HUBZone Act. To help determine whether a statutory term has a particular meaning, we attempt to discern congressional intent from the legislative history of the statute. 2A Sutherland Statutory Construction § 47.27 (5th ed. 1992).

According to Sutherland, supra, both the committee report and conference report represent the most persuasive indicia of congressional intent in enacting a statute. Id. §§ 48.06, 48.08. Unfortunately, there is nothing in either report addressing this issue. In fact, the legislative history is sparse with respect to the meaning of the term U.S. citizen as applicable to the HUBZone Act. There are, however, a few statements made during introductory remarks by Senator Christopher S. Bond (R-MO), the HUBZone Act's sponsor. Courts generally give consideration to statements made by a bill's sponsor, but do so cautiously. Id. § 48.15. With these premises in mind, we review the statements made by Senator Bond about the HUBZone Act.

Senator Bond introduced the HUBZone Act of 1997 as Senate Bill 208 ("S. 208"). S. 208, 105th Cong., 1st Sess. (1997). The bill, as introduced and enacted, required that a HUBZone small business concern be owned and controlled by persons, each of whom is a U.S. citizen. In one instance, during Senator Bond's introductory remarks on this bill, he spoke about two companies called e.villages and Edgewood Technology Services, Inc. ("ETS"). Senator Bond described ETS as his prototype HUBZone small business. 143 Cong. Rec. S730 (daily ed. Jan. 28, 1997). To learn more about the Senator's HUBZone prototype, we now turn to the history of S. 1574, which was the precursor bill to S. 208.[1]

On March 21, 1996, the U.S. Senate Committee on Small Business held hearings on S. 1574. Senator Bond presided over the hearings. Employees of ETS testified at that hearing. All of ETS's employees were residents of the Northwest Washington, D.C. community where the business was located. The Senator stated at the hearing that:

> [o]ur goal here on this Committee is to make sure companies like ETS have the incentives to locate in HUBZones and to hire local residents in order to become eligible for Government contract set-asides. With this approach, I think our

[1] S. 1574 was never enacted into law. However, like S. 208 that eventually was enacted, S. 1574 required that a HUBZone small business concern be owned and controlled by one or more persons, each of whom is a U.S. citizen. S. 1574, 104th Cong., 2nd Sess. (1996).

Nation can receive a direct value added from these small businesses in return for receiving valuable government contract preferences.

S. 1574, The HUBZone Act of 1996, Revitalizing Inner Cities and Rural America: Hearing on S. 1574 Before the Committee on Small Business U.S. Senate, 104th Cong., 2nd Sess. 3 (March 21, 1996).

The co-founder of a company called e.villages also testified at that hearing. e.villages owned and controlled, in part, ETS. Id. e.villages was a commercial, for-profit, data servicing company formed by Adelson Entertainment and the Hamilton Securities Group. e.villages brought computer-based learning, job training, and entrepreneurship opportunities to poor communities. Id. . e.villages had established a pilot training center and data management enterprise at Edgewood Terrace, an assisted multi-family housing complex in Washington, D.C. Several graduates of the training program were hired by e.villages to start the new enterprise, ETS. ETS employees were eligible to earn equity in e.villages's Employee Stock Ownership Plan. In addition, it appears that ETS employees also owned part of ETS. Id. at 16. Thus, Senator Bond's HUBZone prototype was a company owned and controlled in part by another company, and two other companies owned the parent company. The HUBZone prototype was not 100% owned and controlled by U.S. citizens, if that term includes only individuals.

In addition to Senator Bond's comments, we have discovered only one more piece of relevant legislative history concerning this specific issue. It is from a committee hearing on S. 208 (the bill that was enacted into law), at which Senator John Kerry (D-MA) posed certain questions to the SBA Administrator. We review this legislative history with the understanding that courts are often hesitant to rely on statements made by committee members or other persons at the committee's hearings. Sutherland Statutory Construction § 48.10. In fact, "[g]enerally statements made by others at the committee hearings concerning the nature and effect of a bill are not accorded any weight." Id.

Notwithstanding the above, we note that at the hearing Senator Kerry asked the Administrator how many CDCs were located in HUBZones. The SBA Administrator submitted written responses to the Senator, after the committee hearing. These responses were printed in the committee report. The Administrator had responded that the majority of the then current CDCs were located in HUBZones. The HUBZone Act of 1997: Hearing on S. 208 Before the Committee on Small Business U.S. Senate, 105th Cong., 1st Sess. 93 (February 27, 1997) ("Hearing on S. 208").

None of this scant legislative history is clear or persuasive as to whether corporations such as CDCs were intended by Congress to be deemed U.S. citizens for purposes of the HUBZone Act. One could speculate that the legislative history, sparse as it is, evidences an intention to include corporate-owned small businesses within the ambit of the HUBZone Act. The same legislative history, however, could be interpreted in other ways. ETS very well may have been labeled a HUBZone prototype by Senator Bond only because it was a small business located in a disadvantaged neighborhood, and hired only employees from that neighborhood, with no consideration given to its ownership technicalities The little testimony on CDCs is also of no help. It is not clear that either Senator Kerry or the Administrator believed that small businesses

owned by CDCs could be qualified HUBZone small business concerns. Rather, the testimony concerning CDCs located in HUBZones is merely evidence that certain disadvantaged areas may receive aid from both CDCs and HUBZone small business concerns. Finally, none of the legislative history directly addresses the issue of whether artificial entities are to be deemed U.S. citizens under the HUBZone Act, and none of it comes from a committee or conference report, a source representing the most persuasive indicia of congressional intent. See Sutherland Statutory Construction §§ 48.06, 48.08.

In sum, the legislative history is ambiguous, inconclusive and calls for speculation. When Congress provides little material with which to determine the proper legislative history, speculation is improper. See id. § 48.02; see also Western Air Lines, Inc. v. Bd. of Equalization of South Dakota, 480 U.S. 123 (1987). Because the legislative history here does not aid in deciding whether to define a CDC a U.S. citizen under the HUBZone Act, we must look to other sources for guidance.

The first additional source we considered is the Fourteenth Amendment of the U.S. Constitution. The Fourteenth Amendment uses the term "citizens of the United States." It states, in part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

When interpreting this clause, the U.S. Supreme Court has held that "citizens of the United States" must be natural and not artificial persons. See Hague v. Comm. for Indus. Org., 307 U.S. 496, 514 (1939); see also Hamilton v. Lokuta, 803 F. Supp. 82, 86 (E. D. Mich. 1992). Furthermore, the Supreme Court has held that corporations are not citizens of the United States under the Fourteenth Amendment. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656 (1981). A CDC, therefore, would not be considered a U.S. citizen under the Fourteenth Amendment. See id.

