AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 24:1 (2000) 173–182

COMMENTARY

The Continuing Saga of Indian Land Claims

The Catawba Indian Land Claim: A Giant among Indian Land Claims[1]

JOHN C. CHRISTIE, JR.

On 27 October 1993 President William Clinton signed the Catawba Land Claim Settlement Act.[2] By the stroke of his pen, this legislation ended over thirteen years of litigation by extinguishing the claim of the Catawba Indian Tribe to 144,000 acres of highly developed South Carolina land and trespass damages for the 140 years the Catawba have not possessed the land. At the same time, this legislation also provided a variety of federal and state benefits to the Catawba.

The thirteen-year history of this litigation was indeed extraordinary in more respects than the length of its existence. During that time, the case was before the US Supreme Court once, the Fourth Circuit Court of Appeals seven times—six of those times by the entire court sitting *en banc*—and the Supreme Court of South Carolina once. In addition, there were numerous hearings before the US District Court in South Carolina, presided over by Senior Judge Joseph Willson from the western district of Pennsylvania, specifically appointed to the case by the Chief Justice of the US Supreme Court, Warren Burger.

John C. Christie, Jr. is a senior partner in the law firm of Hale and Dorr LLP in Washington, DC. He has served as counsel to the Indian Land Claims Committee of the American Land Title Association, represented defendant landowners in Indian land claims litigation in California, Kansas, New Mexico, and South Carolina including the litigation described herein.

Despite the length of this proceeding, the litigation never resolved the merits of the Catawba's claim. The inherently complex nature of a claim such as this as well as the hardships caused by all concerned during its protracted existence vividly demonstrate that litigation is an unfortunate vehicle by which to resolve essentially political Indian land-claim issues and that a legislative settlement by Congress such as the one ultimately reached is preferable.

NATURE OF THE CLAIM

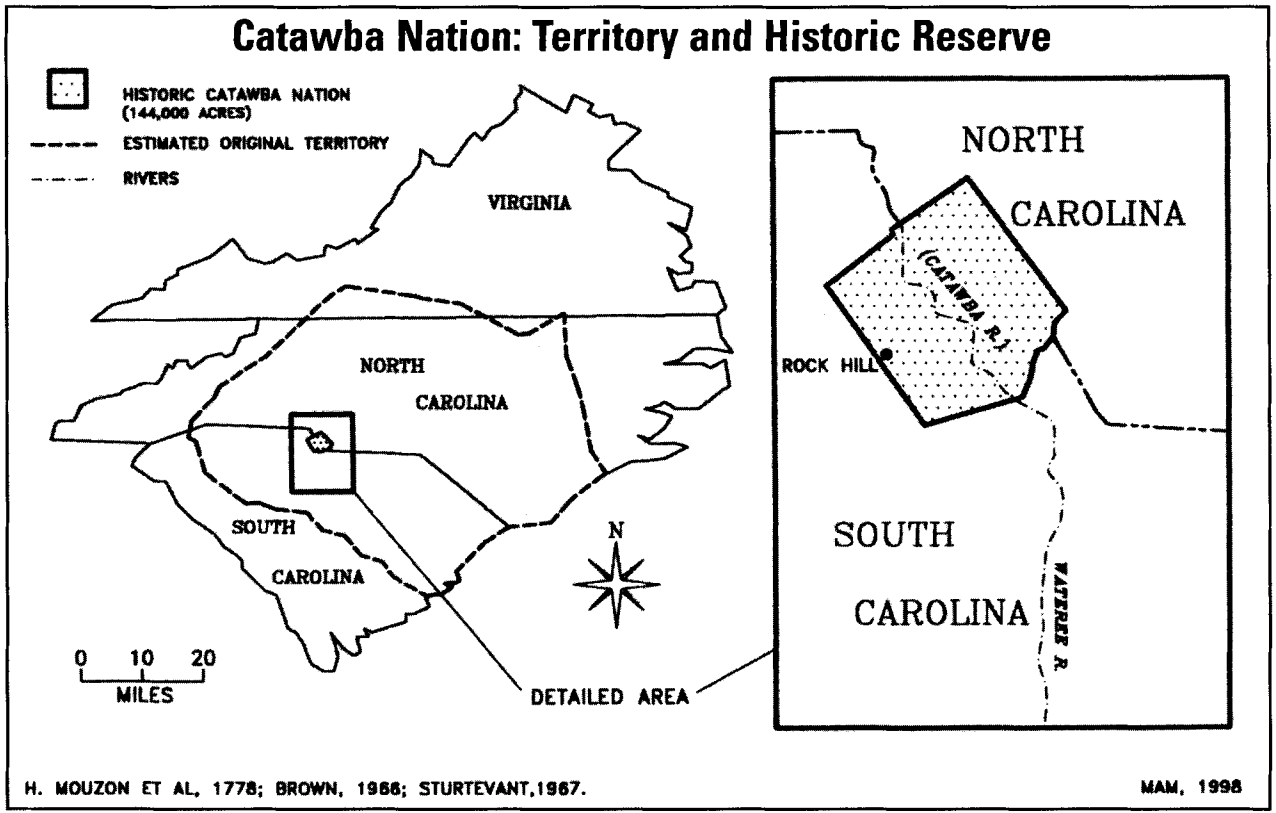
On 28 October 1980 the Catawba Indian Tribe, Incorporated of South Carolina filed the claim in the US District Court of South Carolina. The Catawba claimed the current right to own and possess approximately 144,000 acres of land at the northern border of South Carolina immediately south of Charlotte together with trespass damages in an unstated amount (see Figure 3).[3]

