

A BILL TO RATIFY CERTAIN TRANSFERS OF LAND FROM,
BY, OR ON BEHALF OF THE DELAWARE NATION OF INDI-
ANS

JUNE 29, 1999.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources,
submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 562]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 562) to approve and ratify certain transfers of land and natural resources by or on behalf of the Delaware Nation of Indians, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. RATIFICATION OF TRANSFERS; EXTINGUISHMENT OF TITLE AND CLAIMS.

(a) APPROVAL AND RATIFICATION OF PRIOR TRANSFERS.—Any transfer of land or natural resources located within what is now the boundaries of the State of New Jersey or any transfer of hunting or fishing rights related thereto, from, by, or on behalf of the Delaware Nation of Indians, which occurred prior to 1833, including any transfer pursuant to any treaty, compact, deed, Act, or statute of the State of New Jersey, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any tribe, nation, pueblo, or band of Indians, or any member thereof (including without limitation, the Trade and Inter-course Act of 1790 (ch. 33, sec. 4; 1 Stat. 137, 138)), and Congress does approve and ratify any such transfer effective as of the date of the transfer.

(b) ABORIGINAL TITLE EXTINGUISHED.—To the extent that any transfer described in subsection (a) involves land, natural resources, or hunting or fishing rights to which the Delaware Nation of Indians had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title.

(c) CLAIMS EXTINGUISHED.—All claims against the United States, the State of New Jersey or subdivision thereof, or any other person or entity, by the Delaware Nation of Indians arising before December 31, 1832, and based on any interest in or right to land or natural resources within the boundaries of the State of New Jersey, (including without limitation, claims for trespass damages, claims for use and occupancy, or claims involving hunting or fishing rights) shall be deemed to have been extinguished as of December 31, 1832.

(d) DEFINITION.—For the purposes of this section, the term “Delaware Nation of Indians” means the Delaware Nation of Indians, the Delaware Tribe of Indians, the Delaware Tribe of Western Oklahoma, any member of those tribes, and any descendant, predecessor, or successor in interest of those tribes and any member thereof.

PURPOSE OF THE BILL

The purpose of H.R. 562 is to approve and ratify certain transfers of land and natural resources by or on behalf of the Delaware Nation of Indians.

BACKGROUND AND NEED FOR LEGISLATION

In 1756, a reservation (the “Brotherton Tract”) was created for the Lenape Indians in Burlington County, New Jersey. By 1800, most of the Lenapes had left the reservation. In 1801, at the request of the Lenapes, the State of New Jersey appointed commissioners to sell the reservation, and to place the proceeds in trust for the Tribe to finance their relocation.

In 1832, a Lenape representative appeared before the New Jersey State Legislature and claimed that the 1802 sale did not terminate the Tribe’s hunting and fishing rights. The Legislature authorized payment to the Lenapes in exchange for the extinguishment of all the Lenape’s rights to the property in New Jersey.

The 1802 sale of the Brotherton Tract and the subsequent 1832 financial agreement between the State of New Jersey and the Lenape Indians were never ratified by the United States Congress pursuant to an act to regulate trade and intercourse with the Indian tribes (Act of July 22, 1790, ch. 33, 1 Stat. 137, codified as amended at 25 U.S.C. 177), in which the United States Government assumed all responsibility over Indian land transactions. Enactment of H.R. 562 would recognize and ratify the 1802 sale of the Brotherton Tract, an action in which the federal government would meet its trust obligation under the 1790 Act.

COMMITTEE ACTION

H.R. 562 was introduced on February 3, 1999, by Congressman Jim Saxton (R–NJ), and was referred to the Committee on Resources. On April 28, 1999, the Full Resources Committee met to consider H.R. 562. At that time, Mr. Saxton offered an amendment in the nature of a substitute making technical corrections to the bill, and adding a definition for “Delaware Nation of Tribes.” The amendment was adopted by voice vote. The bill, as amended, was then ordered favorably reported to the House of Representatives by a roll call vote of 21–16, as follows:

Committee on Resources
U.S. House of Representatives
106th Congress

Full Committee

Date 4-28-99Roll No. 1Bill No. H.R. 562 Short Title Land Transfers by Delaware Nation of Indians.Amendment or matter voted on: Final Passage