Several Federal statutes also use the term "citizen of the United States." The Indian Depredation Act (26 Stat. at L. 851, chap. 538) also included the term, but did not define it. The issue of whether a corporation is a "citizen of the United States" for purposes of that statute was addressed in United States v. Northwestern Express, Stage & Transportation Co., 164 U.S. 686 (1897). In that case, a corporation incorporated under the laws of Minnesota sued the Sioux Nation. The corporation alleged that the Sioux tribal members took or destroyed the corporation's four horses and the horses' harnesses. The trial court ruled in favor of the corporation and awarded it $750. The court had decided that the corporation was a U.S. citizen for purposes of that statute because it was incorporated by a state of the Union.

On appeal, the Supreme Court held that a cardinal rule commands that the Court seek out and apply the evident purpose intended to be accomplished by the lawmaking power. Northwestern Express, Stage & Transportation Co., 164 U.S. at 688. The Court found that the statute at issue was meant to make citizens whole for the losses they might have sustained by Indians and that

"cases might arise, where, in order to make restitution to citizens of the United States, the term in question would require a construction embracing Federal and state corporations," because the title to property would be in the name of the corporation and the claims for damages to such property could not be presented in the names of the stockholders. Id. at 690. Thus, the Court concluded that corporations are U.S. citizens for purposes of this "remedial" statute. In the case of Ramsey v. Tacoma Land Co., 196 U.S. 360, 362 (1905), the Court again held that the term citizens of the United States, as used in a "remedial statute" should be considered as including state corporations. The statute in question gave citizens the right to remedy imperfect land titles on land purchased from railroad companies by purchasing the land from the Government.

Turning to more modern statutes, the Federal Aviation Act defines the term and states that:

> 'citizen of the United States' means-
> (A) an individual who is a citizen of the United States;
> (B) a partnership each of whose partners is an individual who is a citizen of the United States; or
> (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States. 49 U.S.C. § 40102(15) (1994).

This statute specifically provides that certain corporations owned and controlled by U.S. citizens shall be deemed U.S. citizens for purposes of that legislation. See also 10 U.S.C. § 9511 (1994) (U.S. citizen has the same meaning given the term in 49 U.S.C. § 40102(15)). Likewise, the Shipping Act states that for purposes of that Act, "no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States." 46 U.S.C. Appx § 802(a) (1994 & Supp. 1998); see also 9 U.S.C. § 202 (1994) (stating that for purposes of that statute section "a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States"). Again, the statute expressly provides that certain corporations shall be deemed U.S. citizens for purposes of that legislation.[2]

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[2] In comparison, 28 U.S.C. § 1983 (1994), enacted pursuant to the above-quoted privileges and immunities clause of the Fourteenth Amendment, provides that every person who "subjects, or causes to be subjected, *any citizen of the United States or other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." (Emphasis added). That statute does not define the term "citizen of the United States or other person." Courts have deemed corporations to be an "other person" for § 1983 purposes and thus have not had to reach the issue of whether a corporation is a "citizen of the United States." See South Macomb Disposal Authority v. Washington, 790 F.2d 500, 503 (6th Cir. 1986); Des Vergnes v. Seekonk Water Dist., 601 F.2d 9 (1st Cir. 1979).

As part of our analysis, we have reviewed with care the case law that has evolved with respect to the Lanham Act. Superficially, that line of cases could be read to deem corporations as "U.S. citizens." We do not believe a thorough review supports that conclusion.

The Lanham Act, 15 U.S.C. § 1051 et seq., makes liable "any person who shall, in commerce," infringe a trademark. 15 U.S.C. § 1114 (1994). The Lanham Act defines the term "person" to include a "juristic person as well as a natural person." Id. § 1127. A "juristic person" includes a "firm, corporation, union, association, or other organization capable of suing and being sued in a court of law." Id. Thus, specific provisions of the Lanham Act permit corporations, as well as individuals, to be sued for trademark infringement.

One of the leading cases on the jurisdictional application of the Lanham Act is Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633 (2nd Cir.), cert. denied, 352 U.S. 871 (1956). In that case, Vanity Fair Mills, a corporation located in the United States, sued T. Eaton Co., a corporation located in Canada, in a U.S. district court for trademark infringement under the Lanham Act. The alleged trademark infringement occurred in Canada. Nonetheless, Vanity Fair Mills asserted that its claims against T. Eaton Co. arose under the laws of the United States, and should therefore be governed by those laws. In other words, Vanity Fairs Mills sought the extraterritorial application of the Lanham Act, a United States statute, to acts that occurred in another country.

In deciding whether to grant this extraterritorial application, the Second Circuit reviewed the Supreme Court's earlier decision in Steele v. Bulova Watch Co., 344 U.S. 280 (1952). In that case, the Supreme Court had held that if a person infringes a trademark while in a foreign country, a U.S. federal court may have jurisdiction to hear the action and apply U.S. law. Specifically, the Court held that "a United States district court has jurisdiction to award relief to an American corporation against acts of trademark infringement and unfair competition consummated in a foreign country by [Mr. Steele] a citizen and resident of the United States," under the Lanham Act. Bulova Watch Co., 344 U.S. at 281.

The Vanity Fair Mills Court believed that the Bulova Court stressed the following three factors as relevant to a determination of the extraterritorial reach of the Lanham Act: (1) *whether the defendant was a U.S. citizen*, (2) whether the defendant's conduct had a substantial effect on United States commerce, and (3) whether there was a conflict with trademark rights established under foreign law. Applying that test, the Second Circuit, in Vanity Fair Mills, held that the remedies provided by the Lanham Act could not be given an extraterritorial application because, for one, the defendant T. Eaton Co. was a Canadian and not a *U.S citizen*.

Subsequent circuit and district courts have followed the Second Circuit's three factor test and have, without discussion, summarily stated that American corporations are U.S. citizens, thereby meeting one prong of the test. See, e.g., Atlantic Richfield Co. v. Arco Globus Int'l Co., 150 F.3d 189 (2nd Cir. 1998) (affirming trial court's finding that the defendant corporation was a U.S. citizen); Aerogroup Internat'l, Inc. v. Marlboro Footworks, Ltd., 1998 U.S. App. LEXIS 7733 (Fed. Cir., April 13, 1998) (affirming trial court's finding that "being incorporated and headquartered in Massachusetts, Marlboro [a corporation] is a United States citizen" subject to the court's authority); Calvin Klein Indus. v. BFK Hong Kong, Ltd., 714 F. Supp. 78, 80

(S.D.N.Y. 1989) (both corporation and its director were "treated as United States citizens for the purposes of" extraterritorial reach of the Lanham Act).