The Catawba premised their ownership claim upon an alleged grant to the Catawba from the King of England in 1760 by the Treaty of Pine Tree Hill. The tribe alleged that a later voluntary sale of the land by the Catawba to the state of South Carolina, pursuant to a treaty in 1840, was void, causing all subsequent transactions since that time from the state to present-day landowners to be void. The basis for this contention was a federal statute known as the Nonintercourse Act,[4] which required federal approval or consent for the transfer of Indian tribal land. The Catawba, however, alleged that this consent had never occurred.

The defendants were seventy-six individuals, companies, and public entities that were named for two reasons: (1) because of their own property interests in the area and (2) to act as representatives of a putative defendant class alleged to consist of everyone who had property interests in the claimed land. Among the group of representative defendants were the state of South Carolina and various local municipalities, a number of individual residents and some prominent entities, including Springs Corporation, Duke Power Company, Southern Railroad, Celanese Corporation, Wachovia Bank, and Jim and Tammy Bakker's infamous Heritage Village, located within the claim area. Beyond the original group of representative defendants, no one ever came to know precisely how many landowners would have been included. However, knowledgeable estimates assumed over 60,000 separate land interests.

With the filing of the complaint came a motion that the Catawba, represented principally by the Native American Rights Fund, hoped would result in the immediate technical inclusion in the litigation of everyone in the claim area. This motion, which would certify the defendant class, would enhance the tribe's political leverage. However, the named defendants sought to have the certification issue deferred pending resolution of a motion to dismiss premised upon a 1959 federal statute commonly referred to as the Catawba Termination Act.[5] When the case was forced to an end by the Catawba Land Claim Settlement Act some thirteen years later, the impact of the Catawba Termination Act on the underlying claim was still being litigated.

Figure 3



The historic Catawba Nation held a grant to 144,000 acres, a fragment of the reconstructed original territory. The contemporary reservation, just southeast of Rock Hill, South Carolina, is only 714 acres (map prepared by Michelle A. Mestrovich).

THE CATAWBA TERMINATION ACT

The Catawba Termination Act had been passed during a period in the 1950s and early 1960s when Congress sought to end federal paternalism toward Indians. A dozen of these acts were passed affecting approximately one hundred tribes or groups of Indians, including the South Carolina Catawba. In addition to providing certain benefits to the Catawba, the Termination Act went on to provide that, upon its effective date in 1962, all federal statutes that affect Indians because of their status as Indians would no longer be applicable to them and, "the laws of the several States shall apply to [the Catawba] in the same manner they apply to other persons or citizens within their jurisdiction."[6]

In the motion to dismiss, the named defendants asserted that, by the terms of the Termination Act, the laws of South Carolina, including its statutes of limitations—laws that limit the time within which judicial action must be taken—became applicable to the Catawba. Thus it was argued that even if state laws of limitations as a general rule do not serve to bar federal Indian tribal claims because of the passage of time, they did so in this case by the expressed intent of Congress.[7] Moreover, by the passage of more than ten years since the effective date of the Catawba Termination Act, the defendant landowners urged that the South Carolina limitations laws applicable to the transfer of real estate would serve to bar this claim in its entirety.

