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COMMENTARY

The Continuing Saga of Indian Land Claims

Not All Aboriginal Territory is Truly Irredeemable

IMRE SUTTON

Indian claims to land have continued to occupy the courts and the US Congress. While the era of the larger territorial claims adjudicated by the Indian Claims Commission has passed, many surviving cases remain unresolved and others focus on new or continuing issues. This mini-symposium reports on the viability of settlement acts; the gnawing questions of surviving aboriginal title; the conflict over submerged lands; the status of adjudicated cases for which tribes have refused monies; the convoluted issues of acknowledgment, landlessness, and land restoration; the quest for access, use, and protection of cultural resources; tribal efforts and judicial frustrations over land consolidation; and the special case of Hawaiian lands. Case studies include the Zuni, Catawba, and Coeur d'Alene.

Lest one believe too strongly that the nation is returning a quantum of acreage to Indian communities, readers should keep in mind that Indian land claims still remain in motion and that now and then limited land restoration does occur. For those who might worry that we are returning the continent to the tribes, fear not; the modicum of acreage restored is miniscule against the

Imre Sutton, editor of this mini-symposium, is professor emeritus of geography at California State University, Fullerton. He is the editor of *Irredeemable America: The Indians' Estate and Land Claims* (1985) and two previous symposia in the *American Indian Culture and Research Journal*, 12:2 (1988) and 15:2 (1991), and coeditor (with Richmond Clow) of *Indian Affairs and the Environmental Movement* (forthcoming).

square miles of extinguished territory. In recent years, one may have read that a court upheld the Shinnecock Indians' claim to bay frontage adjacent to their reservation on Long Island, or that the Oneida of upstate New York continue to lay claim to some 270,000 acres occupied by homes of more than 20,000 non-Indians.[1] In other instances we have learned that the Cheyenne-Arapaho still seek the restoration of lands forming part of Fort Reno, Oklahoma.[2] In the early 1990s the Havasupai of Arizona went to court to regain a sacred site threatened by mining, but to no avail.[3] Yet in 1999 the National Park Service committed itself to the restoration of some lands claimed by the Timbisha within Death Valley National Park.[4]

What are these events telling observers about a process that has gone on longer than the twentieth century? They do tell us that the retirement of the Indian Claims Commission (ICC) in 1978 did not ultimately resolve all tribal claims to aboriginal lands.[5] To be sure, after the demise of the ICC, many cases, unresolved or awaiting appeals, continued their courses of action through the US Court of Claims (now the Federal Claims Court) and occasionally moved as far as the US Supreme Court. For several adjudicated and funded cases, some Indian tribes, including the Western Shoshones, the Lakota and Teton Sioux, and the Pit River (Achomawi) Indians of northern California, have continued to squabble among themselves and have publicly rejected award monies. Perhaps these events were expected. Much less anticipated was that both recognized and unrecognized Indian communities would vigorously pursue efforts to recover some aboriginal acreage or to secure exclusive use of or access to sacred sites and other cultural resources. Many Indian communities have long been pursuing the acknowledgment process in hopes of regaining some minimal restoration of aboriginal lands.

While the courts continue to dominate the claims field, Congress has played an instrumental role in claims resolution by passing settlement acts that oftentimes award funds to purchase land but rarely restore land. A significant number of acts have resolved claims in the eastern United States; a few others affect tribes in the West. Included in this section are two case studies that reveal how the ICC and the courts have not always amply resolved claims conflicts and why tribes have turned from the judicial to the political process. An act "To Convey Certain Lands to the Zuni Indian Tribe for Religious Purposes" and the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 represent the culmination of seemingly endless efforts by attorneys on both sides to find satisfactory resolutions. Less well known tribal claims have also related to submerged lands, for which we review *Idaho* v. *Coeur d'Alene Tribe of Idaho.* Claims to aboriginal territory and to sacred sites, among others, will be reviewed within this essay. However, inter- and intra-tribal land issues will not be revisited.[6]

CONGRESS PASSES VARIOUS SETTLEMENT ACTS

To a certain extent, the legislative process has gained momentum over the judicial with respect to Indian land claims. The reason for this is not that Congress has always so readily consented to enacting appropriate remedies where the courts have not. It is inherent in the position of some observers that

land cannot—perhaps should not—be restored in so many instances by adjudicating claims against contemporary landowners.[7] But Congress has stepped in to resolve many conflicts because a direct land transfer to a tribe cannot be achieved, especially where there is no public domain coterminous with aboriginal territory. Some "successes," as has been the situation for the Passamaquoddy and Penobscot in Maine[8] or the Havasupai in Arizona,[9] have encouraged many other Indian communities to pursue a legislative resolution. While Congress has enacted legislation that hopefully resolves several claims, there are still other Indian communities lacking both recognition and land. Jack Campisi observed of eastern cases that, "Land, not as property but as self-identity, was the central issue. Land in the context of these claims was more akin to estate." And, as several tribal claims have ultimately been resolved, his point remains certain:

> the claims have had an effect on state-federal relations inasmuch as they put to rest the legal arguments that the original thirteen states had a special position in constitutional law which exempted them from congressional control in Indian affairs.[10]

Since 1985 most settlement acts have dealt with eastern land claims. The acts have enabled several agreements, including ones involving funding, recognition, and state and federal jurisdictional issues among eastern Indian communities. For example, amendments to the Rhode Island Indian Claims Settlement Act in 1987 recognized the Wampanoag Tribal Council of Gay Head. It is interesting to note that settlement lands in Rhode Island are subject to state civil and criminal jurisdiction and that the Indian Gaming Regulatory Act was amended so that "settlement lands shall not be treated as Indian lands."[11] With the passage of the original Rhode Island Indian claims act in 1978, the Narragansett, the tribe governed by the act, went to court in 1994 to oppose the proviso that settlement lands be subject to state jurisdiction.[12] The court contended that this was a valid conferral. However, in an earlier case it was determined that the "[S]tatute conferring state jurisdiction over Indian tribal settlement lands does not waive or abrogate a tribe's sovereign immunity."[13]

Other settlement acts were amended or initially enacted for various Indian communities in New England. For example, The Aroostook Band of Micmacs Settlement Act of 1991 establishes,

> the historic presence of Micmacs in Maine and the existence of aboriginal lands in Maine jointly used by the Micmacs and other tribes to which the Micmacs could have asserted aboriginal title but for the extinguishment of all such claims by the Maine Indian Claims Settlement Act of 1980.[14]

Under the act, Congress has established a land acquisition fund of $900,000. In 1986 the Houlton Band of Maliseet Indians Supplementary Claims Settlement Act was passed;[15] it also contained the land acquisition provision for $900,000. When the Mohegan Nation of Connecticut was recognized by

Congress, the tribe and state entered into mutual agreements to resolve all disputes between them. The town of Montville, the site of the Mohegan casino, has also agreed to resolve issues. At the time, a decision regarding ownership of certain lands within the state was pending.[16]

In general, such settlement acts extinguish all Indian claims to aboriginal territory, recognize the Indian community, and redefine its relationship to the state in which the Indians live, provide various services, and make certain funds available. For the Mohegan Nation of Connecticut, legislation was passed in order to facilitate the settlement of claims against the state and to remove any encumbrance to title. It also effectuated a workable relationship between the Indians and the town of Montville in which there are Mohegan land claims. In 1994 these Indians were formally recognized and the following year the federal government placed 244 acres in trust for them. In that same year the state and tribe entered into an agreement that would permit the Indians to purchase another 700 acres of aboriginal lands and establish a reservation. Additionally, the state conveyed 138 acres of ancestral lands to the tribe.[17] These provisions suggest the tenor of resolutions, varying from tribe to tribe, that have been hammered out in negotiations over the years.

In 1990, the Seneca of the Allegany Reservation in western New York received a $35 million settlement from the federal government and another $25 million from New York State in compensation for past inequities in land negotiations. More recently they have renegotiated 3,000 leases to residents of the city of Salamanca.[18] The Indians sought to raise rents relative to fair market value of lands and gained compensation of $60 million for losses incurred under prior leases. Renewals are for forty years and may be renewed for an additional forty years thereafter. The agreement did not resolve the issue over title to the land. Some 4 percent of lessees did not sign leases and in fact brought a suit, which was later dismissed.[19]

As for other claims, the Golden Hill Paugussetts, who number more than one-hundred members, claimed some ninety-one acres around Bridgeport, Connecticut in 1992. The tribe filed and lost their case but continue to seek federal recognition—a process that began in 1982. Ten years later, they filed suit for these ninety-one acres, a part of an original reservation. The tribe seeks to gain recognition and settlement monies to purchase additional land and open a casino.[20] Two other groups located near the Rhode Island-Connecticut border will have their cases heard in the near future. Professor Martin Glassner writes me that, "They want recognition and land expressly for the purpose of opening a...casino."[21] Of course, in Connecticut and surrounding states, Indians do comprehend the meaning of gaming income as they observe the success of the Pequots at Ledyard.[22]

The Seminole Land Claims Settlement Act, passed in 1987, sought to relieve potential economic hardships for residents of Florida from clouded land titles by clarifying an easement right held by the South Florida Water Management District. The state, the district, and the tribe entered into agreements that would not only transfer land, but would also establish settlement funds that the state and the water district will pay. As in other instances, the Seminole relinquish all claims to aboriginal title in the state.[23]

A few settlement acts have also been enacted for tribes elsewhere in the nation. The Saddleback Mountain, Arizona Settlement Act of 1995 finally resolved a controversy between the city of Scottsdale and the Salt River Pima-Maricopa Indians over lands abutting the northern boundary of their reservation. The act provided for joint purchase of land and the preservation of about half of it in a natural state for a public park and recreation.[24] The Puyallup land claims in Washington came to a satisfactory resolution in 1989.[25] Until recently the tribe possessed a mere 103 acres in the Tacoma area and about 99 percent of that land was owned by non-Indians. As a reservation community, they are "partially assimilating a major Northwest city [Tacoma] and three other smaller cities...within the boundaries of the federally designated reservation."[26] For years the tribe has claimed 20,000 acres throughout the Tacoma area, including 120 acres of tideland that was clouding title to lands in the industrial and port areas of Tacoma. The settlement act, passed after *Puyallup Indian Tribe* v. *Port of Tacoma*, restored 900 acres, including property for a marine terminal and industrial development, as well as fishery enhancement and recreation. Finally, the act created a multi-million-dollar trust fund.[27] The tribe relinquished any further claim to the 20,000 acres and gained a mutually exclusive right to enforce environmental laws. According to Professor Katherine F. Nelson, if the case had been further litigated rather than negotiated, development of the port area would have "essentially stopped."[28]

ALASKA NATIVES: THE AFTERMATH OF A LAND SETTLEMENT ACT[29]

More than a decade ago, observers portended some negative consequences of the formation of Native corporations in Alaska. They feared that because of a stipulation in the Alaska Native Claims Settlement Act of 1971 (ANCSA)[30] requiring corporate stock be open to non-members in 1991, several corporations might become dominated by non-Native peoples and more than one might fall into bankruptcy. Actually the Haida Corporation—a village corporation—filed for bankruptcy as early as 1985[31] and in 1986 the Bering Straits Native Corporation and the Thirteenth Region both filed. This concern continued in the immediate years before the 1991 regulations were to take effect. Congress in 1987 did amend the act so that both regional and village corporations could issue stock to Native children born after 1971 and, among other provisions, they could place restrictions on stock alienation and thus keep corporations under Native control.[32] It was also questioned whether Alaska Natives would be better off restoring tribal status, which would reestablish tribal governments and protect land.