We think the court decisions interpreting the extraterritorial reach of the Lanham Act and characterizing corporations as U.S. citizens should not be read as establishing that corporations are United States citizens generally or even necessarily for purposes of the Lanham Act. The Lanham Act itself makes liable non-natural persons, such as corporations, that are capable of being sued in a court of law; it makes no mention of citizens. See 15 U.S.C. § 1127. The use of the term U.S. citizen when discussing the extraterritorial reach of the Lanham Act on defendants is simply a paraphrase, and that paraphrased term has been repeated by later courts without discussion of the issue. In addition, the Lanham Act *is* a remedial statute -- it allows a person to seek redress against another for trademark infringement. In essence, it has never been necessary for a court to reach the question of whether a state corporation is also a United States citizen.

There is one last legal source to address. Section 1332 of Title 28, dealing with diversity jurisdiction, discusses the citizenship of corporations. That statute states that "a corporation shall be deemed to be a *citizen of any state* by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1) (1994) (emphasis added). Thus, although this statute does not state that a corporation is a U.S. citizen, it does treat corporations as state citizens for purposes of diversity jurisdiction.

From the above, we conclude that a U.S. citizen generally must be a natural, not an artificial, person.[3] Although the Supreme Court has interpreted the term "citizen of the United States" as including corporations for certain federal statutes, this has only been done in the context of federal "remedial" statutes a century ago. The HUBZone Act is not a remedial statute in the same sense as, for example, the Indian Depredation Act. The HUBZone Act does not authorize a claim against the Government for compensation; rather, it establishes a federal procurement program and uses the term U.S. citizen to determine eligibility for that program. In addition, Congress does not now generally treat corporations as U.S. citizens. In fact, Congress' awareness of the need to make a clear statement that a corporation is a U.S. citizen is amply demonstrated by the four occasions on which it has expressly done so. See 9 U.S.C. § 202; 10 U.S.C. § 9511; 46 U.S.C. Appx § 802(a) (a corporation may be deemed a U.S. citizen for purposes of that statute); 49 U.S.C. § 40102(15).

Finally, although 28 U.S.C. § 1332(c)(1) states that a corporation is deemed a citizen of any state by which it has been incorporated, the HUBZone Act specifically requires each owner to be a "United States citizen," not a citizen of a state. Simply because an entity is a citizen of a state does not ipso facto mean that it is also a U.S. citizen. guaranteed all the rights and privileges afforded U.S. citizens. See Grosjean, supra (corporations are not U.S. citizens under the Fourteenth Amendment); Jones v. Temmer, 829 F. Supp. 1226 (D. Colo. 1993), opinion vacated on other grounds, remanded, 57 F.3d 921 (10th Cir. 1995) (privileges and immunities clause of the Fourteenth Amendment protects only those rights peculiar to being a U.S. citizen; it does not protect those rights which relate to state citizenship).

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[3] As an exception to this conclusion. we believe that tribally-owned enterprises can qualify under the U.S. citizenship requirement. Our reasons for this exception are explained below.

In sum, based on the specific statutory language in question and on Supreme Court precedent, we conclude that CDCs should not be treated as U.S. citizens under the HUBZone Act. Therefore, a small business concern owned and controlled in whole or in part by a CDC will not be eligible for the HUBZone program. This conclusion is consistent with our regulations. Our existing regulations define a person as a "natural person" and a citizen as a "person born or naturalized in the United States." 13 C.F.R. § 126.103. That regulation, as worded, is a legally permissible implementation of the statute. Our conclusion here does not change that implementation. Each person that owns and controls a HUBZone small business concern must be a "natural" person because that person must be a U.S. citizen.

B. Are Small Business Concerns Owned or Controlled by Tribes Eligible for the HUBZone Program?

The next question presented is whether a Tribe is a person who is a United States citizen under the HUBZone Act. In part, this analysis is similar to the one discussed above. We first look to 1 U.S.C. § 1 for the definition of "person" as "includ[ing] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

This definition does not specifically reference Tribes. It has been held, however, that pursuant to the Indian Reauthorization Act of 1934 ("IRA"),

> an Indian Tribe may organize simultaneously in two ways: first, it may organize as a tribal governmental entity governed by a constitution and bylaws pursuant to 25 U.S.C. § 476 (a so-called Section 16 organization); second, it may incorporate as a federal corporation governed by the terms of its charter pursuant to 25 U.S.C. § 477 (a so-called Section 17 corporation). Veeder v. Omaha Tribe, 864 F. Supp. 889, 898 (N.D. Iowa 1994).

An Indian Tribe organized pursuant to § 16 of IRA can be deemed an association or a society. A "society" is a group of persons broadly distinguished from other groups by mutual interests, participation in characteristic relationships, shared institutions, and a common culture. World Evangelistic Enter. Corp. v. Tracy, 644 N.E.2d 678, 681. An "association" is the act of a number of persons uniting together for some special purpose or business. Roberts v. Schaefer Co. v. San-Con, Inc., 898 F. Supp. 356, 360 (S.D. W. Va. 1995). An Indian Tribe organized pursuant to § 17 of IRA is a corporation. Thus, a Tribe organized pursuant to either § 16 or § 17 of IRA may be deemed a "person" for federal statutory purposes, including the HUBZone Act, because it falls within the definition of the term person under 1 U.S.C. § 1.

This is further confirmed by case law addressing a Tribe's ability to bring suit under 28 U.S.C. § 1983. That statute, discussed above, was enacted pursuant to the privileges and immunities clause of the Fourteenth Amendment. It provides that every person who "subjects, or causes to be subjected, *any citizen of the United States or other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 28 U.S.C. § 1983 (emphasis added). Although the Supreme Court has not addressed this issue, many circuit courts and district courts have deemed Tribes an

"other person" for § 1983 purposes. For example, the court in Mille Lacs Band of Chippewa Indians v. Minnesota Dep't of Natural Resources held that Tribes were "persons" under § 1983 because "it furthers the broad intent of Congress." 853 F. Supp. 1118, 1127 (D. Min. 1994) (quoting Lac Courte Oreilles Bank of Lake Superior Chippewa Indians v. Wisconsin, 663 F. Supp. 682, 691 (W.D. Wis.), appeal dismissed, 829 F.2d 601 (7th Cir. 1987) ("Defendants have not cited any authority, and I cannot find any, to support the proposition that, as federal rights holders, the plaintiff tribes should be excluded from the class of legal 'other persons' entitled to sue under § 1983")). Other courts have simply allowed Tribes to bring § 1983 actions without addressing the issue of whether a Tribe is an "other person" under the statute. See Kiowa Indian Tribe v. Hoover, 150 F.3d 1163 (10th Cir. 1998); Shoshone-Bannock Tribes v. Fish & Game Comm'n, 42 F.3d 1278 (9th Cir. 1994).