Responding to the defendants' suggestion that the resolution of this issue would be an "expeditous" way by which to proceed, Senior Judge Joseph Willson determined to defer the class-action issue and take up instead the Termination Act issue presented by the motion to dismiss. Following extensive briefing and argument, he granted the motion and dismissed the case. In doing so, he ruled that the "explicit statutory language directed that state law apply to the Catawbas" once the act became effective and that state law served to bar the claim in its entirety because more than ten years had passed between the effective date of the act and the filing of the claim.[8]

The Catawba appealed to the Fourth Circuit Court of Appeals. A three-judge panel of that court reversed Judge Willson in a two-to-one split.[9] The majority opinion, written by Senior Judge John Butzner, read the text and the legislative history of the Termination Act as intending only to end federal supervision and assistance. "[T]here is no explicit or implicit indication of any desire to extinguish any tribal claims against [present-day landowners]." Judge K. K. Hall dissented, finding the Termination Act unquestionably to have made South Carolina laws fully applicable to whatever claim the Catawba may have had to ancestral land.

The defendants sought and were granted a rehearing *en banc* by all of the active judges of the Fourth Circuit. Following another round of briefing and another oral argument, the *en banc* panel of the circuit, by a split of four-to-three, affirmed the original panel's ruling.[10] Although concurring with the majority, Judge Francis Murnahan authored an interesting separate opinion. Despite his reading of the Termination Act, Judge Murnahan worried about the ultimate consequences for private owners of the land being sought by the claim. He wrote that "innocent good faith landowners" were left with the "awesome risk" that the absence of any political resolution of the dispute by

Congress "might lead to the Queen of Spades ultimately winding up in the hands of the individual owners."

SUPREME COURT REVIEW

The defendants filed a petition for review with the US Supreme Court urging that this preliminary issue be resolved before forcing innocent landowners to suffer a lengthy and expensive trial on the merits of the Nonintercourse Act claim during which time land in the area would be rendered essentially non-transferable because of the litigation cloud on the title. With the encouragement of Senator Strom Thurmond of South Carolina, the US Solicitor General ultimately supported the petition and the Supreme Court determined to take the case.

In June 1986, by a six-to-three vote, the Supreme Court agreed with Judge Willson's interpretation of the meaning of the Catawba Termination Act.[11] In an opinion written by Justice John Stevens, the majority held that the Termination Act in "unmistakably clear language" made state laws apply to the Catawba in precisely the same fashion that they applied to others. Justice Harry A. Blackmun, writing for the dissenters, read this same "unmistakably clear language" differently. Starting from the assumption that any ambiguity was to be resolved in favor of the Indians, he interpreted this language to make state statutes applicable, but not to a federal claim that pre-dated the passage of the act.

Having ruled that state laws were applicable to the Catawba, the Supreme Court remanded back to the Fourth Circuit the question of what the impact of that application would be under South Carolina law. In dismissing the case, Judge Willson had determined that South Carolina laws would work to bar the claim in its entirety, but the Fourth Circuit majority had never reached that issue given its initial interpretation of the Termination Act.

SOUTH CAROLINA LIMITATIONS LAW

Back in the fourth circuit, still sitting *en banc*, the state law issue was briefed and argued twice. During this time, the defendants also filed an unusual motion to certify the state law issue to the Supreme Court of South Carolina for resolution because the issue had never been specifically addressed by South Carolina courts. Within three weeks of the arrival of the case before the South Carolina Supreme Court, however, the highest state court in effect said "thanks, but no thanks" by issuing an order declining to answer the questions certified.[12]

With nothing else to do but decide the state law issue, the Fourth Circuit acted, this time by a split of four-to-two.[13] South Carolina has a limitations statute providing that no action for the recovery of real property may be brought unless the plaintiff was possessed of the premises within ten years of the commencement of the action, a requirement that the Catawba clearly could not meet. However, the majority relied on another statutory provision that purports to create a "presumption" of possession, once a plaintiff establishes "legal title." The defendants argued that "legal title" meant "record title" as reflected in the official public land records that the Catawba did not

have because the records reflected ownership elsewhere. Nevertheless, the Fourth Circuit majority found that, assuming the allegations of the complaint were true for purposes of the motion, the Catawba had "legal title" premised upon the king's original grant.