The very selection of acreage within given corporations, following the enactment of ANCSA, which abolished all former land tenure, created uneasy and often unworkable configurations in terms of the sustainability of Native livelihood, specifically fishing and hunting. Of course, the division of ownership between surface rights to villages and subsurface rights to regional corporations might well have added to conflict and apprehension. The shift to

state control over fishing and hunting portended other unwelcome intrusions into Native affairs, although the Alaska National Interests Lands Conservation Act (ANILCA)[33] obligated the state of Alaska to manage such resources to protect subsistence uses. Back in 1985, not all of the 45 million acres to be selected by the corporations had been chosen. Meanwhile, the disposition of state-selected lands (103.5 million acres) and the utilization of federal acreage (110 million acres) raised other questions about the fragmentation of resources to sustain Native livelihoods.

The Alaska Native population lives largely in rural areas of the state. And in a state where as much as 60 percent of the population live in three urban centers—Anchorage, Fairbanks, and Juneau—subsistence economy still dominates the livelihood of most villagers. Subsistence as a way of life is very much an integral part of the social and spiritual side of Native culture. As a proviso in ANILCA, Congress sought to protect the continued subsistence use of federal public lands in Alaska. The state fish and game managers were obliged to give priority to rural resident subsistence users. This makes sense considering the predominately Native demography of rural Alaska. Litigation in recent years indicates that the state has not always lived up to the conditions of ANILCA and has led Alaska Natives to challenge, for example, seasons and bag limits on taking caribou and moose because, "the seasons were held to be arbitrary for failing to accommodate the village's customary harvesting of moose and caribou *throughout* the year."[34]

A continuing consequence of ANILCA is litigation springing from a requirement that subsistence fishing and hunting be given a priority over other uses for fish and wildlife on public lands. In *Alaska* v. *Babbitt,* for example, the crucial question turned on the meaning of the term *public lands.* At the district court level, it was argued that public lands embraced all Alaskan waters subject to the *federal navigational servitude.* But the court of appeals held that "subsistence priority applies to navigable waters in which the U.S. has reserved water rights."[35]

The questionable status of subsistence fishing and hunting has suggested other approaches: one to amend ANILCA to establish a Native community subsistence priority[36] and another to allocate subsistence rights based on economic need and the market system.[37] It should be understood that while some land configurations include considerable square miles, the fact remains that Native selection, village by village, within regional corporation bounds creates proprietary conflicts not all resolved by the provisions set up by ANSCA or ANILCA.

It was understood that the state and federal governments would protect Native subsistence fishing and hunting, but when this did not transpire, Title VIII of ANILCA required that rural Alaska residents be accorded a priority for subsistence on public lands. Congress also granted the state authority to implement this rural subsistence preference by passing appropriate law, which under Title VIII the state subsequently did. Thus, the state assumed this management responsibility with the blessings of the federal government. But Alaska's Supreme Court rejected this grant of rural priority as contrary to the state's constitution. In 1990, when the state did not act to amend its legislation, the federal government withdrew Alaska's certification and assumed its own implementation of Title VIII.

In the regulations promulgated by the secretary of the Interior there is a very narrow definition of *public lands* that states, "navigable waters generally are not included within the definition of public lands." The district court concluded that all navigable waters were encompassed by the navigational servitude, but the ninth circuit disagreed. Under ANILCA, *public lands* mean lands in Alaska that are federal lands with title in the United States, but the term *land* in the same document means lands, waters, and interests therein. This, then, is the source of some or much of the conflict. The higher court reasoned that *navigational servitude* describes a paramount US interest in navigable waters, but the servitude per se is not public land within the meaning of ANILCA because the United States does not hold title to it.

The state's effort to diminish or set aside any federal jurisdiction was thus remanded for further review and the court believed that a legislative—not a judicial—answer might lead to a suitable resolution. It is important to remember that no one piece of legislation or one case in litigation can completely clarify the jurisdictional matter over subsistence, whether it relates to land, flowing streams, wildlife, or the continental shelf. But what has been reviewed in brief form—comparable to the tip of the iceberg—reveals much of the aftermath of the land-claims efforts on the part of Alaskan Natives and the ripple effect of state-federal relations in Alaska, a state in which the indigenous population does not represent a third entity of government.

A further ramification of the administration of both ANCSA and ANILCA is the issue of tribal government; in other words, these acts raise the issue of whether the Native population should organize under the Indian Reorganization Act (IRA) and whether this would lead to greater autonomy and the creation of Indian Country in Alaska. To date, the Native population has functioned under two different forms of government—traditional and IRA. Davd H. Getches, Charles F. Wilkinson, and Robert A. Williams note that there were 210 Native villages recognized by ANCSA—120 operate as municipalities under state law; of those, about seventy have IRA councils. The other ninety communities are governed by traditional village councils.[38] The Bureau of Indian Affairs (BIA), however, has provided services to Native communities regardless of their form of government. Some Native people look to membership in either form of government as a means to maintain a clear relationship with the federal government. The only preexisting reservation that survived the enactment of ANCSA was the Annette Island Reserve (Metlakatla). The countless allotments in Alaska, however, are also defined in federal law as Indian Country. Otherwise, a finding is necessary to determine if Indian Country embraces some, much, or all of the villages and lands within Native corporations subsequent to ANCSA.[39]

What is the implication of all this? In *State of Alaska* v. *Native Village of Venetie Tribal Government* the court determined that ANCSA did not extinguish Indian Country in Alaska. This decision was made in part because, as the definition holds, Venetie is a "dependent Indian community." At issue was the question of Native administration of their own resources and the utilization of those resources on public lands without state interference. Certainly, Native autonomy to exercise subsistence land use as well as to engage in com-

mercial ventures should follow from the resolution of land claims that came with ANCSA and ANILCA. The US Supreme Court reversed its decision, holding that except for allotments and Native communities, for which the federal government held land in trust, ANCSA extinguished tribal territorial political control.[41] The conflict over subsistence and sovereignty for Alaska Natives continues with no certain or rapid resolution. Observers express concern over the decline of Alaskan Native culture triggered by the negative aspects of corporate operations.[42]

ISSUES RELATED TO ABORIGINAL TITLE

The decisions of the ICC and the courts do not always clarify land titles and thus new conflicts arise or continuing ones fail to be resolved. In effect, one may ask, Is there still a title cloud over some portions of this nation that Indian communities will continue to contest and litigate? There is the assumption that the decisions handed down by the ICC and the higher courts finally silenced or quieted all claims to aboriginal title lands and most of the lands held in recognized title. Certainly open to question are blank areas on the adjudication map.[43] Even here, however, we know that many areas not so identified on the map relate to cases dismissed or areas of overlapping claims that were rejected by either the commission or the courts. But there are questions about the so-called "judicially established" or adjudicated areas on the map. Since questions continue to arise and litigation follows, can one conclude that there is, in reality, no final word on the subject of some land claims?[44] Two instances pose varying questions and a search for truth: (1) the postmortem of litigation on the grounds of unconscionable dealings as with California Indians and (2) most recently, the "weight of history" argument in Vermont over Abenaki land claims.

California

Bruce S. Flushman and Joe Barbieri have raised "the question of whether any unextinguished aboriginal title remains in California."[45] They seek to answer their question by thoroughly reexamining the legal history of land in California, analyzing the various judicial interpretations of the Land Claims Act of 1851, and ultimately by evaluating the impact of litigation. They remind readers that historically, "the United States focused attention on securing a solid basis of land title for new settlers at the expense of California Indians."[46] Despite the fact that the United States did provide the legal recourse to compensate California Indians for the loss of aboriginal territory, one must still ask if any aboriginal title exists and thus burdens land titles in the state. The authors contend, for example, that the Land Claims Act of 1851 is ambiguous in providing an irrevocable conclusion as to whether it did or did not extinguish aboriginal title. The various arguments go beyond the need to report them here except to note the authors' conclusions. The history of congressional refusal to ratify the eighteen treaties,[47] "not only suggests that nonratification extinguished existing Indian title in California but also raises doubts

whether Congress ever recognized that Indian title existed in the state."[48] Of course, sending special commissioners to negotiate treaties surely inferred some recognition of a right of occupancy. Again, they contend that congressional response was ambiguous—perhaps meaning "an intent to maintain status quo" or possibly *non-ratification* simply meant that there would be a change in the means of extinguishing title, not a rejection of it.[49]

Most important for California Indians and all other litigant tribes who prepared cases before the ICC or the Court of Claims is whether the adjudications irrevocably—or possibly irredeemably—extinguished all aboriginal title. Flushman and Barbieri thus explore the implication of the decisions in *Indians of California.* Here, they note that the ICC looked to and sustained the authority of the Land Claims Act of 1851, despite the issue of ambiguity, and ultimately ruled, "that all lands in California not included in valid private land grants...became vested in the United States free of Indian rights."[50] They conclude that:

> The history of the treatment of Indians in California by the federal is perhaps even more deplorable than the treatment accorded Indians in any other part of this nation. Sadly, this course of treatment makes inevitable the conclusion that *the claims of California Indians to their aboriginal lands are no longer viable in California.*[51]

They close by noting that despite extinguishing aboriginal title, claims to such title will persist, "where aboriginal title is used as a defense to a charge of trespass or illegal hunting or fishing. No doubt claims of aboriginal title will continue to be raised in other contexts as well."[52]

The Abenaki and "the weight of history"

Only a few tribes have seen their claims resolved in land restoration and settlement acts. There will likely be further efforts on the part of a group of Abenaki in New England to gain restoration of some land in Vermont. However, the Abenaki claim may now be moot since the state of Vermont gained a positive resolution in *State* v. *Elliott.* In this case, the Vermont Supreme Court ruled that the "increasing weight of history" supported a view that the longer time passed without federal protection of tribal lands, which were held in trust by the state and later extinguished without the consent of Congress, the more likely it is that the federal government intended to extinguish Indian title.[53] Moreover, Vermont asserted that the United States may take land held under original title as it pleases, without any constitutional limits.[54] No one questions the obligation to compensate for taken land held under recognized title, which is consistent with findings of the ICC, among others. Joseph Singer raises a range of questions regarding the lawful means to extinguish original Indian title and debates the justification of the Vermont court. Our interest here, however, is whether or not there still exists a basis for any Abenaki claim, which could go forward in terms of a congressional settlement act that would similarly assist these Indians in gaining both land and federal recognition.