Interestingly, one court expressing a minority opinion has held that a "Tribe may not bring a Section 1983 action because it is not a 'citizen of the United States or other person' for purposes of Section 1983." Coeur D'Alene Tribe v. Idaho, 798 F. Supp. 1443, 1452 (D. Idaho 1992), aff'd in part, rev'd in part, remanded, 42 F.3d 1244 (9th Cir. 1994). In that case, the district court had also dismissed the § 1983 claims brought by the individual tribal members because it did not believe they were deprived of any rights, privileges or immunities granted by the Constitution. On appeal to the Ninth Circuit, the Tribe only argued the § 1983 issue with respect to the individual tribal members. Coeur D'Alene Tribe v. Idaho, 42 F.3d 1244, 1255 (9th Cir. 1994), rev'd in part, remanded, 521 U.S. 261 (1997) ("Tribe argue[d] the individual plaintiffs have permissible section 1983 claims against the officials acting in their individual capacities."). The Ninth Circuit, therefore, did not address the issue of whether a Tribe is a citizen of the United States or other person under § 1983 in that case.

It appears, however, the Ninth Circuit effectively overruled the district court in a later case. In Native Village of Venetie IRA Council v. Alaska, 155 F.3d 1150, 1152 n.1 (9th Cir. 1998), the court stated in a footnote that the U.S. Supreme Court has liberally construed the term "other persons" to include labor unions, corporations, and non-profit organizations. In addition, Ninth Circuit authority supported the conclusion that a Tribe is an "other person" under § 1983. Id., citing Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1054-55 (9th Cir.), rev'd on other grounds, 474 U.S. 9 (1985) (holding that Tribe is "person" for purposes of state tax statute).

Based upon 1 U.S.C. § 1 and the cases construing 28 U.S.C. § 1983, we believe a Tribe should be deemed a "person" for federal statutory purposes. Therefore, a Tribe is deemed a "person" under the HUBZone Act. The next question, then, is whether a Tribe is a U.S. citizen, since under the HUBZone Act to be eligible for the program a small business concern must be owned and controlled by persons, each of whom is a U.S. citizen. As discussed in our analysis above, neither the HUBZone Act nor 1 U.S.C. § 1 defines the term.

The legislative history with respect to this issue is the same as that already discussed, with some additional material that pertains specifically to Indian businesses. During a committee hearing on S. 208 (the HUBZone bill that was enacted into law), Senator Conrad Burns (R-MT), a co-sponsor of S. 208, spoke briefly and submitted a prepared statement on the issue of including Indian reservations as a qualified HUBZone. Hearing on S. 208, at 15. In addition to this, the

Senator noted in his prepared statement that Looking Eagle Manufacturing ("Looking Eagle"), "an Indian business in Wolf Point, Montana on the Fort Peck Reservation, would benefit from this bill." Id. Looking Eagle is an 8(a) company that Senator Burns believed would benefit from the HUBZone program because "it is located in an economically depressed area." Id. The Senator said little else about this company.

We have considered the basic facts pertaining to Looking Eagle. The Wolf Point Community Organization ("Wolf Point") owns Looking Eagle. Wolf Point is a non-profit entity that is designed to promote education and assistance to the Assiniboine and Sioux Tribes, the two Tribes that chartered Wolf Point. Therefore, Looking Eagle is a tribally-owned small business, albeit through an intermediary non-profit corporation chartered by the two Tribes. It is not clear from the legislative history that Senator Burns was aware that Looking Eagle is tribally-owned, as opposed to being owned and controlled by individual Indian Tribe members.

During that same hearing Mr. Pete Homer, CEO of the National Indian Business Association, testified. The following is some of the discourse that occurred between Mr. Homer and Senator Bond:

> **Chairman Bond.** Mr. Homer, you worked at the SBA as a Native American advocate, I believe, in the past, have you not?
> **Mr. Homer.** Yes, sir.
> **Chairman Bond.** Did you find that Native American-owned businesses had difficulty gaining access to the 8(a) Program?
> **Mr. Homer.** Yes, sir.
> **Chairman Bond.** Why?
> **Mr. Homer.** *Tribal governments* had a very difficult time because of the simple fact that they could not be eligible under the processes that were there. SBA or Congress needs to modify portions of the rules and the regulations in order to qualify *Indian tribes* for inclusion into SBA programs. I think you have something like 17 *tribal governments* out of 561 tribes. There are an estimated 250 SBA 8(a) certified companies off reservations. The difficulty of Native American communities accessing the 8(a) program is: there are no outreach efforts that provide training and technical assistance to these communities.
> **Chairman Bond.** So you feel that the HUBZone program could be tailored to bring the jobs and overcome the statutory problems or regulatory problems, or just the practical problems that make it difficult to get 8(a) jobs onto the reservations?
> **Mr. Homer.** I think both. I think if we sit around the table with whoever the agency is that is responsible for the labor force statistics or the implementation of the program, that we could guide that through and make at least some of those *tribes* more successful in getting eligible for this type of program, or both programs.
> **Chairman Bond.** Any thoughts on what specific kinds of Government contracts would be appropriate for a reservation? What do you see as the best opportunity?
> **Mr. Homer.** Light manufacturing, circuit boarding, wire harnessing, those kinds of operations which are similar to existing businesses that Choctaw Industries

> located in Mississippi, Laguna Industries located in New Mexico, and Uniband Corporation located in North Dakota have successfully managed. Every Indian reservation that is near a metropolitan area could be involved; that is over 100 Indian *tribal governments*. Id. at 73-74 (emphasis added).

Later in the hearing Senator Michael B. Enzi (R-WY) asked Mr. Homer about any loopholes or problems with the HUBZone legislation. Mr. Homer's response was a recommendation that the committee specifically include Indian reservations as a HUBZone. Id. at 74.

Although it is clear from the testimony quoted above that Mr. Homer believed tribally-owned enterprises could be HUBZone small business concerns, it is not clear that either Senators Bond or Burns focused on that point. In addition, these statements by Mr. Homer should be accorded little weight. See Sutherland Statutory Construction § 48.10 ("Generally statements made by others at committee hearings concerning the nature and effect of a bill are not accorded any weight"). In addition, most of the testimony and statements concerning Indian Tribes and the HUBZone bill relate to the sole issue of Indian reservations becoming designated HUBZones. In fact, after the last hearing on S. 208, the bill was amended to include Indian reservations as designated HUBZones. Thus, the legislative history for the issue addressed in this memorandum is only marginally more useful than that for corporate entities generally.

