



United States Department of the Interior



OFFICE OF THE SOLICITOR
Washington, D.C. 20240

JUN - 5 1992

BIA-IA-0892

MEMORANDUM

TO: Eastern Area Director, Bureau of Indian Affairs

FROM: Associate Solicitor, Indian Affairs

SUBJECT: Penobscot Indian Reservation Land Status

You have asked that this office reconsider the Department of the Interior's position regarding the status of the Penobscot Indian Reservation lands in light of a recent decision in Cayuga Indian Nation of New York v. Cuomo. The Penobscot Nation has also submitted a request for reconsideration. The Department's position is relevant to at least two hydroelectric projects on the Penobscot River that are in relicensing proceedings before the Federal Energy Regulatory Commission (FERC). The Penobscot Nation is concerned that its fishery resources be considered and protected in the licenses' terms. The Secretary can only impose license conditions protective of the interests of the Nation under Section 4(e) of the Federal Power Act if the United States holds some interest in the Nations' lands.¹ The Secretary may still put forward these interests absent a United States interest in land but without a binding effect on FERC.

In two memoranda, one of April 13, 1983, and one of December 1, 1988, previous Associate Solicitors have concluded that the United States holds no title to the lands within the Penobscot Reservation. Upon review of both memoranda, I find that neither addressed the central question whether the Reservation lands are held in trust by the United States and that it may be concluded that the Penobscot Nation's lands within the Reservation are held in trust.

The 1983 memorandum briefly (in two pages) responded to your question about the applicability of BIA right-of-way regulations

¹ The Reservation, or some part thereof, must meet the following definition in the Federal Power Act: "tribal lands embraced within Indian reservations, . . . and other lands and interests in lands owned by the United States . . ." 16 U.S.C. § 796(2). See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984). The Secretary, of course, may impose license conditions for fish protection that may incidentally protect tribal interests. See 16 U.S.C. § 803(j).

to Reservation lands. It did not analyse the status of those lands but concluded--without citation: "Since the fee title to the Penobscot Reservation is not held by the United States, this would indicate exclusion of the tribal land of the Nation from any right to annual charges under the Federal Power Act." This conclusion followed from the assumption that "such land is apparently held by the State of Maine in trust for the Nation subject to federal restrictions against alienation." The citation given for this statement was 25 U.S.C. § 1724(g)(2), which makes no reference to ownership.²

The 1988 memorandum assumed the correctness of the 1983 memorandum's conclusion and went on to answer the question whether the United States owns a Federal Power Act (FPA) "proprietary interest" in Reservation lands based on trust obligations imposed by the Maine Indian Claims Settlement Act, Pub. L. No. 96-420, codified at 25 U.S.C. §§ 1721-1735 (MICSA). The memorandum concluded that the United States did not but correctly stated that "[n]o blanket statements can be made concerning whether Penobscot Reservation lands are 'reservation' lands for purposes of the FPA."

The key question of Reservation ownership remains unanswered by these memoranda. To answer it, the decision in Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (Tuscarora), must be considered and the meaning of the language of MICSA must be discerned and applied to the facts of the Penobscot situation.

In Tuscarora the Supreme Court held that Indian reservation lands in which the United States did not hold a proprietary interest were not reservation lands under the FPA. The Tuscarora lands were unusual for a number of reasons. First, the lands were in New York, some distance from the Tuscarora Nation's aboriginal home in North Carolina. Second, the lands were purchased by the

² The full text is as follows:

Except as provided in paragraph (3) of this subsection, any transfer of land or natural resources within Passamaquoddy Indian Territory or Penobscot Indian Territory, except (A) takings for public uses consistent with the Maine Implementing Act, (B) takings for public uses pursuant to the laws of the United States, or (C) transfers of individual Indian use assignments from one member of the Passamaquoddy Tribe or Penobscot Nation to another member of the same tribe or nation, shall be void ab initio and without any validity in law or equity.