Singer goes on to review the legal premise that only Congress can extinguish tribal title—states do not hold this power. He quotes from the decision in *County of Oneida* v. *Oneida Indian Nation* (1985), which states that, "congressional intent to extinguish Indian title must be 'plain and unambiguous' and will not be 'lightly implied.'"[55] Vermont, however, contends that Abenaki title was extinguished when the Republic of Vermont severed from New York and Congress admitted the state into the Union. Furthermore, the state argued that the land title was voided by the "increasing weight of history."[56] Singer questions whether Vermont, as a republic, gained full sovereignty over Indian titles. It would seem that once Vermont became a state, Congress would have assumed jurisdiction over Native lands within the state's boundaries. Singer reminds us that the First Trade and Intercourse Act was passed in 1790, a year before Vermont entered the Union. As Singer notes, "The Vermont Supreme Court was well aware that neither the 1777 declaration of independence of the Republic of Vermont nor the admission of Vermont to the Union in 1791, either alone or together, clearly demonstrated an intent to extinguish Abenaki title. The court therefore viewed these events as cumulative 'evidence' that demonstrates congressional intent to extinguish Abenaki title over time."[57] Thus the court arrived at the "increasing weight of history" argument. As Singer points out, no reservation was ever established for the Abenaki that might reveal congressional intent to extinguish all other aboriginal lands not included within the reservation.[58]

Ultimately, Vermont asserted that neither the state nor the federal government had any monetary liability for an unlawful taking of Abenaki land. Singer contends that, "The Vermont Supreme Court failed to recognize that the most likely and most appropriate resolution to the case would have been a negotiated and ultimately legislative one."[59] One must concur with Singer. Had the court acknowledged the Abenaki claim, the United States could then negotiate a settlement much like the several settlement acts governing the Passamaquoddy and Penobscot in Maine along with those in other New England states. Unfortunately for the Missisquoi Abenaki Nation that brought the suit, the US Supreme Court rejected hearing an appeal.[60] Of course, a further factor that would affect a continuing claim by the Abenaki is the fact that the Mohawks also lay claim to land within Vermont.[61]

In reference to Abenaki territorial claims, it should be noted that some members of the Wabanaki (Abenaki) Federation in Maine (different from the Western Abenaki in Vermont[62]) participated in the occupation of Baxter State Park in the mid-1970s. The collective Indian intent was the worship of Native gods that inhabit the region of Mt. Katahdin. Ultimately, the state of Maine granted permission to various tribes to utilize the 201,000 acre wilderness park for spiritual practices. Nothing, however, was said about Native title to the region.[63]

SUBMERGED LANDS

Navigable waters generally belong to the nation and are subject to a federal navigable servitude. What comes to mind, of course, are such rivers as the

Hudson, Mississippi, and Colorado, as well as the Great Lakes. Rivers and lakebeds present problems of propriety relative to claims by states and local civil divisions. Propriety issues also arise around submerged areas that lie within treaty areas and reservations. Conflicts with or without litigation may relate to water surfaces and sub-surfaces and, of course, water rights. Among submerged land claims is that argued by the Cherokee to the Arkansas riverbed. Despite efforts to craft a bill favorable to its settlement, a bill did not come out of congressional committee.[64] On the other hand, the Supreme Court's decision against tribal claims to the bed of Lake Coeur d'Alene may not effectively end all litigation (see E. Richard Hart, this issue).[65] In *United States* v. *Cherokee Nation of Oklahoma* the Supreme Court ruled that the US navigable servitude worked against a tribal claim to the Arkansas River waterway and the majority of the Court also rejected the tribe's claim that federal trust responsibilities protected any Indian right in the riverbed.[66]

In the mid-1990s the Torres-Martinez Band of Cahuilla Indians, located in both the Coachella and Imperial valleys of Southern California, sought restitution for the inundation of a portion of their reservation by the creation of the Salton Sea and its expansion since the early 1900s. It should be noted that such claims do not conflict with ICC decisions in *Indians of California* v. *United States* because that case dealt with aboriginal title, Congress' rejection of treaties, and unconscionable dealings with Indians.[67] The inundated lands were then part of a designated reservation—already-recognized title lands. However, at first the government rejected the band's quest for a trade-off consisting of a parcel of land farther north in the heart of the Coachella Valley, not far from several thriving communities such as Palm Springs, where the Indians might establish a casino. The Agua Caliente and Cabezon bands, which operate casinos on trust lands in the valley, were opposed to any land deal. More recently, some land transfer has been agreed upon and one suspects that another casino may eventually be established in the Coachella Valley.

The Equal Footing Doctrine

The larger litigious considerations over submerged lands apparently have generated legal arguments over the "Equal Footing" doctrine.[68] Frank W. DiCastri notes that pre-statehood treaties included reserved aboriginal rights to bedlands. Of course, many states argue that, lacking equal footing, they would have entered the union with less or diminished territorial sovereignty than pre-union states. Contrast, for example, Virginia with any of the western states, including those of the Northwest Ordinance. DiCastri cites a number of cases in which the equal footing doctrine is argued for bedland ownership. He notes that in the case of tribes asserting a claim to the beds of rivers and lakes, states contend that said stipulations in treaties were abrogated when a state joined the union.[69] Tribes, he notes, retort by emphasizing that such treaties were not grants *to* Indians but were grants *from* them. In his analysis of *Choctaw Nation* v. *Oklahoma,*[70] he finds that nothing in the wording of the treaty with the Choctaw granted the state the bed of the Arkansas River, as alleged by the state. In *Montana* v. *United States*[71] the Crow Indians claimed

title to the bed of the Big Horn River. The tribe ceded territory in the Treaty of Fort Laramie (1851), added territory in a subsequent treaty, and reserved some additional 8 million acres, including lands through which the Big Horn courses.[72] Eventually other acts of Congress further reduced the size of the Crow reservation. DiCastri contends that the court examined the dispute as if the federal government had granted land in the first treaty. In this discussion, DiCastri distinguishes between *granted* and *reserved* rights. He notes that aboriginal territory is land with which tribes never parted—it is land *reserved* by the tribes; *granted* lands, on the other hand, came into existence through our federal government's treaty-wordings. Reserved rights are arguably of greater legal weight. He notes in the confusion that "the Choctaw tribe possesses rights to submerged lands in new territory that was granted by the federal government whereas the Crow own none of its bedlands yet retaining lands it had always owned." However, he points out that Fifth Amendment protection only seems to protect "recognized" Indian rights, those established—read: granted—by the federal government.[73]

ON TRIBES THAT CONTINUE TO REJECT MONETARY AWARDS

The Black Hills Without Resolution

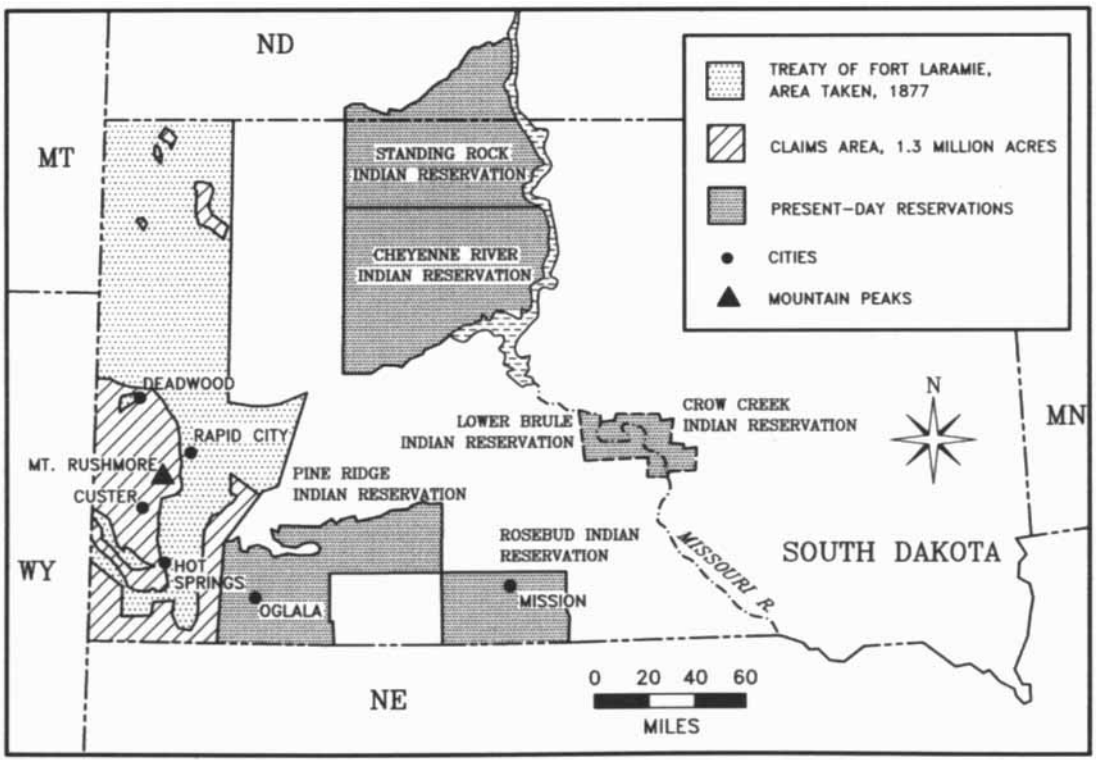
The late Wilcomb E. Washburn suggested that the Sioux claim to the Black Hills (*Sioux Nation of Indians* v. *United States)* had "probably" been laid to rest.[74] To be sure, the litigation came to an end, but Sioux tribes that participated in this litigation have continued to refuse the monetary award.[75] As far back as 1980, they had passed tribal resolutions to oppose any distribution of such funds, and they have periodically evoked their quest for the restoration of some land (see Figure 1). There had been talk at one time about creating a Sioux National Park out of one section of the Black Hills, but it came to naught. More specifically, legislative effort commenced in 1985 with the Sioux Nation Black Hills Act, submitted to Congress but with little congressional support. The bill included the reconveyance of all federal lands—some 1.3 million acres—to the Sioux Nation and the establishment of a Sioux National Council to govern this "reestablished area." Political opposition in South Dakota has been cited as a major reason the act was never passed.[76]

Of course it is the sacredness issue of the Black Hills that sustains tribal opposition to accepting money. Linea Sundstrom, an archaeological and ethnohistorical consultant, revisits the issue of sacredness by querying:

> Instead of asking why the Lakotas were claiming sacred status for the Black Hills in the 1970s, we might more productively ask how the conventional wisdom of the 1870s—that the Black Hills were the Lakotas' holy land—came to be disputed in the 1970s. The answer seems to lie in the sudden relevance of sacredness to land claims disputes. The Black Hills have increasingly become a symbol of Native American resistance to acculturation, and because of this symbolic role, they are today sacred in ways that they historically were not.[77]

Figure 1

The Black Hills and Sioux Indian Claims



The claims area represented a portion of lands taken subsequent to the Treaty of Laramie, 1877 (used with permission from Christian Science Monitor, *12 April 1988). Map prepared by Michelle A. Mestrovich.*

It is an easy reach to presume that the Sioux's continual refusal to accept monetary award relates not only to the concern that payment removes any further title cloud to the Black Hills and thus forever extinguishes tribal title to these lands, but also to the emotional side of the issue, perhaps as strong an issue as the proprietal one. The Indians could still appeal for exclusive access rights to certain sacred grounds within the hills. But such a concession—even the grant of full access—flies in the face of aboriginal claim to the upland.