While the HUBZone Act does not create a new judicial remedy like the Indian Depredation Act, its authors did establish a new development program to assist defined areas of long-term endemic economic underutilization. This demonstrates a broad Congressional purpose to assist areas of the country, including Indian reservations, that suffered historically from severe economic adversity. We cannot be blind to the curative purpose of the Congressional authors. We note that the Supreme Court has stated that "it is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians." Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 149 (1984); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973). This "purposive" approach is appropriate, particularly in light of the Supreme Court's resort to "purpose" in the Northwestern Express case, supra, where it was used to the detriment of the Indian Tribes. With this in mind, we turn to case law which will aid in interpretation.

Unfortunately, there are no federal statutes or court decisions deeming Indian Tribes "citizens of the United States." As noted in the above discussion on corporations, a state-chartered corporation is deemed a citizen of a state for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c)(1). Indian Tribes that have incorporated under § 17 of IRA have also been deemed citizens of the state where they have their principal place of business, for diversity jurisdiction purposes. Gaines v. Ski Apache, 8 F.3d 726 (10th Cir. 1993); cf. Whiteco Metrocom Div. v. Yankton Sioux Tribe, 902 F. Supp. 199 (D.S.D. 1995) (a Tribe organized pursuant to § 16 of IRA "is not a citizen of any state for purposes of diversity jurisdiction").

Nevertheless, this statute and the case law do not resolve the issue. The case law and diversity jurisdiction statute provide that a corporation is deemed a citizen of any state by which it has been incorporated, whereas the HUBZone Act specifically requires each owner to be a "United

States citizen," not a citizen of a state. As noted above, simply because an entity is a citizen of a state does not ipso facto mean that it is also a U.S. citizen, guaranteed all the rights and privileges afforded U.S. citizens. See Grosjean, supra.

Tribes have not been deemed U.S. citizens under any legal authority. Rather, they have been treated as sovereigns pursuant to §16 of IRA, corporations pursuant to § 17 of IRA, or persons, see Mille Lacs Band of Chippewa Indians, supra (Tribe is "other person" for purposes of § 1983). There are, however, numerous federal court decisions and rulings holding that a Tribe and a wholly-owned tribal entity organized pursuant to tribal law, and sometimes state law, are to be treated as one and the same for purposes of sovereign immunity, for purposes of 25 U.S.C. § 81, and for purposes of federal tax law. This is crucial to our analysis because if the Tribe and its tribally-owned business concerns are one and the same, and the Tribe's members are all U.S. citizens,[4] then a tribally-owned business can be eligible as a HUBZone small business concern (assuming all other eligibility requirements are met).

In Thomas v. Dugan, 1997 U.S. Dist. LEXIS 20850 (D.N.C.), aff'd, 1998 U.S. 4th Cir. LEXIS 32675, the plaintiffs, employees at a tribal casino, brought suit against the Chief of the Eastern Band of Cherokee Indians, the Tribe, the Tribal Casino Gaming Enterprise Board ("Board"), the members of the Board, and the Cherokee Tribal Casino ("Casino") for alleged violations of 42 U.S.C. § 2000e ("Title VII") and the Indian Civil Rights Act. The Casino was an unincorporated tribal venture. Title VII, which prohibits racial discrimination by employers, defines an employer for purposes of the Act as excluding Tribes. Thus, plaintiff's claims for violations of Title VII against the Tribe and the individual defendants sued in their official capacities were dismissed.

Plaintiffs argued that the claims against the Board and Casino, however, should not be dismissed because those two concerns are not extensions of the Tribe, but are independent business entities that may be sued under Title VII. The court disagreed and stated that the Board conducted its business pursuant to the "rules and regulations promulgated by [the] Tribal Council" and the Casino is a "tribally owned business." Thomas, 1997 U.S. Dist. LEXIS at *7. Because tribal councils are exempt under Title VII and are granted sovereign immunity, the court found "no reason to distinguish among tribal councils, gaming boards, and businesses owned and operated by the Tribe." Id.; see also Barker v. Menominee Nation Casino, 897 F. Supp. 389, 393 (E.D. Wis. 1995) (an action against a tribal enterprise, which was issued a corporate charter through a Tribal ordinance and pursuant to the Tribal Constitution, is in essence an action against the Tribe itself); Local IV-302 Int'l Woodworkers Union v. Menominee Tribal Enter., 595 F. Supp. 859, 862 (E.D. Wis. 1984). In other words, the tribally-chartered corporation was one and the same as the Tribe.

Another district court ruled similarly. In Giedosh v. Little Wound School Bd., Inc., 995 F. Supp. 1052 (D.S.D. 1997), the court held that the Little Wound School Board ("Board") fits within the definition of "Indian Tribe" under Title VII. The Board was a non-profit corporation incorporated under the laws of South Dakota. It was democratically-elected, and its members

[4] According to 8 U.S.C. § 1401 (1994) members of an Indian Tribe shall be nationals and citizens of the United States at birth.

were solely Oglala Sioux Tribe members. In addition, the Board was tribally-chartered and provided a variety of educational services primarily to the tribally-enrolled members of the Indian community. The court held that the fact that the Board was incorporated under the laws of South Dakota did not "abolish the relationship between the Board and the Tribe." Giedosh, 995 F. Supp. at 1055. The court, relying on Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir. 1986), believed that Indian Tribes, like other sovereigns, exercise some of their sovereign power through delegations to various agencies. Those tribal agencies would be exempt from Title VII. Thus, the court in Giedosh took this into consideration when issuing its decision, and it appears, likened the Board to a tribal agency. Id. at 1058.

In another case, Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir.), cert. denied, 510 U.S. 1019 (1993), plaintiff brought suit against Sioux Manufacturing Corporation ("SMC"), a wholly-owned tribal corporation and governmental subdivision of the Sioux, organized under the Tribe's Law and Order Code. The plaintiff and SMC had entered into a contract. According to 25 U.S.C. § 81, the Secretary of the Interior must approve all contracts with Indian Tribes concerning Indian lands. The contract here between the plaintiff and SMC was never approved by the Secretary of the Interior. The district court had held that the Secretary was required to approve the contract pursuant to § 81, because the contract was really between the plaintiff and the Tribe, not SMC. The Seventh Circuit agreed.