The referenced paragraph (3) gives the statutes under which such land may be leased, sold, or subjected to rights-of-way. It too is silent on ownership of the lands.

Nation with proceeds from the sale of its North Carolina lands. Finally, the Court emphasized, no treaty or statute confirmed the reservation to the Nation. Id. at 124.

The Court examined these unique facts and determined that Congress did not intend the protections of the FPA to extend to such privately held Indian lands. Simply "no 'interest' in them is 'owned by the United States,'" so "they are not within a 'reservation' as that term is defined and used in the Federal Power Act." Id. at 111.

MICSA was passed to resolve major outstanding claims to land in the State of Maine, including those of the Penobscot Nation. It ratified the Maine Indian Claims Implementing Act of 1979, 30 M.R.S.A. §§ 6201-6214 (the Implementing Act). MICSA described the Penobscot Reservation by reference to the Implementing Act as follows:

the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian [or Old Town] Island and all islands in said river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818.

25 U.S.C. § 1722(i), citing 30 M.R.S.A. § 6203.8.

These lands in the Penobscot River were at the center of the Penobscot aboriginal territory. House Report No. 96-1353, Sept. 19, 1980, 1980 U.S.C.C.A.N. 3786, 3787; see Handbook of North American Indians, Northeast, B. G. Trigger, ed, at 137 (Smithsonian 1978). MICSA confirmed the Reservation to the Nation by ratifying the Implementing Act. 25 U.S.C. § 1721(b). However, MICSA is not altogether clear as to the land tenure of the Reservation. The Act contemplates both trust and restricted land within the Reservation both expressly and by negative implication. In Section 5(i) of MICSA, the following language appears:

(1) Trust or restricted land or natural resources within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. In the event that the compensation for the taking is in the form of substitute land to be added to the reservation, such land shall become a part of the reservation in accordance with the Maine Implementing Act and upon notification to the Secretary of the location and boundaries of the substitute land. Such substitute land shall have the same trust or restricted

status as the land taken.

(2) Trust land of the Passamaquoddy Tribe or the Penobscot Nation not within the Passamaquoddy Reservation or Penobscot Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. . . .

25 U.S.C. § 1724(i). The reference to "trust or restricted land . . . within the Penobscot Indian Reservation" indicates Congress's understanding that both types of land tenure would exist there. The reference to trust land "not within the . . . Penobscot Reservation" implies that Congress understood that the Reservation would include trust land. Otherwise, it would not be necessary to qualify the statement by referring to the Reservation.

Another provision of Section 5 ties land tenure to location. Where the United States acquires land for the Nation within Penobscot Indian Territory, as defined, "the first 150,000 acres . . . shall be held in trust for the benefit of the [Penobscot] nation." Penobscot Indian Territory includes the Penobscot Reservation. 25 U.S.C. § 1722(j), incorporating by reference 30 M.R.S.A. § 6205.2. Land acquired outside of Penobscot Indian Territory "shall be held in fee by the [Penobscot] nation."

While acknowledging that MICSA is not a model of clarity, we think the above provisions demonstrate the trust character of at least some of the lands within the Reservation. In support of this conclusion, we cite the anomalous land tenure result of reaching a different conclusion and the canons of Indian statutory construction.

If the Nation's Reservation lands were only held in restricted fee status, the bizarre result of a donut of trust lands would occur. The hole of the donut--the Reservation--would be in restricted fee status. The donut surrounding that area would be tens of thousands of acres of tribal trust lands. Surrounding that area is tribal fee land. Nowhere else does such a pattern of Indian land tenure exist.

More importantly, we are bound to follow the canon of Indian statutory construction that ambiguous provisions are interpreted to the benefit of the affected Indians. See, e.g., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, ___ U.S. ___, 112 S.Ct. 683, 693 (1992). Undeniably, MICSA is a statute enacted for the benefit of the Penobscot Nation, among others. It confirmed its existing landholdings, confirmed and provided a number of federal protections on its lands, and provided the Nation with compensation for its lost lands. The benefit is also clear--holding the lands in trust enables the Nation to call upon the Secretary to condition the licenses of hydroelectric operators upon their taking measures to

protect the Nation's fisheries and other resources.