Member	Yea	Nay	Present	Member	Yea	Nay	Present
Mr. Young (Chairman)	X			Mr. Miller		X	
Mr. Tauzin				Mr. Rahall			
Mr. Hansen	X			Mr. Vento		X	
Mr. Saxton	X			Mr. Kildee		X	
Mr. Gallegly				Mr. DeFazio			
Mr. Duncan	X			Mr. Faleomavaega		X	
Mr. Hefley	X			Mr. Abercrombie		X	
Mr. Doolittle	X			Mr. Ortiz		X	
Mr. Gilchrest				Mr. Pickett		X	
Mr. Calvert				Mr. Pallone			
Mr. Pombo	X			Mr. Dooley			
Mrs. Cubin	X			Mr. Romero-Barcelo			
Mrs. Chenoweth				Mr. Underwood		X	
Mr. Radanovich	X			Mr. Kennedy			
Mr. Jones	X			Mr. Smith		X	
Mr. Thornberry				Mr. John			
Mr. Cannon				Mrs. Christensen		X	
Mr. Brady	X			Mr. Kind		X	
Mr. Peterson	X			Mr. Inslee		X	
Mr. Hill	X			Mrs. Napolitano		X	
Mr. Schaffer	X			Mr. Tom Udall		X	
Mr. Gibbons	X			Mr. Mark Udall		X	
Mr. Souder	X			Mr. Crowley		X	
Mr. Walden	X						
Mr. Sherwood	X						
Mr. Hayes	X						
Mr. Simpson	X						
Mr. Tancredo	X			TOTAL	21	16	

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation.—Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act.—As required by clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. Government Reform Oversight Findings.—Under clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform on this bill.

4. Congressional Budget Office Cost Estimate.—Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 22, 1999.

Hon. DON YOUNG,
*Chairman, Committee on Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 562, a bill to provide and ratify certain transfers of land and natural resources by or on behalf of the Delaware Nation of Indians, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Megan Carroll (for federal costs) and Marjorie Miller (for the impact on state, local, and tribal governments).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

H.R. 562—A bill to approve and ratify certain transfers of land and natural resources by or on behalf of the Delaware Nation of Indians, and for other purposes

H.R. 562 would approve and ratify any transfer of land or natural resources by or on behalf of the Delaware Nation of Indians that occurred prior to 1833 within the present boundaries of the state of New Jersey. The bill also would extinguish any title to the transferred lands and resources all claims against the United States and the state of New Jersey made by the Delaware Nation of Indians that are based on an interest in land or resources transferred prior to 1833.

CBO estimates that enacting H.R. 562 would have no significant impact on the federal budget. H.R. 562 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). CBO estimates that this mandate would not impose costs above the threshold established by the act (\$50 million in 1996, adjusted annually for inflation) in any of the five years following its enactment. The bill contains no new private-sector mandates as defined in UMRA.

In the early 1800s, the Lenape Indians—a band recognized as part of the Delaware Nation of Tribes—left their reservation in New Jersey. At the tribe's request, the state of New Jersey sold their land and placed the proceeds in trust for the tribe. In 1832, the state made an additional payment to the tribe to settle the tribe's claim to hunting and fishing rights on that land. These transactions were never ratified by the Congress, as required by the Trade and Intercourse Act of 1790, and so the land could be subject to claims on behalf of tribes claiming to be descendants of the Lenape. This bill would extinguish all such claims as of December 31, 1832, thus cutting off the primary legal avenue currently available to these tribes to pursue land claims in New Jersey. CBO has determined that this action would constitute a mandate as defined in UMRA because it would prohibit the tribes from exercising a legal right that they currently possess.

The cost of this mandate would depend on the outcome of any future land claims that might be brought under current law and would equal whatever compensation a tribe might realize from such a claim. No such claims have been brought, but the Department of the Interior is investigating whether members of the Delaware Tribe of Western Oklahoma are descended from the Lenape and could pursue a claim for that land on behalf of the tribe. That claim would be forestalled by this legislation.

CBO has no basis for predicting the outcome of this potential claim or any others that might be affected by this bill. We find it highly unlikely, however, that tribes would realize a monetary gain of more than \$50 million in any year within the five-year time frame established by UMRA, in part because any such claims are not likely to be settled within that period. Further, the initial monetary benefits, if any, probably would be less than \$50 million. Based on information provided by New Jersey state officials, CBO estimates that the value of the land that might be claimed by the Delaware Tribe of Western Oklahoma probably would initially be

less than that amount. Consequently, CBO estimates that the mandate would not impose costs to tribes above the UMRA threshold in any of the next five years.