The same result occurred in Penobscot Indian Nation v. Key Bank, 112 F.3d 538 (1st Cir.), cert. denied, - U.S. - , 118 S. Ct. 297 (1997). There, the court held that a settlement agreement entered into between Key Bank and Schiavi Homes was really between Key Bank and the Penobscot Indian Nation ("PIN"), not Schiavi Homes. PIN was a limited partner in Schiavi Homes, a Maine limited partnership. Nonetheless, the First Circuit reasoned that "courts look beyond the mere formality of corporate structure in construing the identity of parties with regard to §81." Penobscot Indian Nation, 112 F.3d at 545, quoting Penobscot Indian Nation v. Key Bank, 906 F. Supp. 13, 19 (D. Me. 1995). Thus, the agreement was within the purview of § 81 requiring approval by the Secretary.

Likewise, in Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300 (D.D.C. 1987), the court held that the tribally-owned enterprise was one and the same as the Tribe, and thus the Secretary's approval for a contract between the defendant and the tribally-owned enterprise was required pursuant to § 81. The court based its decision on the fact that the tribally-owned enterprise could bind indirectly the Tribe's money and its lands. The court believed this was the sort of thing over which Congress wanted to give the Secretary a role under § 81.

In Inecon Agricorporation v. Tribal Farms, Inc., 656 F.2d 498, 501 (9th Cir. 1981), however, the court found that Tribal Farms, a wholly-owned corporation of the Fort Mojave Indian Tribe incorporated pursuant to the laws of Arizona, did not fall within the protected class of "tribe of Indians or individual Indians" covered by 25 U.S.C. § 81. There is no other discussion on this issue. In interpreting the Tribal Farms case, one court stated that the holding is premised on the fact that the Fort Mojave Indian Tribe played a limited role in Tribal Farms' contracts. See Altheimer & Gray, 983 F.2d at 810. Another court stated that Tribal Farms was a separate entity from the Tribe because it was a valid Arizona corporation. See Pueblo of Santa Ana, 663 F. Supp. at 1306.

In addition to the above case law, the Internal Revenue Service ("IRS") addressed how to treat Tribes and tribally-owned enterprises for tax purposes. Although no constitutional or statutory provision expressly exempts Indian Tribes from federal income taxation, the "political entity embodied in the concept of an Indian tribe has been recognized and no tax liability has been asserted against a tribe with respect to tribal income from activities carried on within the boundaries of the reservation." Rev. Rul. 81-295, 1981-2 C.B. 15. Because Tribes are not taxable entities, for the most part, the IRS has stated that tribal income not otherwise exempt from Federal income tax is includible in the gross income of the Indian tribal member when distributed or constructively received by him. Rev. Rul. 67-284, 1967-2 C.B. 55; see also Choteau v. Burnet, 283 U.S. 691 (1931). The IRS treats Tribes that incorporate under § 17 of IRA and Tribes that are sovereigns pursuant to § 16 of IRA the same -- they are not taxable entities. Rev. Rul. 81-295, 1981-2 C.B. 15. In other words, a § 17 IRA federally-chartered Indian tribal corporation shares the same tax status as the Indian Tribe itself. Id.

The IRS has issued several rulings on the taxation of a Tribe's business activities. For example, the IRS has ruled that a federally-recognized Tribe conducting commercial business both on and off its reservation is not subject to federal income tax. Rev. Rul. 94-16, 1994-1 C.B. 19. The IRS has also ruled that a § 17 IRA tribal corporation is not subject to federal income tax on the income earned in the conduct of commercial business on or off the Tribe's reservation. Id.; see also Rev. Rul. 94-65, 1994-2 C.B. 14 (a tribal corporation organized under the Oklahoma Welfare Act, 25 U.S.C. § 503, is not subject to federal income tax on income earned in the conduct of commercial business on or off the Tribe's reservation). In contrast, an entity organized by an Indian Tribe under *state* law is subject to federal income tax on its income, regardless of the location of the activities that produced the income. Id. The IRS has yet to issue a ruling on the tax treatment of entities incorporated pursuant to tribal law.

This analysis leads to three conclusions about tribal enterprises:

(1) The foregoing cases strongly support the view that tribally-owned enterprises whether incorporated or organized pursuant to tribal law or § 17 of IRA should be considered to be *one and the same* as the Tribe. Certainly, tribal members own and control the Tribe. Thus, a tribally-owned entity considered to be one and the same as the Tribe itself can be deemed to be "owned and controlled" by U.S. citizens, and thus eligible for the HUBZone program.[5]

(2) The case law concerning tribally-owned entities incorporated or organized under state law, however, is inconsistent with respect to whether those entities are considered one and the same as the Tribe. We note that in each of the South Dakota District Court and Court of Appeals for the First Circuit cases discussed above, the tribal entity was organized under state law, yet the courts treated the tribal entity as if it were the Tribe. The Ninth Circuit case is contrary. Given this unsettled state of the law, we invoke the Supreme Court admonition to liberally construe an ambiguity in statutes designed to benefit Indian Tribes, which was discussed above. There is no

[5] Of course, as has always been the position of SBA, if individual tribal members who are U.S. citizens own and control such a business entity, then the entity is deemed owned and controlled by U.S. citizens.

question that Congress, by specifically adding Indian reservation lands as qualifying HUBZone locations, meant to benefit Indian Tribes. Accordingly, we find that with this congressional directive small businesses owned by a Tribe, and incorporated under state law, are eligible for the HUBZone program.

(3) As stated in our analysis on corporations, our existing regulations define person as a "natural person" and a citizen as a "person born or naturalized in the United States." 13 C.F.R. § 126.103. That regulation, as worded, is a legally permissible implementation of the statute. Our conclusion here does not change that implementation. Each person that owns and controls a HUBZone firm must be a "natural" person because that person must be a U.S. citizen. We have determined that tribally-owned entities are considered to be one and the same as the Tribe itself, and therefore are deemed to be "owned and controlled" by tribal members, i.e., persons who are U.S. citizens.

C. Are Alaska Native Corporations United States Citizens under the HUBZone Act?

SBA's HUBZone regulations define a "HUBZone small business concern" as a "concern that is small as defined by § 126.203, *is exclusively owned and controlled by persons who are United States citizens*, and has its principal office located in a HUBZone." 13 C.F.R. § 126.103 (emphasis added). The regulations define a "person" as follows:

> Person means a natural person. Pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1626(e), Alaska Native Corporations and any direct or indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation are deemed to be owned an controlled by Natives, and are thus persons."

This regulatory exception for ANC's is based upon 43 U.S.C. § 1626, which is part of the Alaska Native Claims Settlement Act. Specifically, § 1626 states:

> (e) Minority status
> (1) *For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives* and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.
> (2) *For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives* and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both --
> (A) the total equity of the subsidiary corporation, joint venture, or partnership; and

(B) the total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers.