Under the South Carolina statute relied upon by the majority, once "legal title" was shown to belong to the Catawba, the presumption of possession could only be rebutted by showing that the land had been held and possessed "adversely" to such legal title for ten years before the commencement of such action. Because South Carolina is one of the few (if not the only) jurisdictions not to allow a series of successive "adverse" possessors to aggregate their time of possession for purposes of demonstrating adverse possession, the Fourth Circuit majority's ultimate holding was that the Catawba's claims against the named defendants were barred under these South Carolina limitations provisions only as to those properties that had been held and possessed "adversely" by one person for ten years after 12 July 1962, the date the Termination Act became effective, and before 28 October 1980, the date the litigation commenced.

In summary, the US Supreme Court held that, by the passage of the Catawba Termination Act, South Carolina state laws affecting the transfer of land did apply to the land sought by the claim. However, the Fourth Circuit's interpretation of those laws limited the claim to those parcels that had been bought and sold so frequently that no one person had held them for ten successive years between 1962 and 1980. Those parcels shown to have been continuously held by one owner for ten years or more would be free of the claim.

RESUMPTION OF THE PROCEEDINGS BELOW

Having spent a nine-year interlude seeking justice on high, the case was returned to the district court, Senior Judge Willson still presiding. At this juncture, the question became whether Judge Willson would proceed to apply the Fourth Circuit's limitations ruling to the properties of the original group of named defendants or take up the plaintiff's deferred motion to certify a defendant class. Judge Willson chose to deal with the remaining limitations issues. This decision prompted the Catawba to lodge a mandamus petition—an extraordinary writ compelling performance of an act that the law recognizes as a duty—with the Fourth Circuit to try to force the district court to entertain the class certification issue. The Fourth Circuit instead declined to entertain the mandamus petition.

Ultimately, forty-six of the original named defendants filed a supplemental brief together with dozens of supporting affidavits asserting that under the Fourth Circuit's ruling, adverse possession was demonstrated as to their respective properties for the requisite period of time and therefore the claim should be dismissed. In total, these affidavits covered more than one thousand separate parcels of land.

Although the substance of the affidavits varied considerably in detail, all of them substantially asserted that the defendant (or a predecessor) had continuously occupied or possessed the property for ten years during the requi-

site period, had treated the property as his or her own, paid taxes thereon, and taken steps to protect it against trespassers. The principal issue became whether or not those representations were sufficient, without extensive recitation of specific acts of possession, to demonstrate "actual, open, notorious, hostile, continuous and exclusive possession," the standard test for determining that land had been held "adversely."

Judge Willson found that the affidavits were sufficient and in a series of judgment orders dismissed substantial numbers of properties from the case as well as some of the named defendants whose entire holdings in the claim area were the subject of affidavits. The Fourth Circuit, still sitting *en banc*, affirmed in large part by an undivided decision.[14] "To survive the claimants' motions for summary judgment, the Tribe must establish that there is a genuine issue as to whether the claimants have satisfied South Carolina's adverse possession requirements." The tribe never established this.

Having so disposed of the pending adverse possession issue, the district court finally invited briefs from the parties on the class certification motion filed by the Catawba with the original complaint. The defendants responded by asserting that certification was inappropriate because each potential class member could raise an individualized, fact-based defense of adverse possession. Moreover, by the passage of now more than twenty years since the effective date of the Termination Act, the named defendants also argued that another South Carolina limitations doctrine—the so-called presumption of grant doctrine—now operated to bar litigation against all landowners except the original group of named defendants. The Catawba asserted that without certification they would be forced to individually sue and individually serve process upon each of the more than 60,000 landowners in the claim area and that, moreover, the filing of the original complaint against the named defendants, together with the class certification motion, had tolled any unexpired limitations period as to everyone in the alleged class.