Enactment of this bill could impose substantially greater costs on Indian tribes beyond the five-year period. Considering only the possible claim of the Delaware Tribe of Western Oklahoma, the value of a settlement could be much greater several years from now, should the tribe prevail and establish profitable businesses on the land. Any other claims that might be brought by this or other tribes under current law also would be precluded. CBO cannot predict whether such claims would be brought or would be successful.

In contrast, the state of New Jersey and local governments in the state would benefit from enactment of this legislation to the extent that it would preclude any land claims that might otherwise impose costs on those entities.

The CBO staff contacts are Megan Carroll (for federal costs) and Majorie Miller (for the impact on state, local, and tribal governments). This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act, but the costs imposed are below the threshold established by that Act.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State or local law. If the Delaware Nation of Tribes is found to have a claim against the United States regarding the Brotherton Tract, this bill would extinguish those claims in accordance with the Trade and Intercourse Act (25 U.S.C. 177).

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

DISSENTING VIEWS

We strongly oppose passage of this legislation which terminates the legal claims of the Delaware Tribe of Western Oklahoma without a public hearing. Over the years, this Committee has made strides in addressing past injustices to Indian tribes, but this bill represents a serious step backward, not only to the Delaware Tribe, but to all those who care about protecting the interests of American Indians and believe in due process

BACKGROUND

At the time of European contact, the Lenni Lenape, now commonly known as the Delaware tribe, originally inhabited lands along the river now bearing their name in the present state of New York, Pennsylvania, New Jersey and Delaware. Initial contact with Europeans is believed to have taken place about 1620; by 1682, due in most part to pressure from non-Indian settlement, the main body of the tribe was located in eastern Pennsylvania, where they signed the famous treaty with William Penn. Some tribal members remained in New Jersey, however, where in 1758 the colonial government created the Brotherton Reservation, containing approximately 3,000 acres of land in the present Evesham Township, Burlington County, New Jersey.

As with nearly every American Indian tribe in the East, the Delawares soon faced tremendous pressure to relocate away from the tide of non-Indian settlement or suffer the consequences. Individual tribal members forced to migrate during this period typically did not travel as part of a cohesive unit. Typically, some tribal members left early on, while others resisted removal as long as possible. The net result was that migrations usually became protracted, constantly shifting struggles against non-Indian encroachment. Many tribal members simply perished or dropped out of the group along the way. Among the Delaware, this meant the tribe was soon scattered along a migratory trail from New Jersey all the way to the Mississippi River. During the American Revolution, the main body of the Tribe was living in Ohio and Indiana. Some Delawares, not happy with the results of the War, traveled as far West as the Spanish territory of Missouri soon thereafter. Those Delaware tribal members still living on the lands set aside for them as the Brotherton Reservation in New Jersey faced tremendous pressure to sell their lands during this period.

In 1778, the Delawares were the first Indian tribe to negotiate a peace treaty with the new United States (7 Stat. 13). In 1788, the Constitution of the United States, including the "Indian Commerce Clause," became the law of the land. In 1790, Congress passed the Trade and Intercourse Act (as amended 25 U.S.C. 177), placing the authority over Indian land sales exclusively within federal jurisdiction. In 1801, the New Jersey legislature enacted legis-

lation (N.J. Session Laws 1801 Chap LXIII) authorizing the allotment and public sale of the Brotherhood Reservation. The State also compensated a small number of tribal members for lost hunting and fishing rights on these small lands in 1832. These acts, the subject of the present controversy, may have violated the Trade and Intercourse Act.

The Delaware Tribe of Western Oklahoma and the Wichita Delaware Tribe of Indians are both Federally recognized tribes, and both are successors in interest to the Delaware/Lenape from the Brotherton Reservation in New Jersey. Both groups have received compensation from the Federal government in the past for lands in Indiana and Ohio, based on their shared status as successors to the "Delaware Tribe." At present only the Delaware Tribe of Western Oklahoma is pursuing any claims in New Jersey.

STATUS OF LAND CLAIM

The Delaware Tribe of Western Oklahoma began investigating their claim to the Brotherton Reservation lands in 1996, by correspondence with the Governor of New Jersey and the Department of Interior, including the Assistant Secretary for Indian Affairs. The Tribe was notified by letter on July 15, 1996 from the Office of the Solicitor, Department of Interior, that the Department would assist them in pursuit of their claim. Following this 1996 letter the tribe submitted additional information to the Department, which prompted the Solicitor to assure, in a March 29, 1999 correspondence, that he anticipated a review of the Tribe's claim would be completed by late summer of this year (1999). Passage of H.R. 562 would prematurely halt the review process.