MICSA, on this point, is a good example of an ambiguous Indian statute. Here, there is no statement that the Reservation lands are to be held in trust as opposed to restricted fee status. Nor is there any statement that these lands are not to be held in trust. Indeed, the only support for the proposition that the lands are not to be held in trust comes from the Special Issues segment of the House Report on MICSA. Responding to a concern that "[i]ndividual Indian property . . . will be taken in the settlement," the Interior Committee noted that:

The settlement envisions four categories of Indian land in Maine: Individually-assigned existing reservation land, existing reservation land held in common, newly-acquired tribal land within "Indian territory," and newly-acquired tribal land outside "Indian territory." Only newly-acquired land within Indian territory and newly-acquired tribal land to be held in trust for the Houlton Band of Maliseet Indians will be taken in trust by the United States. Existing land within the reservations, whether held by individuals pursuant to a use assignment or in common by the Tribe as a whole, will not be taken by the United States in trust. These lands will simply be subject to a federal restriction against alienation which will prevent their loss or transfer to a non-tribal member.

House Report No. 96-1353, Sept. 19, 1980, 1980 U.S.C.C.A.N. 3786, 3791. The Report goes on to specify the protections for individual Indian landowners.

The import of this response seems clear--only restricted fee lands lie within the reservations.³ Yet the language of MICSA is "[t]rust or restricted land . . . within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation." This conflict may well stem from understandable confusion on the part of the Committee. A theory held by New York State at the time was that the original states--to one of which Maine, of course, is a successor--held the underlying fee to Indian lands within their boundaries, even those within federal Indian reservations.

³ FERC came to this conclusion in *Bangor Hydro-Electric Co.*, 27 F.E.R.C. 61,467 (1984). However, FERC relied on a letter based on the 1983 Associate Solicitor's Memorandum on this subject and the House Report language. We have noted that the 1983 Memorandum is conclusory on the question of Reservation land status. The House Report does not address the language of MICSA with its reference to trust lands on the Reservation. FERC, too, did not address this statutory language. For these reasons, we do not find the FERC decision to be instructive.

Presumably, the Committee knew of the theory and that under it Maine held some interest in the Reservation. This confusion appears to be dispelled by the recent decision in Cayuga Indian Nation of New York v. Cuomo, 758 F.Supp. 107 (N.D.N.Y. 1991), to which you refer in your request for review of this issue. The court held that the State of New York owned no interest in Indian lands within the Cayuga Indian Reservation. Any interest it may have held was ceded to the United States by ratification of the United States Constitution. "Once New York State ratified the United States Constitution, relations with Indian tribes and authority over Indian lands fell under the exclusive province of federal law." Id. at 116. It is unclear what impact Cayuga may have on state Indian reservations in the original United States. Cayuga confirms, however, that no later than MICSA's granting of federal status to the Penobscot Reservation, whatever interest Maine may have held in the lands was surrendered to the United States.

Given the injunction of the canon of Indian statutory construction, we are obliged to find trust status in Reservation lands. Still, the language of the House Report may be given meaning based on the question being answered without doing damage to this interpretation of the MICSA language. The Committee was addressing a question raised by individual Indian landowners on individual land tenure--not a concern of the tribes about tribal interests in land. Those individually assigned lands on the Reservation were intended to be held in restricted fee and the Committee appears to be reassuring those Indian landowners that the United States would not be the legal owner of their lands and, therefore, would not potentially divest them of individual property rights.

The House Report is not one-sided on this point. It does lend some support to the trust status of the Reservation. The section-by-section analysis states that "the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts" Id. at 3794. Tribal lands within federally recognized Indian reservations are typically held in trust. Furthermore, it must be assumed, at a minimum, that the Interior Committee knew of the Tuscarora decision and that basic protection of the rights of a riverine tribe depended on a sufficient federal interest in Indian land to invoke the license condition provision of the Federal Power Act.