Shoshone Claims and Stalemate

A disunited Indian community, fragmented from within, impedes full retirement of the Western Shoshone case that adjudicated lands in Nevada and California. These Indians continue to refuse award monies.[78] Perhaps naively perceived, I have always held the view that a combination of a land purchase funded by ICC award monies and land restoration could encourage more Indian ranching by utilizing acreage now part of grazing allotments administered by the Bureau of Land Management and adjacent ranches. For the Great Basin claims cases, the government awarded the Western Shoshone some $26 million for the loss of 24-million acres of original territory, mostly in Nevada.[79] As with many other Indians, the Shoshone say that land cannot be sold and that the Treaty of Ruby Valley, which governs the status of their lands, should be upheld. Throughout the 1990s the Western Shoshone National Council has continued to reject a monetary award.[80]

ACKNOWLEDGMENT AS PRELUDE TO LAND

During the past two decades some 150 non-recognized Indian communities have been pursuing the quest for federal acknowledgment, a process established by the BIA in 1978. It was estimated a few years ago that approximately 115,000 Indians represent non-recognized tribes. In 1977 the American Indian Policy Review Commission identified 133 non-recognized Indian communities in the United States. Another twenty-eight tribes started to petition the government in 1989.[81] Of course, Indians and advocates of tribal acknowledgment have contended that the government moves too slowly, creates obstacles in the path of recognition, and offers other reasons for rejecting claimants. Recognition, a formal process undertaken by the branch of acknowledgment and research (BAR) of the Bureau of Indian Affairs, is a first step toward the Indians receiving services and potential trust land. Indian communities already holding land may, in reality, only be seeking services and perhaps trusteeship status for their land; other Indians hope to gain some land restoration.

The California Situation

Of an estimated more than 200,000 Indians living in California, approximately one-half of them are descendents of indigenous California Indian communities. A large percentage of these Indians remain unrecognized by

the federal government. Yet a vast majority of these Indians, whose older generations were on the rolls to be recipients of land-claims awards, are landless—in fact, by accepting money in lieu of land they accentuated their landlessness. But this is a moot point because prior to the adjudication of *Indians of California* v. *United States*, they were just as landless as they are today. Whether non-recognized or recognized, Indians speak to the repatriation of graves, human remains, and the protection of cultural resources such as sacred sites.[82] The link between tribal recognition by the government, the establishment of federal services, and a modicum of trust acreage is closely identified with the need to preserve Native culture in which sacred places assume prominence. Some observers in California or other states would reject recognition for so many Indian communities because, as they allege, Indian communities want to establish casinos, which is an alternative and sustainable economic pursuit on reservations in California and elsewhere in the nation.

It is unfortunate that Indian gaming, regulated by the National Indian Gaming Act of 1989,[83] which created a commission to supervise tribal casinos, has caused some qualification of the motives tribes may have in seeking recognition. To be sure, tribal casinos need to be established on trust acreage. Thus unrecognized tribes must first appeal to the acknowledgment process, secure land, and then move in the direction of establishing a casino. But the government would be wrong if it sought to preclude from recognition any Indian community that openly expresses a desire to operate a casino. This confusion, for example, occurred in Southern California, where the Juaneños, a much divided Indian community in Orange County, have not achieved recognition. Yet one band, located in the city of San Juan Capistrano, allegedly sought acreage in town for the purpose of operating a casino. My reaction to this effort was to advise such Indian communities to separate the desire for a casino from the quest for recognition altogether.[84] Note, however, that in the Rhode Island Indian Claims Settlement Act[85] settlement lands shall not be treated as Indian lands and thus the state has jurisdiction over gaming.

The public at large, of course, sees dozens of little symbols for reservations on the California map and presumes wrongly that the federal government kept faith with most of the California Indians and provided trust acreage for all known Native communities. This belief is very far from the truth. Only in 1976, for example, thanks to the excellent ethnographic work of Florence Shipek, a known expert witness and anthropologist in the California Indian field, the Jamul community in San Diego County was recognized and granted trust status for their small acreage, parcels occupied essentially uninterrupted since before the turn of the twentieth century.[86]

With the close of *Indians of California* v. *United States* and per capita payments made to thousands of California Indians, one would suspect that the issue of Indian land claims has disappeared, vanished from the California scene. The fact remains, however, as *Pechanga* v. *Kacor*[87] demonstrated, that countless quests for land restoration and exclusive access to cultural resource sites—most notably sacred places—persist for various reasons. Too many California Indian communities were ignored, bypassed, and rejected in the process of establishing reservations in the state.[88] More recently, a consider-

able number were terminated by law and only a small number have been restored to trust status. It is unrealistic, whether referring to unrecognized Indian communities in California or any other state, to expect that the BIA will eventually acknowledge all of them, provide services, and enable them to secure a land base. Perhaps some small number of these communities will be successful in this new century.

The Case of the Timbisha[89]

The Timbisha represent a small branch of the Western Shoshone whose home territory embraces parts of Death Valley National Park. These Indians have pursued the restoration of some aboriginal acreage within the park. Although the gross area of Western Shoshone claims overlaps the northern third of the park,[90] as best as record suggests, the Timbisha only briefly participated in the Shoshone claims case. For a brief period in 1980, Timbisha were represented at meetings in Elko, Nevada, where the Western Shoshone Planning Committee pushed for monetary settlement. But at a subsequent meeting Shoshone tribal members opposed a monetary judgment in favor of a return of ancestral lands. Because none of the Western Shoshone have accepted the existing monetary award, the Timbisha have gone their own way in seeking a land restoration.

In *United States* v. *Grantham*[91] the court acknowledged the validity of two Indian allotments inside the then national monument. For a time the National Park Service (NPS) supported the idea of establishing an Indian village inside Death Valley; subsequently the BIA and the NPS agreed to build homes on a forty-acre colony site near Furnace Creek. As Steven J. Crum points out, the village site was not classified as a reservation because it was inside the national monument.[92] After forming a tribal council, the resident Timbisha approached the government to establish them as the Death Valley Shoshone Reservation. Meanwhile, the NPS began to restrict Timbisha hunting-and-gathering, the tribe's subsistence means of long standing. When the termination program came about in California in the 1950s, both allotments were eventually sold, terminating Indian holdings within the monument. Crum comments, "In the end, the Park Service acquired two hundred acres of former Indian land. It was the big winner while the Timbisha Shoshones were the losers."[93] Several other Shoshone reservations were terminated at that time. The Indian village near Furnace Creek, not being a reservation, could not be terminated. The NPS, still seeking to get the Indian residents to abandon the village, established a rental policy that the Indians could not afford. The NPS's response to the Indians' supporters was that the Timbisha could find a home outside the monument or leave Death Valley altogether.

However, regardless of shifting policies over their resident status inside the monument, the Timbisha lacked a land base and could not gain services from the BIA. In the mid-1970s, the government did make some effort to provide services and improve housing. In 1982, having met all the criteria established by the acknowledgment program, they were declared a federally recognized tribe.[94] Subsequently, they prepared a report calling for the estab-

lishment of a 2,000-acre reservation to be located around the existing Indian village inside the monument. They had no desire to relocate and continued to regard Death Valley as their homeland. The NPS, of course, found justification in rejecting the proposal, arguing among other factors, that only thirty-two of the 199 members resided in the village. The NPS position is quoted by Crum: "Reservation status is...the least acceptable of the alternatives since it would in all probability require the Park Service to relinquish most authority over the management of these lands within the monument."[95] In 1993 the tribe passed a resolution calling for the creation of a 160,000 acre noncontiguous reservation inside and near the monument that the following year became a national park. In 1999, the Timbisha and the NPS reached a working agreement that permits the tribe to own land and develop it. They will acquire 300 acres at Furnace Creek, located in the heart of the park, enjoy exclusive use of an adjacent 1,000 acres, and share in the management of a 300,000 acre expanse of parkland to be known as the Timbisha Preservation Area. In addition, another 6,000 acres lying outside the park and currently administered by the Bureau of Land Management will be turned over to the tribe. Pat Parker, chief of the NPS's American Indian Liaison Office, was quoted to say, "this agreement is special because preservation of the Timbisha way of life now becomes an official purpose of the park." Apparently, Professor Charles F. Wilkinson of the University of Colorado law school was instrumental in bringing all parties to the bargaining table.[96]

Pacific Northwest

Indian groups in western Washington have also fared poorly in the acknowledgment process. For example, the Duwamish, which participated in claims litigation before the Court of Claims and received a modest payment by the Indian Claims Commission,[97] were denied participation in the tribal benefits won in the Boldt Decision of 1974, which allocated 50 percent of the commercial harvest of salmon in western Washington to treaty Indians, because they were an unrecognized Indian group.[98] The nearby Samish, also unrecognized, petitioned unsuccessfully after the ICC granted them a modest award, which they refused. In 1992 a federal court ordered the reopening of the Samish claim to recognition.[99]

Eastern Examples

Frank W. Porter suggests a three-fold classification of Indian communities in the eastern United States: reservation communities, missionary communities, and folk communities.[100] He contends that a large number of non-recognized eastern tribes are folk communities, being "small and both socially and spatially isolated," "possessing a strong sense of belonging together," among other traits common to folk groups in general. As a rule, they have retained a property base (outside of federal or state jurisdiction). Many of these communities were investigated prior to the federal acknowledgement project started by the BIA in 1978. Later recognition was granted to a small number

of eastern tribes. En route, the Passamaquoddy and Penobscot communities overcame federal resistance to recognition and a settlement act was passed in 1980. Subsequently, numerous petitions for recognition were set in motion. Of course, recognition was established in the various settlement acts reported earlier.