Judge Willson denied the motion to certify and also denied a motion to certify the question for immediate appeal. As a result, the Catawba were forced to seek reversal of the certification decision through another mandamus petition. The petition was subsequently denied by the Fourth Circuit *en banc* in an opinion holding that the district court's conclusion that the individualized nature of the defenses of the potential class members made certification inappropriate did not "present a proper case for use of the writ of mandamus."[15] In so holding, the Fourth Circuit expressly declined to address the alternative ground for the certification decision below; namely, the application of the presumption of grant doctrine to bar new litigation against any landowner beyond the original group of defendants. The viability of this defense was thus left to further litigation.

SETTLEMENT

At this stage, the Catawba had no choice but to begin serious preparations for the filing of more than 60,000 separate complaints against all the individual landowners in the claim area. Even by their own reading of applicable limita-

tions doctrines, the Catawba conceded that these complaints had to be filed, if they were ever to be filed, by October 1992.

The complaints, together with a separate summons, were drafted and printed. A docket number was obtained and an anticipatory order entered by the district court setting out a procedure and schedule for service and a response by the thousands of new defendants. It would have been the largest single filing of separate complaints in the history of the federal court system. The United States District Court in South Carolina sought emergency funding to be in a position to deal with the anticipated blizzard of paperwork.

As might be expected, the anticipated filing also generated a firestorm of political heat in the claim area and in the state generally. Representatives of the Catawba, the governor, and the congressman from the area, John Spratt, together with a representative of the secretary of the Interior, reacted by entering into intense negotiations designed to try to reach a settlement satisfactory to all concerned prior to the October deadline. On the basis of the progress made by August 1992, Congress, by voice vote, enacted legislation purporting to toll any unexpired state statute of limitations for an additional year in order to allow for the necessary drafting of a definitive settlement agreement and the passage of enabling legislation in both South Carolina and Congress. On the basis of that legislation, the Catawba determined to defer the filing of the new litigation for a year.

As it began to take shape, the settlement contemplated that the Catawba would receive certain federal and state entitlements, including restoration as a federal tribe, and the payment of $50 million. In exchange, the Catawba agreed to federal legislation extinguishing the claim.

Passage of the necessary legislation in Washington, DC came to be difficult. Basically, there was hostility from both directions: (1) those who thought the Catawba had won too much in federal monies, particularly given their lack of litigation success and federal status and (2) those who thought the Catawba had not won enough, particularly relative to other Indian land claim settlements. Congressional passage of the legislation occurred in the middle of the night in August 1993, shortly after passage of the administration's budget legislation. Critical administration support for the passage of the Catawba legislation may well have turned on the president's need to line up votes for passage of his omnibus budget legislation.

CONCLUSION

Given the general direction of the litigation, a complete defense may have been available to all the landowners in the claim area except those few in the original group of defendants who were unable to avoid the implications of the Fourth Circuit's interpretation of South Carolina's convoluted limitations laws. To the extent the claim would have survived as to certain parcels of land, the underlying merits of the Nonintercourse Act case still remained to be tried, a process that could have easily consumed another thirteen years.

However, for a variety of reasons, a legislative settlement such as the one ultimately achieved is far preferable to litigation of Indian land claims such as

this one. The settlement provided for an equitable resolution of the claim, while at the same time relieved present-day landowners and their land from continued jeopardy.

A legislative resolution is preferable in the first place because Indian land claims litigation is very expensive and protracted. As the *Catawba* case illustrates so well, Indian land claim litigation is extraordinarily complex and time-consuming. A considerable amount of time and effort must be spent by both sides on legal and historical research—much of it on issues that are novel.

Second, the historic nature of the relevant facts and documents in dispute makes it less than certain that one could ever establish in a court of law precisely what did or did not occur. Of course, there are no living witnesses and the effort to retrieve documents can never be a precise science. In the *Catawba* case itself, for example, it was acknowledged that the Treaty of Pine Tree Hill, upon which the tribe premised its original ownership of the land at issue, had been missing for several centuries. Thus, the "search for truth" through litigation and the adversarial process is necessarily somewhat suspect in this kind of case.