(Emphasis added). Thus, an ANC and its direct or indirect subsidiaries statutorily must be deemed entities "owned and controlled by Natives." Id. A small business concern owned by an ANC is its subsidiary. Therefore, by law, it is "owned and controlled by Natives." See id. Because of this statute, a small business owned and controlled by an ANC is owned and controlled by Natives. A "Native" "means a *citizen of the United States* who is a person that is of one-fourth or more Alaska Indian . . . Eskimo, or Aleut blood, or combination thereof." Id. § 1602(b) (emphasis added). Consequently, a small business concern owned by an ANC meets the requirement that it be "owned and controlled by 1 or more persons, each of whom is a United States citizen." 15 U.S.C. § 632(p)(3).

Thus, our existing regulation for ANCs is legally correct.

D. Summary

CDCs may not be owners of otherwise eligible HUBZone enterprises either under the clear language of the statute or any interpretation based on case law or legislative history. Conversely, Alaska Native Corporations are clearly eligible owners of such enterprises. A closer question arises in considering applications by enterprises owned by Indian Tribes. Unlike ANCs, eligibility is not conferred upon them by clear statutory language. However, when the underlying *purpose* of the HUBZone statute is considered together with the duty of the United States to the Tribes and relevant case law, we can conclude that tribally-owned enterprises are eligible for HUBZone treatment because of the historic identity between individual members and the Tribe itself which is recognized in our jurisprudence. Nevertheless, this conclusion should in no way impede efforts to clarify the statute in this regard; particularly, as there may be both extensions and limitations Congress may wish to provide which cannot be done with a legal opinion.[9]

cc: Aida Alvarez, Administrator

[9] E.g., whether any restriction should be placed on the sovereign immunity protection from suits on contract given to Tribes in their governmental or commercial activities, see Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., 523 U.S. 751 (1998); whether Congress would expand the concept of "reservations" explicitly to include state reservation lands or native lands not within a reservation.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. paper	re: Navajo-Hopi Settlement (5 pages)	06/27/1994	P5 6199

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Michael Schmidt (Subject File)
OA/Box Number: 7350

FOLDER TITLE:
Navajo-Hopi Mediation

Jimmie Purvis
2006-0197-F
jp718

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6199

United States Department of Agriculture
Office of the General Counsel
Washington, D.C. 20250-1400

NAVAJO-HOPI SETTLEMENT

At issue is the proposed settlement of several lawsuits involving the Hopi and Navajo Indian Tribes and the United States Department of the Interior. USDA and Forest Service are not involved in the lawsuits, but National Forest lands are proposed as part of the resolution of the lawsuits.

BACKGROUND:

For decades, the Navajo and Hopi Indians have claimed title to the same land in northeastern Arizona. In 1958 the Congress passed a law vesting title to the disputed land in both tribes and authorized them to litigate their respective rights and interests. In 1962 an Arizona district court determined that five-sixths of the disputed area (the Joint Use Area) belonged to both Tribes. In 1974 the Congress passed the Navajo-Hopi Relocation Act, authorizing the district court to partition the Joint Use Area and relocate tribal members to their respective areas. To date, the relocation effort has required expenditure of over $350 million by the Bureau of Indian Affairs and the relocation of thousands of Indians, but approximately 150 Navajo families have refused to leave the Hopi Partitioned Land (the HPL) because of ancestral and religious ties.

At least 8 lawsuits are pending, with the United States' liability estimated at $30 million. This liability arises in part due to the alleged failure of the Secretary of the Interior to relocate the Navajos who are living in trespass on Hopi lands. The Ninth Circuit Court of Appeals ordered negotiations to settle several of these claims.

On October 30, 1992, the Navajo Nation, the Hopi Tribe, the Manybeads plaintiffs, and the United States Departments of Justice and the Interior entered into an "Agreement in Principle for Resolving Issues in Connection with the Navajo-Hopi Settlement Act" (Principles of Agreement). No one in USDA was a party to the negotiations despite the fact that National Forest lands were involved. Nonetheless, the Principles of Agreement were ratified by Secretaries Lujan and Madigan on November 25, 1992, subject to clarification of certain issues, including protection of existing rights and access and finality of the settlement. Former Secretary Madigan signed the Principles of Agreement over the strong objections of the Forest Service and the Office of General Counsel.

Under the Principles of Agreement, the Hopi Tribe would receive approximately 200,000 acres of land in the Coconino and Kaibab National Forests, 8,000 acres of public domain land, 165,000

acres of state land, 35,000 acres of private land and a $15 million cash settlement. Eligible Navajos would be allowed to remain on the HPL for 75 years pursuant to the terms of a lease that was to be negotiated and agreed upon by the Hopi Tribe, the affected Navajo families and the Navajo Nation. Congress would have to ratify the settlement to effect these terms.

In December 1992, the settlement negotiators briefed numerous Congressional members in an attempt to gain support for the agreement. Senators McCain and DeConcini held public hearings in Arizona in January and February 1993. At that time, public sentiment was strongly against giving up National Forest System lands as part of the settlement. After the public hearings, Senator DeConcini stated publicly that the settlement would not pass the Congress in its current form.

The Navajo Nation rejected a draft lease presented by the Hopis on August 6, 1993. On September 16, 1993, the Federal Magistrate ordered the parties to continue negotiations. On June 6, 1994, a representative of the Department of Justice informed the Department that, on June 3, 1994, 83% of the Navajo families on the HPL ratified what is now being called an accommodation agreement between the Hopi Tribe and the Navajo Nation. This accommodation agreement is a substitute for the lease required by the Principles of Agreement.

We have requested but to date have not been provided a copy of the accommodation agreement. We are informed that it contains a 75 year lease provision and gives the Navajo Nation the right to request renewal of the lease at its expiration. The lease still has to be approved by the Navajo Nation Council, but we are told that is a matter of formality.

CURRENT ACTIVITIES: The Department of Justice is scheduling meetings among affected Federal agencies sometime before July 7th (that being the date that DOJ plans to meet with the Hopi Tribe to present a Federal position). We are not sure what will be discussed at the meeting, and also we have not been provided a copy of the proposed accommodation agreement.

One possible topic to be discussed at the meeting is alternatives to transfer outright of the National Forest lands to the Hopis. On alternative that has been mentioned is to maintain National Forest status of the 200,000 acres, but grant to the Hopis the grazing, timber, and concession rights to the land. Under such a scenario, the Forest Service would still retain responsibilities for land management and associated costs.