The Tigua in Texas

As for the Ysleta del Sur Pueblo (Tigua in west Texas, near El Paso), this Indian community was recognized in 1968 and their trust lands of some one-hundred acres were ultimately transferred to the state of Texas. As of 1994, their claim to other lands has been pending. Of highest priority is Hueco Tanks (a granite rock formation), which has been held in trust by the state. The Tigua consider this a sacred place and they claim that the state has not kept faith in regard to the site's management.[101]

CLAIMS TO CULTURAL RESOURCES AND SACRED PLACES

Restorations such as Blue Lake (Taos) and Kolhu/wala:wa (Zuni) have encouraged other tribes to pursue litigation and legislation that would return specific cultural, historic, and sacred sites.[102] Indians have agitated for restoration by trespassing on their own aboriginal grounds, have invoked the American Indian Religious Freedom Act (1978), and have lobbied members of Congress. For example, in *Lyng* v. *Northwest Indian Cemetery Protective Association*, the American Indian Religious Freedom Act (1978) proved ineffective in the Indians' pursuit of land restoration.[103] Litigation in the Zuni case, as Hart notes in this issue, led to a legislative solution. But as public agencies do their homework and follow every step in the environmental procedures, it becomes clear that land transfers will now become few and far between. Of course, non-recognized or unacknowledged Indian communities will continue to face an even greater uphill battle than their recognized brethren, for recognition must take place before or at least simultaneously with the government's intention to recommend the restoration of land. It is no secret that the federal government neither recognizes nor chooses to acknowledge countless Indian communities across the nation.

As of the mid-1990s, some 150 Indian communities were non-recognized and about the same number continued to petition the federal government for recognition. Such communities exist in all but six or seven states, with high concentrations in the eastern states as well as on the West Coast.[104] The need for financial assistance as well as social and health services remains fundamental in terms of the poverty of many unacknowledged Indian communities. In the absence of federal recognition, however, such assistance will not be forthcoming. At the same time, the recognition leading to services also comes with the expectation of land restoration.

The survival, protection, and even restoration and repatriation of cultural, historic, or sacred resources depend upon the successful outcome of tribal assertions under various acts such as the Historic Preservation Act (HPA)

and the Native American Graves Protection and Repatriation Act (NAGPRA). Several cases have come and gone; in general, the judicial contention is that tribes cannot counter the public purposes of public land agencies such as the US Forest Service or National Park Service. Even when there is some cooperation by these agencies, the public at large has intervened on the grounds that establishing exclusive tribal access and rights of use to cultural and sacred sites represents an unconstitutional action. The only major restoration of a sacred place in recent years has been that of the Zuni.

According to the National Congress of American Indians (NCAI), NAGPRA is the law to which most tribes turn for assistance. Tribes and the federal government do not concur on the efficacy of various provisions in that law. For example, section 3(c) of the act states that if cultural affiliation cannot be reasonably determined when cultural objects are found on federal lands that were recognized by a final judgment of the ICC or the Court of Claims as aboriginal land, then the ownership or control shall be, "in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered." The crux of this provision is the interpretation of adjudicated aboriginal territory. NCAI and many tribes have rejected ICC decisions and other case law that have established the official adjudicated areas. Although now defunct, in 1998 it was proposed (HR 2893) in Congress that section 3(c) of NAGPRA be struck from the law, but no other wording was indicated. This provision in section 3(c), however less than acceptable, is still most critical to any tribal determination of cultural affiliation with cultural resources such as burial sites. While the NCAI would seek to replace the wording in favor of tribal determination of aboriginal territory, tribes can at least pursue through Geographic Information System (GIS) or other cartographic means a rightful claim to cultural resources within given aboriginal territories. Some observers raise the question, Do such attempts to eliminate section 3(c) infer that aboriginal territory as adjudicated by the ICC is perceived as invalid?[105] One wonders if there is any hidden agenda behind motives to dilute NAGPRA; perhaps special interests want to prevent any further encumbrances such as tribal rights to specific sites on federal public lands.

Some expert witnesses question the merits of all or most existing legal determinations of tribal territoriality. In fall 1999, a symposium focused attention on the continued relevance of aboriginal territories in the determination of specific tribal rights to interpret, protect, and gain restoration of cultural resources. According to a preliminary copy, this symposium takes exception to congressional proposals to modify tribal involvement in cultural resources on public lands as stipulated in NAGPRA. The co-chairs also focus on the role of GIS in determining appropriate boundaries for tribal assertion of rights to given sites. Among more critical concerns are the ethnographic and ethnohistoric accuracy of bounded aboriginal territories adjudicated by the ICC and the legal interpretation of boundaries as worded in treaties and interpreted by C. C. Royce, whose compendious report, *Indian Land Cessions in the U.S.*, has been the bulwark of all recognized Indian title. Moreover, a great many expert witnesses did tend to rely upon the foundational work of Alfred L. Kroeber and his students in determining aboriginal boundaries. In recent

years, however, tribes have much criticized Kroeber's findings. Ultimately, the need is to ascertain tribal perceptions of their aboriginal territories and then adjust their interpretation of territoriality by the most judicious means to assist both recognized and unrecognized Indian communities in their quest to protect and gain restoration of cultural resource sites.[106]

The Havasupai Case

While one might believe that a monetary award in claims litigation would end a tribal quest for land restoration, we have several cases that indicate that for some tribes the claims process does not end there. In the case of the Havasupai, litigation suggests that Indians disquieted over the need to protect sacred places cuts across Indian Country today, even over adjudicated lands whose title has been quieted. The Havasupai won an award before the ICC in 1969; then in 1975, pursuant to the Grand Canyon National Park Enlargement Act (GCEA), Congress granted the tribe 185,000 acres that had been part of aboriginal territory and also granted the use of another 95,300 acres of public lands.[107] In 1990 the tribe filed suit against the Forest Service, alleging that that agency failed to uphold requirements of an Environmental Impact Survey(EIS) as they sought to determine if the Canyon Uranium Mine should be established at a site declared to be sacred but lying outside lands restored to the tribe. John Martin, an anthropologist, observed of the location near Red Butte, about forty miles east of the eastern boundary of the current reservation: "Whether or not Red Butte was sacred in the past, it is now, and the tribe holds an annual politico-religious gathering there, maintaining it is the locus of an 'earth navel' through which ancestors climbed to the present world."[108] The record shows that the Forest Service went to great lengths to determine if environmental constraints should prohibit mining operations and found none. Moreover, the agency did examine religious circumstances of the site. The tribe, of course, contends that the site is located near the center of aboriginal territory, yet they did not formally argue for its inclusion when Congress sought to determine boundaries of the land restoration under the GCEA.

These claims on lands held by public-land agencies are not new: recall *Lyng* and the northern California Pit River Indians, who refused a monetary award in the major litigation *Indians of California* v. *United States.* The Pit River Indians later provoked a controversy leading to litigation when they intervened to prevent development of a timber road through a sacred site in aboriginal territory that lies within the borders of a national forest in northern California. The Indians thus entered into litigation under the American Indian Religious Freedom Act, but lost in the first major test of that act's capacity to protect Native cultural resources, especially sacred sites not protected by trust status. *Lyng* drew attention to the flaws in that act, for one thing, and the inability of tribes to secure such isolated parcels as trust acreage.[109] What can we learn from these events?

The courts noted in *Havasupai* that the First Amendment was not violated and that the American Indian Religious Freedom Act (AIRFA) was not

applicable. The government was not denying the Indians access, although the tribe gained no specific right of access under GCEA. Also, we are reminded that the claims case paid for title to aboriginal acreage. Also reservations for national forests can and do extinguish aboriginal title. It is regrettable that these conflicts over cultural resources such as sacred and historic sites emerge subsequent to long drawn-out litigation over land claims. One might contend that when tribes lose the claims battle, later litigation over specific sites within aboriginal territory makes far more sense. But here is a tribe that was awarded funds and major land restoration, although with some restrictions on use. The Forest Service, of course, contends that the tribe did nothing early on to indicate that that site was so culturally significant to them.

In the years since the Supreme Court's ruling, the mining company dug a water well and constructed some facilities at the site, but the price of uranium dropped and the original company went bankrupt; subsequently, the company that bought them out has not proceeded to engage in mining operations, although only economic reasons stand in the way.[110]

Although generally incidental to the outcome of land-claims litigation, land restoration has other implications. The number of cases that have been litigated relative to tribal access to sacred sites, to special efforts to gain restoration of land parcels or to the repatriation of cultural resources—especially human remains—does suggest that this genre of land claims deserves more discussion. These cases do not directly deal with the caseload of the ICC, but have often come into discussion tangentially, considering that the ICC could speak to the issue of land restoration but could not—or would not—restore land.[111] We have seen how the Zuni ultimately were returned sacred ground subsequent to but not determined by decisions in land-claims litigation before the Claims Court. It is interesting that other ramifications of the findings and decisions in the claims litigation process continue to serve the Indian community. For example, as Dean B. Suagee notes, NAGPRA prohibits any intentional removal or excavation of Native American cultural materials without a permit issued under the Archaeological Resources Protection Act (ARPA). Tribes must consent and, as for federal lands, be consulted before this occurs. He suggests this is easy to determine under the law whenever the land is recognized by a final judgment of the ICC, the Federal Claims Court, or the Supreme Court as original title lands[112]

TRIBAL EFFORTS TO CONSOLIDATE LAND

Tribal efforts to consolidate land within the borders of reservations by invoking the 1983 Indian Land Consolidation Act have led to litigation brought by heirs and relatives of deceased allottees. These descendents contend that the escheat provision of that law is unconstitutional.[113] The act contends that a means by which the complexities of inheritance could be diminished by permitting tribes to acquire marginal undivided interests in inheritable trust allotments. But the plaintiffs in a pair of cases—*Hodel* v. *Irving*[114] and *Youpee* v. *Babbitt*[115]—successfully argued before the courts that tribal acquisition of such acreage under the act constituted a taking, which requires just compensation.

Ultimately, the US Supreme Court determined that the original law and its later amendments were unconstitutional.

From the viewpoint of property rights, individual Indians and families are entitled to equal protection under the law, yet tribal acquisition of allotments is an appropriate option—laudable in terms of the better environmental management of reservation resources. Heirship problems on a great many reservations have rendered much land in allotments unusable simply because too many heirs cannot agree on utilization or cannot be found in order to render appropriate land-use decisions. I might point out that logically the tribes should be the legitimate *first* claimants of such encumbered acreage, just as they were deemed such when permitted to acquire defaulted or escheated lands once opened to homesteading. Many non-Indian farmers defaulted over the years and many even abandoned the land altogether.[116] Obviously Congress, despite efforts to overcome the Supreme Court ruling on the constitutionality of the escheat provisions in the act, sought a logical and progressive means to place unused, idle, and vacant acreage into some program of tribal management. Of course, individual Indians and families are entitled to the protections of the Constitution no less than is the rest of the population. Congress wrongly presumed that with its plenary powers over Indian trust lands it held the sole power to enact whatever legislation would be needed to consolidate land on reservations.