Third, if there was an historical injustice done to the Indians in a particular circumstance, the United States or a predecessor nation was generally the culprit—either because it acted in the taking of the land or failed to act as guardian of Indian tribal interests by preventing it. Yet in cases for which the *Catawba* case serves as an example, the United States is not a party. As one historian has observed: "By standing on the sidelines as Indians and non-Indians fight these bitter court battles, the federal government has encouraged an impression that Indian advances can be made only at the expense of non-Indians who did not commit the acts alleged as the basis of the suit"[16] Surely there is an additional inequity in forcing present-day landowners to defend themselves against ancient claims not based upon any wrongdoing on their part, while the United States sits on the sidelines or assists in the prosecution. Judge Murnahan was right when he worried that, absent a political settlement, "the Queen of Spades [might] ultimately wind up in the hands of [innocent good faith] landowners." To the extent that an Indian land claim has legal or moral foundation, it deserves to be addressed or remedied by the federal government which ought to bear the burden of having failed to act over the years.

Finally, the mere pendency or hint of litigation of this sort—whatever its ultimate resolution—causes substantial uncertainty with respect to the marketability and taxability of the affected land. The public and private economic and emotional concerns created by this uncertainty only increase as long as litigation continues. All of this leaves a heavy social cost because of the strain placed on relations between Indians and non-Indians who otherwise live and work together in the affected area.

NOTES

1. Much of this essay was first published in John C. Christie, Jr., "The Catawba Case—Extraordinary by Any Measure," *Title News* 73:3 (1994): 6–9.

2. PL 103-116.

3. The 144,000-acre parcel depicted in Figure 3 is derived from the end-map copy of the original source: Henry Mouzon, et al., "An Accurate Map of North and South Carolina with Their Indian Frontiers...," 1778. This map is reproduced on the inside cover of Douglas Summers Brown, *The Catawba Nation: The People of the River* (Columbia: University of South Carolina Press, 1966). The reconstruction of Catawba original territory is based on a map (1967) by William C. Sturtevant, "Early Indian Tribes, Culture Areas, and Linguistic Stocks," in *The National Atlas of the United States of America* (Washington, DC: US Geological Survey, 1983). For additional background on the ethnohistory of the Catawbas, see Charles M. Hudson, *The Catawba Nation* (Athens: University of Georgia Press, 1970); Hudson, "The Catawba Indians of South Carolina: A Question of Ethnic Survival," in *Southeastern Indians: Since the Removal Era,* ed. Walter L. Williams (Athens: University of Georgia Press, 1979), 110–120; and H. L. Scaife, *History and Conditions of the Catawba Indians of South Carolina* (Philadelphia: Indian Rights Association, 1896).

4. 25 USC § 177 (1976). The term *nonintercourse* refers to restrictions on the alienation of Indian lands contained in a series of more comprehensive acts regulating Indian affairs, each known as the Indian Trade and Intercourse Act, which was first enacted in 1790 and most recently modified in 1834.

5. 25 USC §§ 931-938 (1976).

6. 25 USC § 935 (1976).

7. 476 US 498, 507. "[F]ederal policy may preclude the ordinary applicability of a state statute of limitations [for a federal claim brought by an Indian tribe] in the absence of a specific congressional enactment to the contrary." *South Carolina* v *Catawba Indian Tribe,* 476 US 498, 507 (1986), citing *County of Oneida* v *Oneida Indian Nation,* 470 *US* 226 (1985).

8. Memorandum and Order of 10 June 1982, ¶ A(1).

9. *Catawba Indian Tribe* v *South Carolina,* 718 F.2d 1291 (4th Cir., 1983).

10. *Catawba Indian Tribe* v *South Carolina,* 740, F.2d 305 (4th Cir., 1984).

11. *South Carolina* v *Catawba Indian Tribe, Inc.,* 476 US 498 (1986).

12. Order of September 1987.

13. *Catawba Indian Tribe* v *South Carolina,* 865 F. 2d 1444 (4th Cir., 1989).

14. *Catawba Indian Tribe of South Carolina* v *State of South Carolina,* 978 F.2d 1334 (1992). The lengthy opinion also disposed of the Catawba's other arguments involving smaller numbers of landowners. The Catawba filed a petition for certiorari from this opinion. The petition was denied by the Supreme Court; 113 US S Ct. 1415 (1993).

15. *In re Catawba Indian Tribe of South Carolina,* 973 F.2d 1133 (4th Cir., 1992).

16. F. G. Hutchins, "Righting Old Wrongs," *The New Republic,* 30 August 1980, 14.