⁴ Under the reasoning of Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), these lands were already subject to 25 U.S.C. § 177, which imposed the restriction on alienation on all lands in which a tribe has an interest. See Memorandum of the Solicitor to Executive Assistant to the Secretary of July 8, 1976.

MICSA clearly presents an ambiguity. The Department must give precedence to a reading that redounds to the Nation's benefit. The interpretation that benefits the Nation recognizes the presence of both trust and restricted lands on the Reservation. Thus, any conflicting committee comment on the unassigned lands of the Nation is overridden by the meaning of the statutory language. The only reading of the comment that we can give effect given the MICSA language is that tribal lands would be held in trust and the individual assignment lands would be held in restricted fee.

I find that the Penobscot situation is distinguishable from that in Tuscarora. Some of the tribal lands within the Penobscot Reservation are held in trust, in stark contrast to the fee title of all of the Tuscarora lands.

While I conclude that the United States holds the Penobscot Nation's reservation lands in trust, I note that the Secretary's conditioning power under the Federal Power Act may well extend to tribal restricted fee land within a reservation as well. To return to Tuscarora, the uniqueness of the Tuscarora lands is clear. That case does not deal with the typical restricted fee reservation, such as those of the Pueblos, which unquestionably are cloaked with the protection of the federal trust based on treaties and statutes of the United States. See United States v. Candelaria, 271 U.S. 432 (1926). Rather, the Court in Tuscarora found no treaty or statute confirming the Tuscarora lands or guaranteeing their protection by the United States. 362 U.S. at 105-106, 123-124.

Prior to the enactment of MICSA, Congress had not acknowledged any duty to the Penobscot Nation or its lands. Congress had not ratified any treaty or agreement with the Nation. Nor had Congress undertaken any commitments--either by treaty with another nation or by statute--to the Nation. The Penobscot Nation and the Tuscarora Nation were thus similarly situated. MICSA altered the mix, guaranteeing protection, albeit limited,⁵ for the Nation's lands.

MICSA was crafted against the backdrop of the Passamaquoddy decision. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), held that the United States had a duty to protect tribal title to property in Maine, even if the property was held in fee simple by the tribe. Congress acted accordingly when it acknowledged the restricted fee of Passamaquoddy and Penobscot tribal lands in MICSA. Passamaquoddy

⁵ MICSA was unique in this regard in providing for state condemnation of tribal land "for public purposes." 25 U.S.C. § 1724(i).

did not define the limited duty but left this to the Secretary. Congress inserted § 4(e) into the FPA for the purpose of protecting Indian lands it understood it had a duty to protect. This congressional action and Tuscarora came prior to the Passamaquoddy decision and the understanding that the United States had a duty to protect tribal lands in Maine. The Secretary's discretion to define his duty under Passamaquoddy would reasonably extend to setting license conditions necessary to protect tribal interests in restricted fee lands on reservations.

MICSA went further than simply acknowledging a duty to protect lands, however. It appears to have created a proprietary interest in the restricted fee reservation lands. Section 5 of the Act requires that the proceeds from any restricted lands condemned under federal law be used to acquire land to be held in trust by the United States. 25 U.S.C. § 1724(j). Upon sale of the lands, the proceeds are held in trust. This degree of control over property may well be enough to satisfy the § 4(e) requirement of some proprietary interest in tribal lands. It presents an important distinction from Tuscarora.

Where the restricted fee of reservation lands is guaranteed by a statute such as MICSA, enacting a settlement to which the United States is a party, it is reasonable to conclude that Congress considers the United States to have a proprietary interest in the lands central to the settlement--an interest sufficient for § 4(e) purposes. The Penobscot Nation Reservation lands are in this category.

Catherine E. Wilson

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