Recently, the Indian Land Working Group (ILWG) urged implementation of uniform inheritance codes across the states as one means to rein in on allotments overwhelmed by heirship. At a recent symposium, Indian leaders referred to the effective techniques of land consolidation: land swaps of "useless fractionated interests for a block of tribal trust land he can use, say, as a homesite." ILWG has introduced reform legislation that would provide "for estate planning services; accurate and accessible land records; removal of regulatory barriers which impact real estate transactions; an acquisition fund for tribes and individual landowners; and a federal probate code which prevents non-Indian inheritance." Such a law would preserve trust status, reduce fractionation, and consolidate allotments, leading to far more productive use of trust lands.[117]

THE SPECIAL CIRCUMSTANCES OF NATIVE HAWAIIANS[118]

In the narrowest sense, of course, Native Hawaiians are not Indians, yet the term *Indian* has been interpreted to mean *indigenous*; the term has embraced both Aleuts and Eskimos and thus could easily refer to all Native populations of this nation. Had Hawaiians been included earlier in such a broad definition, then they may have had an opportunity to litigate land claims before the Indian Claims Commission. By belonging to that larger community of indigenous peoples, they have experienced the loss of traditional land and territory by dint of Manifest Destiny. Unless Congress were to remake the BIA into a Bureau of *Indigenous* Affairs, Native Hawaiians are not so embraced by the body of statutes and case law that govern Indian affairs. Yet, there is considerable reason to compare the land claims of these indigenous Americans to

mainland claims.[119] For one thing, Alaska and Hawaii, in anticipation of entering the Union in 1959, were both subjected to the scrutiny of Native peoples and their champions over the distribution of statehood land grants—traditional for all western states since the Morrill Act of 1863. Such land distributions were bound to open wounds and lead to dissention. Since federal public domain constitutes the "easier" means to restore lands to Native Americans, the destiny of federal lands that would be given prospective new states should logically invoke much controversy.

In Alaska, the state had already begun to select its acreage under statehood land-grant provisions at least a decade before the passage of the settlement act in 1971 and the process was delayed until agreements could be reached. In Hawaii the federal government transferred considerable public lands at the time of statehood except, for example, national parks and defense lands. As in the earlier instance of the so-called Sagebrush Rebellion, western states are eager to get their hands on public domain and have generally shown little regard for indigenous claims and potential land restoration.[120] Against this setting, let's examine where Hawaii seems to be heading.

In 1920, Congress created the Hawaiian Homelands Commission (HHC) with the trust responsibility to manage and distribute some 200,000 acres to Native Hawaiians. Only a small portion of this acreage has passed into Native hands.[121] At statehood, the HHC was transferred to the state, which then became obliged to hold these lands in trust "for the betterment of the conditions of native Hawaiians..., for the development of farm and home ownership," and other purposes. Perhaps early on Native land claims to the public domain were bypassed at statehood because of the existence of the HHC and the notion that the legal transfer to the state of indigenous responsibilities met the need. The trust responsibility required that the state reflect a continuing concern by Native Hawaiians for the lands transferred to the state. Getches, et al. suggest that, "this would give rise to a claim for income from the lands or for the value of lands the state has appropriated for its own uses."[122]

When Congress, in joint resolution, acknowledged the one-hundredth anniversary of the overthrow of the Hawaiian Kingdom, "Congress was careful to state that nothing in the resolution serves as a settlement of claims."[123] What continues to aggravate the claims situation is that the Hawaiian Homes program, dating from the 1920s, has distributed only a meager amount of land to Native Hawaiians and the waiting period for applicants seems endless. It is almost as if delays were deliberate. Moreover, the bulk of these lands do not represent the best arable lands and their location on islands other than Oahu prevents many Native Hawaiians from seeking work in the Honolulu metropolitan area. It is unfortunate, too, that the state has been found to lease Hawaiian homelands to non-Native persons while the Native population awaits some honorable land distribution. This is not perceived as keeping faith with the intent of the land transfer to the state.

In the meantime, Native Hawaiians are moving forward in their efforts to create self-government by electing delegates to a convention to draft a constitution.[124] Also, in *Price* v. *Akaka*,[125] Native Hawaiians had challenged the

state's administration of trust lands under the Admission Act of 1959, especially the manner in which income from trust lands has been used. In recent years, Congress has embraced Native Hawaiians in some statutes that provide services to Native Americans, especially those statutes focusing on health and housing.[126] Despite the intentions of various federal laws, Native Hawaiians still do not have equal or parallel access to services such as those delivered to individual Indians and tribes by the BIA and other agencies.

Land also figures closely in the state mandate to protect or restore Native Hawaiian culture. Part of this trust involves the protection of customary and traditional subsistence as possessed by descendants of Native Hawaiians and tenants of *ahupua'a*, a land division that generally extends from the seashore to the mountains along rational lines, such as ridges or other natural features including watersheds. At issue, of course, is the conflict between protecting Native culture and upholding private property rights of all citizens.[127] Daniel G. Mueller notes that in *Pele Defense Fund* v. *Paty*[128] the Hawaiian Supreme Court permitted the expansion of gathering rights to Native Hawaiians other than those who reside on *ahupua'a*. In general, the courts have said that traditional rights may not be extinguished due to the existence of modern land tenure, yet may be modified so as not to interfere with fee-simple ownership.[129] This argument still does not preclude litigation on the matter. It is not my intention to review the entire legal story of gathering rights here.[130] Rather, I wish to note that the issue in and out of court runs concurrently with issues over the protection, distribution, and income from lands held in trust for Native Hawaiians. For Hawaii to default on the protection of customary rights is to diminish Native Hawaiian land options. At the same time there is no resolution favoring their rights to the restoration of original lands or the forward movement of land distribution under the Hawaiian Homes Act.

When turning to Hawaii, we must recognize that despite certain historic and legal similarities, Native Hawaiians exist outside the arena of Indian affairs. For more than a century Hawaiians have pursued a political approach to the quest for the restoration of their sovereignty and the recovery of their lands. Regaining a land base, of course, would put them on the road to limited economic self-sufficiency and would provide them with a resident home base and a political locus. Some Native Hawaiians continue to seek complete independence from the United States, while others would choose "nation-within-a-nation" status, placing them in the same position as Indian tribes. As legal scholar Jon Van Dyke of the University of Hawaii puts it, "Although considerable disagreement exists among different Native Hawaiian groups, the momentum behind the movement for a return of land and a restoration of sovereignty appears to be irreversible."[131] As he and others continue to point out, Native Hawaiians are the only indigenous group that have been unable to seek redress before a tribunal much like the Indian Claims Commission.

In 1993, Congress finally acknowledged the illegal takeover a century before of the Hawaiian Kingdom and publicly recognized that 1.8 million acres were taken by the United States without compensation.[132] Subsequent to that legislative acknowledgement, the Hawaii State Legislature created the Hawaiian Sovereignty Elections Council in 1994 as a means to enable a

process designed to facilitate efforts of the Hawaiian people "[t]o restore a nation of their own choosing."[133] In 1996, an election by mail-ballot was held in which 73 percent of voters favored a movement toward self-determination. Even though the election was criticized because less than half of Native Hawaiians actually voted, the response is indicative of pending change. Hawaiian law states that the island of Kaho'olawe and its waters shall be transferred "to the sovereign native Hawaiian entity upon its recognition by the U.S. and the State of Hawaii."[134] I assume that such a gesture suggests the establishment of trust status over the island not unlike the establishment of an Indian reservation on the mainland. The following year, the Hawaii Legislature enacted a law that provided some funding to undertake a complete inventory of the public lands in trust and established a joint committee to determine "whether lands should be transferred to the Office of Hawaiian Affairs in partial or full satisfaction of any past or future obligations."[135]

Despite various arguments contesting the view that Native Hawaiians are entitled to a status and hence rights equivalent to those enjoyed by mainland Indian tribes,[136] the enactment in 1920 of the Hawaiian Homes Commission[137] is deemed tantamount to the creation of a trust status over land to be administered on behalf of these people. This act, which set aside 200,000 acres, was to enable Native Hawaiians to secure home sites and farm lots, yet much of the acreage held in trust is of marginal agricultural value. Among other provisions, the act provided for the "betterment of the conditions of the native Hawaiians."[138] Van Dyke observes that "Even though the...Act was an inadequate response to the needs..., its passage was nonetheless significant in providing *clear recognition* of the federal government's trust responsibilities to the Native Hawaiian people.[139] At statehood in 1959, when the Hawaiian Homes Commission was transferred to the new state, so were some 1.2 million acres of federal lands, plus the 200,000 held by the HHC.[140] However, it was not until 1978 that the state created an Office of Hawaiian Affairs (OHA) to administer to the needs of Native Hawaiians. By constitutional amendment, the state has acknowledged its responsibility to hold the ceded lands as a *public land trust* for Native Hawaiians and the general populace. The state also mandated that a pro rata share of revenues from the trust be assigned to the OHA for the betterment of Native Hawaiians.[141]

In fall 1998, the OHA and others brought suit against the Housing Finance Development Corporation of the State of Hawaii,[142] seeking "injunctive and declaratory relief to prevent the State of Hawai'i from selling, transferring or otherwise alienating any of the lands in the Public Land Trust."[143] The brief notes that Native Hawaiians have a recognized but still unresolved claim to the return of all or some of these lands. The plaintiffs argue that it would be "a serious violation of the State's responsibilities as trustee...to sell, transfer, or otherwise alienate any acreage...until the claims of the Native Hawaiian peoples are addressed and resolved."[144] The brief identifies various laws and cases that reveal the Native Hawaiians' valid claim to ceded lands. The plaintiffs also note the state's parallel with Alaska, which placed a freeze on any lands transferred to the state pending resolution of claims by Native inhabitants. As of this writing, the case has not been resolved.

DEDICATION

This symposium is dedicated to the memory of Wilcomb E. Washburn, who died in February 1997. I would like to acknowledge Wilcomb's assistance in the publication of my first book (*Indian Land Tenure*), for which he wrote the foreword, and for his generous participation in the development of *Irredeemable America,* for which he contributed far more than a chapter. Wilcomb was a mentor in the American Indian studies field and I will remember him with much gratitude, appreciation, and respect.

NOTES

1. *New York Times,* 18 April 1998, B, 6:5; 12 December 1998, B, 4:5; and 12 January 1999 B, 6:5. Attempts at a negotiated settlement are pending. The Oneida have been buying acreage in upstate New York. This very heated conflict over land was aired on *Sixty Minutes,* 23 May 1999. Earlier cases were won by the Oneida, but the current case persists. See *County of Oneida* v *Oneida Indian Nation,* 470 US 226 (1985) and discussion in David H. Getches, Charles F. Wilkinson, and Robert A. Williams, *Cases and Materials on Federal Indian Law,* 4th ed. (St. Paul: West Publishing Company, 1998), 286–298.