The Chairman of the House Resources Committee received a letter from the Solicitor of the Department of Interior on April 28, 1999, the day the bill was marked up and voted on, strongly opposing passage of H.R. 562. (Attached). The Solicitor's correspondence noted that if concern over Indian gaming was a motivating factor behind the bill, such concern was "misplaced" for two reasons. First, any agreement reached over the land involving the Department of Interior would constitute "settlement of a land claim," which would require Congressional ratification. This would give Congress a clear opportunity at a later date to consider potential gaming issues. Second, if the Tribe negotiated some sort of settlement with the State of New Jersey, it would required gubernatorial concurrence.

H.R. 562 was rammed through the Resources Committee and marked up on a straight party line vote. All Democratic Members present voted against the measure. We are not taking a position on the merits of the Delaware Tribe of Western Oklahoma's legal claims without even benefit of a public hearing.

GEORGE MILLER.
 ENI FALEOMAVAEGA.
 PATRICK J. KENNEDY.
 DALE E. KILDEE.
 NEIL ABERCROMBIE.
 DONNA MC CHRISTENSEN.
 RON KIND.

MARK UDALL.
JAY INSLEE.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, DC, April 28, 1999.

Hon. DON YOUNG,
*Chairman, Committee on Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: We understand that H.R. 562, a bill "to approve and ratify certain transfers of land and natural resources by or on behalf of the Delaware Nation of Indians, and for other purposes" will be the subject of a full committee markup today. The Department strongly opposes passage of H.R. 562.

Our understanding is that a primary motivation for the proposed legislation is concern about the possibility that the Delaware Tribe of Western Oklahoma may be interested in establishing a gaming operation in the State of New Jersey, without first complying with the gubernatorial concurrence requirement for off-reservation gaming found in Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719. The idea is that the Tribe would seek to settle its claim to land in New Jersey (a claim based on an alleged violation of the Non-Intercourse Act, 25 U.S.C. § 177) and seek to game on the land without gubernatorial concurrence, arguing that it is a "settlement of a land claim" exempt from the section.

Such a concern is misplaced. In our view, to be eligible for the "settlement of a land claim" exemption from Section 20 and its gubernatorial concurrence requirement, the land at issue must have been obtained pursuant to a settlement that has been ratified by Congress. See the attached memorandum of November 18, 1998, from the Associate Solicitor for Indian Affairs.

This means that the Department would not accept into trust, as lands obtained in "settlement of a land claim" under section 20 of IGRA, any off-reservation lands obtained by the Delaware Tribe of Western Oklahoma in the State of New Jersey, unless Congress had ratified the settlement. The requirement of congressional ratification would obviously give Congress a clear opportunity to address potential gaming issues on such lands.

Our application of IGRA Section 20 is consistent with the Department's general policy on the settlement of Indian land claims. Whenever a tribe has raised a land claim based on the Non-Intercourse Act, we have made clear to all interests involved in settlement negotiations that Congress must ratify any settlement agreement. I am not aware of any land claim settlements based on the Non-Intercourse Act that purport to be valid absent such Congressional approval.

Not only is this bill unnecessary, but we strongly object to its approach of outright extinguishment of a legal claim without giving the adversely affected party the benefit of any hearing on the merits. The federal courts are the usual and proper forum for examining the merits of such claims, including the factual history and applicable legal standards on which such claims are based.

Finally, although we have not had an opportunity to consult with the Department of Justice regarding this matter, the Department of Interior is concerned that enactment of H.R. 562 might give rise to a claim for compensation by the Delaware Tribe of Oklahoma against the United States.

Neither the Department of the Interior nor the Department of Justice have had adequate opportunity to review the factual or legal underpinnings of the Delaware Nation's claim. Therefore we cannot comment on its merits or lack thereof. But to extinguish such a claim outright in these circumstances, without any investigation or consideration, raises serious questions of fairness and due process. This is especially the case when, as explained above, the apparent motivating concern about Indian gaming cannot be squared with IGRA's requirement that gubernatorial concurrence be obtained, or that any settlement that might be exempt from section 20's requirement be ratified by Congress.

For these reasons, the Department strongly opposes the enactment of H.R. 562.

Sincerely,

JOHN D. LESHY,
Solicitor.

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