April 9, 1973

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MEMORANDUM TO: Messrs. Willens, Lapin and Carter

RE: Marianas Islands

This memorandum will expand the comments by Mr. Marcuse of the Department of Justice concerning federal legislation towards American Indians. Particular emphasis will be placed upon the federal land policy in this area. A second memorandum will be needed to supplement the information contained herein.

Background

The source of federal power over Indian affairs is the Constitution. The commerce clause specifically grants authority to regulate commerce with Indian tribes. During the early nineteenth century, the federal government entered into treaties with nearly every tribe within the United States and, as a result, tribes were considered sovereign. Thus, the use of treaties rather than statutes in dealing with the Indian created an international as opposed to a national relationship.

In 1871 the practice of treaty-making with the Indians was terminated with the passage of the Indian Appropriation Act, Rev. Stat. §2079 (1875), 25 U.S.C. §71, which provided that:

So, even though citizens, limits on land alienation. However, underlying theory is dependence. Harder to argue in Marianas case.

> No Indian nation or tribe wihin the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made or ratified with any such Indian nation or tribe prior to March 3, 1971, shall be invalidated or impaired.

Due to this legislative enactment, the relationship between the federal government and Indian Tribes became controlled by statute. Nonetheless, the doctrine of tribal sovereignty remained rooted in the conception of tribes as independent nations.

In Cherokee Nation v. Georgia, Chief Justice Marshall stated that a Cherokee tribe could not be classified as a foreign nation or a state. Instead, the Indians relationship to the federal government "resembles that a ward to his guardian." 30 U.S. at 17. This principle was upheld in U.S. v. Kagama, 118 U.S. 375 (1886), when the Supreme Court denied to the states any control over Indian tribes within their borders:

> These Indian tribes are the wards of the nation. They are communities dependent on the United States....
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because...it has never been denied, and because it alone can enforce its laws on all the tribes. (original emphasis). 118 U.S. at 383-84.

Hence, even though tribes may be viewed as sovereign, the federal government has the exclusive power to restrict that sovereignty by protective legislation. Note, The Constitutional Rights of the American Tribal Indian, 51 Va. L. Rev. 121, 129 (1965).

Federal Land Policy

In 1887, Congress passed the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. §331 et. seq., which provided that individual Indians were to be allotted land on their reservations and that the United States was to hold the land "in trust for the sole use and benefit of the Indian" allottees. The alloted land was not to exceed 160 acres of grazing land or 80 acres of agricultural land. 25 U.S.C. §331. Twenty-five years after allotment, the allottees were to receive the land discharged according to the trust held by the United States and to receive a patent "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. §338. The term "patent", however, has been described by the Supreme Court in Monson v. Simonson, 231 U.S. 341 (1913) as inadequately describing an allottee's interest because,

> Congress...was careful to avoid investing the allottee with the title in the first instance, and directed that there should be issued to him what...is in reality an allotment certificate... 231 U.S. at 345.

The trust period of the allotted lands has been regularly extended by Executive Order. See note following 25 U.S.C. §348, and 25 U.S.C. §462, which provides: "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress."

The power of Congress to legislate concerning the tribal property of the Indians has been frequently affirmed by the courts. See, e.g. Cherokee Nation v. Hitchcock, 187 U.S. 294. As stated by the Supreme Court in Sunderland v. United States, 266 U.S. 226, 233-34 (1924),

> Such [Congressional legislative power] rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal Government to safeguard their interests and protect them against the greed of others and their own improvidence.

Furthermore, the protection applies even though members of a tribe have received citizenship. Cherokee, supra, 187 U.S. at 307-08. See, Beck v. Flournoy Live Stock & Real Estate Co., 65 F.30 (8th Cir. 1894).

Accordingly, the federal policy of maintaining restrictions on the Indian's control of land has been consistently upheld. The purpose of the allotment system was to designed to protect the Indian's interest and "to prepare the Indians to take their place as independent

qualified members of the modern body politic," Board of Comm'rs v. Seber, 318 U.S. 705, 715 (1943), while the United States retained the power to scrutinize the various transactions by which the Indian might be separated from that property. Squire v. Capoeman, 351 U.S. 1, 9 (1956). See, 18 Cong. Rec. 190-92 (1886).

The Bureau of Indian Affairs

The Bureau of Indian Affairs (hereinafter referred to as the "BIA") was established in 1849 as a branch of the Interior Department. Act of Mar. 3, 1849, ch. 108, §5, 9 Stat. 395 (codified at 25 U.S.C. §1 (1964)). The Bureau administers federal Indian policy under the broad statutory authority delegated by the Secretary of the Interior. 25 U.S.C. 1a, 2 (1964). The BIA possesses final authority over most tribal actions as well as many decisions made by Indians as individuals. For example, BIA approval is required in certain individual wills, Id. at §373 (1964), and when a tribe enters into a contract, Id. at §81, expends money, Id. at §§13,145, or amends its constitution. Id. at 476. See generally, Note, The Indian: The Forgotten American 81 Harv. L. Rev. 1818(1968).

The supervision by the BIA over the Indian affairs extends to the appropriate use of a particular piece of land. See 25 C.F.R. §§ 131.2, 131.5. Most importantly,

during the trust period the Secretary of the Interior must approve the issuance of patents in fee, Id. at §121.2(a), the leasing, Id. at §131.5(a), or the subleasing of an allotted land, Id. at §131.12(a). Application for patents in fee, Id. at §121.1, or leases Id. at §131.5(b)(1). The BIA maintains an office of records for all the trust lands. Id. at §120.1.

The Secretary of the Interior is, however, not the lessor of the allotted land and he can grant a lease only in behalf of: persons of an unsound mind, Id. at §131.2(a)(1); an orphaned minor, Id. at §131.2(a)(2); an undetermined heir of a decedent's estate, Id. at §131.2(a)(3); the heirs or devisees of an allotted who have not been able to agree upon a lease for a period of three months, provided that the land is not in use by the heirs or devisees, Id. at §131.2(a)(4); Indians who have given the Secretary written authority, Id. at §131.2(a)(5); and Indians whose whereabouts are unknown, Id. at §131.2(b).

The lessee is required to furnish a surety bond, in an amount satisfactory to the Secretary, guaranteeing compliance with the terms of the lease, Id. at §131.5(c) and may be required to provide insurance in order to protect any improvements on the leased premises. Id. at §131.5(d).

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