2. *Dateline,* "Cheyenne-Arapaho Claims to Fort Reno, Oklahoma," 8 December 1998.

3. *Havasupai Tribe* v *United States,* 752 F. Supp. 1471 (D. Ariz. 1990), cert. denied, 503 US 959 (1992).

4. Frank Clifford, "Death Valley Indians Strike a Unique Land Deal," *Los Angeles Times,* 25 February 1999, A3, 24.

5. See Indian Claims Commission (ICC), *Final Report* (Washington, DC, Government Printing Office, 1979).

6. "To convey certain lands to the Zuni Indian Tribe for Relgious Purposes," PL 98-408 (1984). See, for examples, David M. Brugge, *The Navajo-Hopi Land Dispute: An American Tragedy* (Albuquerque: University of New Mexico Press, 1994). In *Masayesva* v *Zah* (1992), the court awarded 22,675 acres as the Hopi Exclusive Use Area; also 37,843 acres of the 1934 Navajo-Hopi Joint Use Area was partitioned to the Hopi Tribe. See Louis A. Hieb, "Hopi," in *Native America in the Twentieth Century: An Encyclopedia,* ed. Mary Davis (New York: Garland Publishing Company, 1994), 241. Note also Thomas Buckley and the Yurok Transition Team, "Yurok," in Davis, *Native America,* 719–721. In 1988, the Hoopa-Yurok Settlement Act was passed as an outgrowth of issues in *Jessie Short* v *United States* (1973) in favor of Yuroks.

7. Cf. John C. Christie, Jr., "Indian Land Claims Involving Private Owners of Land: A Lawyer's Perspective," in *Irredeemable America: The Indians' Estate and Land Claims,* ed. Imre Sutton (Albuquerque: University of New Mexico Press, 1985), 233–246, which deals with *Pechanga* v *Kacor.* The Indians lost their suit. Not all critics support the position Christie or I would take; in Henry F. Dobyns and Florence C. Shipek, review of *Irredeemable America,* edited by Imre Sutton, *American Indian Quarterly,* 131(1989): 59–68, Shipek took issue with Christie's interpretation, contending that his chapter is "an interesting study in the justification of an originally fraudulent title"(p. 60). Shipek had been an expert witness for this case. I would agree that in no way does a long title-chain justify a fraudulent title, but I also contend, as Christie does in his current analysis of the Catawba case, that when so much time, confusion, loss of documentation, and the like have occurred, it is certainly not appropriate justice to con-

demn the contemporary owners. In cases such as this, it is more just to turn to Congress for redress. Our national laws have allowed for any number of inconsistencies, including potential fraud, to enter into land transactions. Only monetary award would be justified a century or so later. While I am less proactive in matters of Indian land rights, in no way do I exonerate the government for allowing these situations to transpire. But if we indeed challenged the title of hundreds—even thousands—of parcels, we would be dismissing what I believe is the one goal that the ICC did largely accomplish—to dissolve much of the title cloud hanging over the nation. Advocates of the Indians' cause do not like to accept this notion. Cf. Lynn Loftis, "The Catawba's Final Battle: A Bittersweet Victory," *American Indian Law Review* 19:1 (1994): 183–215.

8. Cf. Jack Campisi, "The Trade and Intercourse Acts: Land Claims on the Eastern Seaboard," in Sutton, *Irredeemable America*, 337–362. By 1994, the Passamaquoddy had purchased 134,000 acres of trust land, including about 1000 acres adjacent to Pleasant Point, some acres of blueberry barrens, and forest (Harald E. L. Prins, "Passamaquoddy," in Davis, *Native America*, 436). The Penobscot gained federal recognition in 1979 and by 1994 had acquired 55,278 acres in trust and another 69,485 in fee simple (Prins, "Penobscot," in Davis, *Native America*, 442). In addition to the Catawba, discussed by Christie in this issue, the Shawnee Nation of Ohio, recognized by the state in 1980, were able to purchase 117 acres in 1989 (Sharlotte Neely, "Shawnee," in Davis, *Native America*, 584).

9. Cf. John Martin, "From Judgment to Land Restoration: The Havasupai Land Claims Case," in Sutton, *Irredeemable America*, 271–300.

10. Campisi, "The Trade and Intercourse Acts," 360–361.

11. 110 US Stat. 3009 (1996).

12. *State of Rhode Island* v *Narragansett Indian Tribe*, 19 F. 3rd 685, cert. denied 115 S. Ct. 298.

13. *Maynard* v *Narragansett Indian Tribe*, 798 F. Supp. 94 (1992), affirmed 984 F. 2nd 14 (1993).

14. 105 US Stat. 1143 (1991), ref. to Sec. 2(a)(3).

15. *Houlton Band of Maliseet Indians Supplementary Claims Settlement Act*, 1986, PL 99-566, 100 Stat. 3184.

16. *Mohegan Nation Land Claims Settlement*, 108 US Stat. 3501 (1994). *The Mohegan Tribe of Indians of Connecticut* v *State of Connecticut* (Civil Action H-77-434).

17. Laurie Weinstein, Melissa Fawcett, and Gladys I. Tantaquidgeon, "Mohegan," in Davis, *Native America*, 355; Veronica E. Velarde Tiller, *Tiller's Guide to Indian Country* (Albuquerque: BowArrow Publishing Company, 1996), 320.

18. George H. J. Abrams, "Seneca," in Davis, *Native America*, 581; Tiller, *Tiller's Guide*, 474; PL 101-503 (1990), 104 Stat. 1292.

19. *Fluent* v *Salamanca Indian Land Authority*, 928 F. 2nd 542 (2nd Cir.), cert. denied, 112 S. Ct. 74 (1991); Katherine F. Nelson, "Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power," *Villanova Law Review* 39:3 (1994): 525–626.

20. Cf. Ann McMullen, "Paugussett," in Davis, *Native America*, 437.

21. Martin Glassner, professor emeritus of geography, Southern Connecticut State University, correspondence with author, 20 October 1997.

22. See Anne-Marie D'Hauteserre, "Foxwoods Casino Resort: An Unusual Experiment in Economic Development," *Economic Geography*, Extra Issue (Annual

Meetings of Association of American Geographers, Boston, 25–28 March 1998): 112–121.

23. PL 100-228; 101 US Stat. 556 (1987).

24. PL 104-102, 110 US Stat 50 (1996). This act provided that part of 701 acres would be established as *mountain property* in trust, another parcel as *preservation property* and a third parcel as *development property* for the economic benefit of the Indian community.

25. Washington Indian (Puyallup) Land Claims Settlement Act, 1989 (103 Stat. 83).

26. George M. Guilmet and David L. Whited, "Puyallup," in Davis, *Native America*, 521.

27. 7 F 2nd 1251 (9th Cir. 1983); Nelson, "Resolving Native American Land Claims," 570–576.

28. Nelson, "Resolving Native American Land Claims," 578.

29. This section relies on the discussion of Alaska in Getches, et al., *Federal Indian Law*, 905–944 and the assistance of David S. Case, attorney-at-law, of Copeland, Landye, Bennett and Wolf, Anchorage, Alaska, to whom I am indebted for not only updating me, but also catching several of my misinterpretations. Errors and oversights still remain my burden. For a thorough historical analysis of Alaskan Native land ownership, see Donald C. Mitchell, *Sold American: The Story of Alaska Natives and Their Land, 1867–1959* (Hanover, NH: University Press of New England, 1997).

30. 43 USCA §§ 1601–28.

31. Getches et al., *Federal Indian Law*, 863.

32. Ibid., 821; J. Tate London, "The '1991 Amendments' to the Alaska Native Claims Settlement Act: Protection for Native Lands?," *Stanford Environmental Law Journal* 8 (1989): 200.

33. 16 USCA §§ 3101–33 (1980).

34. Getches et al., *Federal Indian Law*, 877–878 (emphasis added).

35. 72 F 3d 698 (1995), cert. denied, 116 S. Ct. 2499 (1996); Getches et al., *Federal Indian Law*, 880.

36. Mary Kancewick and Eric Smith, "Subsistence in Alaska: Towards a Native Priority," *UMKC Law Review* 59 (1991): 645.

37. Jeremy D. Sacks, "Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights," *Alaska Law Review* 12 (1995): 247, as cited in Getches, et al., *Federal Indian Law*, 879.

38. Ibid., 886.

39. Ibid., 892, citing David V. Blurton, "ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country," *Alaska Law Review* 13 (1996): 211.

40. 101 F 3rd 1286 (9th Cir. 1996).

41. *Alaska* v *Native Village of Venetie*, 118 S. Ct. 998 (1998).

42. Marilyn J. Ward Ford, "Twenty Five Years of the Alaska Native Claims Settlement Act: Self-Determination or Destruction of the Heritage, Culture and Way of Life Alaska's Native Americans?" *Journal of Environmental Law and Litigation* 12:2 (1997).

43. Indian Claims Commission (ICC), *Final Report* (map in pocket); Sutton, *Irredeemable America*, Fig. P.1, 12–13.

44. For a broader historical review, see Michael J. Kaplan, "Issues in Land Claims: Aboriginal Title," in Sutton, *Irredeemable America*, 71–86.

45. Bruce S. Flushman and Joe Barbieri, "Aboriginal Title: The Special Case of California," *Pacific Law Journal* 17 (1986): 391–460, 392 (quote).

46. Flushman and Barbieri, "Aboriginal Title," 415, 429.

47. Readers of this journal will find a map of the cessions and reserved tracts pursuant to the eighteen unratified treaties in Imre Sutton, introduction to issue entitled "New Perspectives on California Indian Research," *American Indian Culture and Research Journal* 12:2 (1988): 4; Cf. George H. Phillips, *The Enduring Struggle: Indians in California History* (San Francisco: Boyd and Fraser Publishing Company, 1981), map, 51.

48. Flushman and Barbieri, "Aboriginal Title," 439.

49. Ibid., 442.

50. Ibid., 450, citing 8 ICC 29 (1959).

51. Flushman and Barbieri, "Aboriginal Title," 459 (emphasis added).

52. Ibid., 460.

53. 616 A2nd 219 (Vermont 1992), cert. denied 113 S. Ct. 1258 (1993).

54. Joseph W. Singer, "Well Settled?: The Increasing Weight of History in American Indian Land Claims," *Georgia Law Review* 28 (1994): 481–532, 487 (quote).

55. Ibid., 502.

56. Ibid., 503.

57. Ibid., 511–512.

58. Ibid., 515.

59. Ibid., 531.

60. 113 S. Ct. 1258 (1993).