USDA POLICY CONCERNS: There are many serious policy concerns over this proposal:

1. The Hopi-Navajo Dispute has nothing to do with the National Forests or USDA programs.

This proposed settlement calls for the transfer of substantial National Forest land resources in settlement of a claim totally unrelated to USDA programs or the lands involved. The liability for these lawsuits arose from the actions or nonactions of the Secretary of the Interior. Therefore, a solution should come from the lands and programs administered by the Department of the Interior.

2. It is inappropriate to use National Forest lands to settle Indian claims as Congress has provided other remedies.

Congress enacted the Navajo-Hopi Relocation Act to resolve the Hopi-Navajo dispute but the Secretary of the Interior did not implement the law to the full extent. The United States is faced with liability in a number of lawsuits due to the nonfeasance or malfeasance of the Secretary of the Interior and the Bureau of Indian Affairs. There is no precedent for the transfer of National Forest lands to settle these kinds of Indian claims.

3. This transfer will be precedent for the use of National Forest lands to resolve a myriad of other Indian claims.

Over three-quarters of the Nation constituted adjudicated aboriginal title areas for Native Americans, or were covered by treaties. In many cases, tribal claims to such lands are unresolved. If the Government can use National Forest land to satisfy unrelated claims, then how can it deal with the issue of claims directly involving the National Forests?

For example, the Sioux have refused monetary compensation for the Black Hills National Forest and want it returned to Indian trust status. The Hopi-Navajo accommodation will make it more difficult to refuse similar accommodations to other tribal groups.

4. The "agreement" to transfer National Forest lands was done in secret without any public involvement.

The Forest Service expends considerable time and expense in land management planning for the Coconino and Kaibab National Forests involving the public in all stages of the decision making process. The public feels it has a stake in these lands. Yet, the agreement to transfer them was made by lawyers in other agencies negotiating in secret. Under the agreement, the public will be potentially denied use and access to the affected lands which they rightly consider as open and available to all citizens.

5. The proposed settlement is not "final".

Despite all the discussions and good intentions, the proposed settlement does not resolve the conflict of Navajos living on Hopi land; it merely postpones the resolution for the duration of a 75 year lease. It is quite probable that at the end of 75 years, the Government will be in the same position that it is in today.

6. The value of the National Forest lands to go to the Hopis probably far exceeds the potential liability of the United States in the lawsuit.

The Department of Justice has varied its estimate of the potential liability of the United States from $30 million to over $300 million. The value they ascribe to the National Forest lands is based on valuation of the Hopi reservation lands which are not comparable. In fact, the value of the National Forest lands could far exceed the potential liability of the government in the event it lost all aspects of the pending cases.

The Department of Justice has estimated the value of the involved National Forest, Bureau of Land Management and private lands at $11,272,500. Besides the erroneous method used to calculate this figure, we note that the precise lands which are to be conveyed have not been identified yet. The private land has to be either acquired or condemned. Thus, the total cost to the United States is unknown at this time.

7. There is no offset for loss of the National Forest lands.

There is nothing requiring the loss of the National Forest lands to be offset by the transfer to the Department of Agriculture of administrative jurisdiction of Bureau of Land Management or other lands under the jurisdiction of the Department of the Interior of equal or greater value. Allowing the Secretary of Agriculture to select replacement lands anywhere in the country probably would lessen the prospect of similar situations occurring in the future.

8. Giving the Hopis usufructuary rights to timber, grazing and concessions will establish a very undesirable precedent and will be very difficult to manage.

Experience with reserved treaty usufructuary rights on National Forest lands elsewhere in the nation has shown that it is extremely difficult to manage National Forests for multiple uses by the public and accommodate Indian usufructuary rights. In this

case, we would be creating such rights without consideration of the demonstrated difficulties we have encountered elsewhere. Further, in this case, there is no connection between the creation of such rights and any existing treaty involving the affected national forest lands.

9. The state and local governments will be affected by this transfer due to impacts on revenues they received under the Twenty Five Percent Fund (16 U.S.C. §500).

The State currently receives 25% of the gross revenues generated from the all the National Forests in Arizona. Transfer of the lands to Indian trust status will reduce the acreage and revenues by which rights under the 25% Fund are determined.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Joel Klein & Stephen R. Neuwirth to John Podesta; re: Indian Land & Water Claims Corrections Act (1 page)	05/31/1994	P5 6200
002. letter	Leslie M. Turner to Leon E. Panetta; re: S. 1654 - Technical Corrections to Six Laws Concerning Indian Tribes (4 pages)	05/26/1994	P5

released, NLMS 2008-122 on 2/4/10

COLLECTION:
Clinton Presidential Records
Counsel's Office
Stephen R. Neuwirth (Subject File)
OA/Box Number: 386

FOLDER TITLE:
Indian Corrections Act

Jimmie Purvis
2006-0197-F
jp200

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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6200

THE WHITE HOUSE

WASHINGTON

May 31, 1994

MEMORANDUM FOR JOHN PODESTA

FROM: JOEL KLEIN JK
DEPUTY COUNSEL TO THE PRESIDENT

STEPHEN R. NEUWIRTH SN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: INDIAN LAND AND WATER CLAIMS CORRECTIONS ACT

The Counsel's Office has reviewed the materials delivered by you concerning the Indian Land and Water Claims Corrections Act, S. 1654. The Counsel's Office has determined that there is no legal basis for the President not to approve the bill.

We do note, however, that the Interior Department is planning to interpret narrowly one provision of the Act, an amendment to the Indian Reorganization Act of 1934. Specifically, as set forth in Director Panetta's memorandum to the President, Interior will construe that amendment to have been intended only to reverse a 1936 opinion of the Interior Solicitor -- an opinion that interpreted the 1934 Act and attributed different levels of sovereignty to "historic" and "non-historic" tribes. (Historic tribes have existed since time immemorial as a unique group of Native Americans; non-historic tribes are communities of adult Native Americans who reside together on reservations.)

Interior recognizes that the actual language of the new Corrections Act is susceptible (inappropriately) to a broader interpretation that, in Interior's view, does not accurately reflect Congressional intent. The new Act provides, among other things, that departments and agencies of the federal government may not promulgate any regulation or decision under the 1934 Act that draws any distinction between federally recognized tribes as to the "privileges and immunities" available to them.

There is thus some risk that a court could construe the statute more broadly than the Interior Department, a result that Interior believes could lead to "unintended problems in the future."

We have consulted with the Interior Department and were advised that neither the Department nor OMB believes a signing statement by the President is necessary or appropriate under these circumstances. We agree with that conclusion.