61. Anon., "A History of Mohawk Land Claims in Vermont," *Akwesasne Notes* 16:1 (1984): 31; see also 16:2 (1984).

62. Cf. Frederick M. Wiseman and Laurence M. Hauptman, "Abenaki, Western," in Davis, *Native America,* 1.

63. Phyllis Austin, "Taking Back Katahdin: Wabenaki Claim Their Right to Worship a Big Mountain Spirit," *AMC Outdoors* 59:9 (1993): 30–33.

64. Richard S. Crump, "Twentieth Century Cherokee Property Claims: A Study Based on the Case Files of Earl Boyd Pierce," *American Indian Law Review* 19 (1994): 507–541.

65. *Idaho* v *Coeur d'Alene Tribe of Idaho,* No. 94-1474, 1997, WL338603 (US 23 June 1997); Kathleen Smith, "Land Rights: Quiet Title Action Against the State [*Idaho* v *Coeur d'Alene Tribe of Idaho*]," *American Indian Law Review* 22:1 (1997): 249–253.

66. 480 US 700 (1987); Getches et al., *Federal Indian Law,* 304.

67. 8 ICC 29 (1959).

68. Frank W. DiCastri, "Are All States Really Equal? The 'Equal Footing' Doctrine and Indian Claims to Submerged Lands," *Wisconsin Law Review* 1 (1997): 179–206; Thomas H. Pacheco, "Indian Bedlands Claims: A Need to Clear the Waters," *Harvard Environmental Law Review* 15 (1995): 5ff.

69. DiCastri, "Are All States Really Equal?" 184.

70. 397 US 620 (1970).

71. 450 US 544 (1981).

72. DiCastri, "Are All States Really Equal?" 193–194.

73. Ibid., 196.

74. Wilcomb E. Washburn, "Land Claims in the Mainstream of Indian/White Land History," in Sutton, *Irredeemable America,* 21–33, 25–26 (quote); 220 Ct. Cl. 442, 601 F. 2nd 1157 (1979), aff'd 448 US 371.

75. In South Dakota: Cheyenne River, Crow Creek, Lower Brule, Oglala, Rosebud, and Standing Rock; in Nebraska: Santee; and in Montana: Fort Peck Sioux.

76. Frank Pommersheim, "Black Hills," in Davis, *Native America,* 72–75.

77. Linea Sundstrom, "The Sacred Black Hills: An Ethnohistorical Review," *Great Plains Quarterly* 17 (Summer/Fall, 1997): 185–212, 208 (quote).

78. Steven J. Crum, "Western Shoshone," in Davis, *Native America,* 593–595.

79. Docket 326-K, Shoshone, Western, Identifiable Group, Represented by Temoak Band, was transferred to the US Court of Claims. See Omer C. Stewart, "The Shoshone Claims Cases," in Sutton, *Irredeemable America,* 187–206 and Imre Sutton, "Incident or Event: Land Restoration in the Claims Process," in ibid., 219–224.

80. See Crum, "Western Shoshone," 593–595; Jerry Mander, "The Theft of Nevada: The Case of the Western Shoshones," in *In the Absence of the Sacred: Failure of Technology and the Survival of the Indian Nations* (San Francisco: Sierra Club Books, 1991), 303–318; and Elmer R. Rusco, "Historic Change in Western Shoshone Country: The Establishment of the Western Shoshone National Council and Traditional Land Claims," *American Indian Quarterly* 16:3 (1992): 337–360.

81. Donald L. Fixico, "U.S. Indian Legislation," in *The Native North American Almanac,* ed. Duane Champagne (Detroit: Gale Research Inc., 1994), 491–492; Dorthy Lonewolf Miller and David de Jong, "Non-Reservation Indians in the United States," in ibid., 614–615. *The Native North American Almanac* provides a map of non-recognized Indian communities, 612–613.

82. Carole Goldberg, "Acknowledging the Repatriation Claims of Unacknowledged California Tribes," *American Indian Culture and Research Journal* 21:3 (1997): 183–190; Diane D. Wilson, "California Indian Participation in Repatriation: Working Toward Recognition," ibid., 191–210. In 1997, a branch of the Chumash did receive some minor consideration in the setting aside of a site on acreage developed for a Wal-Mart in the city of Paso Robles.

83. 25 USC 2701 et seq.; 102 Stat. 2467.

84. Imre Sutton, "Land Restoration and Casinos are Separate Issues," *Los Angeles Times,* 17 August 1997, B7. For a broader discussion of California Indians and recognition, including a list of non-recognized groups, see Al Logan Slagle, "Unfinished Justice: Completing the Restoration and Acknowledgement of California Indian Tribes," *American Indian Quarterly* 13:4 (1989): 325–345.

85. PL 100-95 (1987).

86. Florence C. Shipek, *Pushed into the Rocks: Southern California Indian Land Tenure, 1779–1986* (Lincoln: University of Nebraska Press, 1987), 103–105.

87. *Pechanga Band of Mission Indians* v *Kacor Realty, Inc. et al.,* 680 F. 2d 71 (9th Cir. 1982), cert. denied, 103 S. Ct. 817 (1983). See Christie, "Indian Land Claims Involving Private Owners of Land," 233–246.

88. For a discussion of this historic fact, see Imre Sutton, "Land Tenure and Changing Occupance on Indian Reservations in Southern California," (Ph.D. diss., University of California, Los Angeles, 1964). Many of the Indian communities in Southern California that were denied reservations are shown on exhibit xiv, 91.

89. Steven J. Crum, professor, University of California, Davis, correspondence with author, 4 May 1998, updated some of this section. The tribal name is variously spelled: Timbisha, Timbesha, Tim-bisha.

90. Cf. David H. Thomas, Lorann S. A. Pendleton, and Stephen C. Cappannari, "Western Shoshone," in *Great Basin,* vol. 11, ed. Warren L. D'Azevedo, *Handbook of North American Indians* (Washington, DC: Government Printing Office, 1986), figure 1;

note sites in Death Valley, 45, 222. Cf. Sutton, *Irredeemable America,* 199–200, 222 (figures 8.3, 8.4, and 9.2).

91. *United States* v *Grantham;* for discussion of this case, see Steven J. Crum, "A Tripartite State of Affairs: The Timbisha Shoshone Tribe, the National Park Service, and the Bureau of Indian Affairs, 1933–1994," *American Indian Culture and Research Journal* 22:1 (1998): 117–136, 122 (quote).

92. Crum, "A Tripartite State," 124; see also Crum, "Western Shoshone," 593–595.

93. Crum, "A Tripartite State," 128.

94. Ibid., 134.

95. Ibid., 132. On the general policy of the NPS toward Natives and current policy changes, see Robert H. Keller and Michael F. Turek, *American Indians and National Parks* (Tucson: University of Arizona Press, 1998); with reference to elsewhere in California, see Mark Spence, "Dispossessing the Wilderness: Yosemite Indians and the National Park Ideal, 1864–1930," *Pacific Historical Review* 65 (Feb.1996): 27–59.

96. Clifford, "Death Valley Indians," see supra note 4.

97. *Duwamish* v *United States,* Docket 109, 10 ICC 447 (1962).

98. *United States* v *State of Washington,* 384 F. Supp. 312 (1974), cert. denied, 423 US 1086, 96 S. Ct. 877 (1976); Cf. Daniel L. Boxberger, "Duwamish," in Davis, *Native America,* 173.

99. Bruce G. Miller, "Samish," in Davis, *Native America,* 567. See general discussion by Frank W. Porter, III, "Without Reservation: Federal Indian Policy and the Landless Tribes of Washington," in *State and Reservation: New Perspectives on Federal Indian Policy,* eds. George P. Castile and Robert L. Bee (Tucson: University of Arizona Press, 1992), 110–135. As an example of minor restoration of land, the Sauk-Suiattle of Washington, recognized in 1973 and granted fishing rights under the 1974 Boldt Decision (*United States* v *State of Washington,* Civil 9213, 384 F. Supp. 312, 1974), had trust land purchased for them in 1985 in Sauk Prairie (Daniel L. Boxberger, "Sauk-Suiattle," in Davis, *Native America,* 569).

100. Frank W. Porter, III, "Nonrecognized American Indian Tribes in the Eastern United States: An Historical Overview," in *Strategies for Survival,* ed. Frank W. Porter, III (New York: Greenwood Press, 1986), 15–36, 25–26. For a more legal differentiation of Indian communities, see Miller and de Jong, "Non-Reservation Indians," in Champagne, *Native North American Almanac,* 615.

101. Tom Diamond, "Ysleta del Sur Pueblo," in Davis, *Native America,* 714–715.

102. Much has been written about sacred places and land restorations: R. C. Gordon-McCutchan, *The Taos Indians and the Battle for Blue Lake* (Santa Fe: Red Crane Books, 1991); Klara B. Kelley and Harris Francis, *Navajo Sacred Places* (Bloomington: Indiana University Press, 1994); Deward E. Walker, Jr., "Protection of American Indian Sacred Geography," in *Handbook of American Indian Religious Freedom,* ed. Christopher Vecsey (New York: The Crossroad Publishing Company, 1991), 100–115; Robert S. Michaelsen, "Dirt in the Court Room: Indian Land Claims and American Property Rights," in *American Sacred Space,* eds. David Chidester and Edward T. Linenthal (Bloomington: Indiana University Press, 1995), 43–96.

103. Cf. Nancy Akins, "New Direction in Sacred Land Claims: *Lyng* v. *Northwest Indian Cemetery Protective Assn,*" *Natural Resources Journal* 29 (1989): 593–605; see also *Havasupai Tribe* v *United States,* 752 F. Supp. 1471 (1990), cert. denied 503 US 959 (1992).

104. Weinstein et al., "Mohegan," 355; there is a national map in Champagne, *Native North American Almanac,* 612–613; Porter, "Non-Recognized American Indian Tribes"; Martin Glassner, professor emeritus of geography, Southern Connecticut State University, correspondence with author, 20 October 1997; Slagle, "Unfinished Justice"; Porter, "Without Reservation"; and Kenneth D. Tollefson, "Political Survival of Landless Puget Sound Indians," *American Indian Quarterly* 16:2 (1992): 213–235.

105. See Maurice Eben (chairman, commission on repatriation and burial sites protection, National Congress of American Indians), "Testimony on H.R. 2893," [http://www.ncai.org/indianissues/Cultural Resources/maurice_eben_2893.htm], 10 June 1998; Maurice Eben, telephone communication with author, 12 July 1999. For a general legal guide, see Thomas F. King, *Cultural Resources Law and Practice: An Introductory Guide* (Walnut Creek, CA: Altamira Press, 1998).

106. Jhon Goes in Center (Oglala Lakota) and Bryan A. Marozas (Ojibwa), "The Relevance of Tribal Aboriginal Territories in the Interpretation, Protection, and Restoration of Cultural Resources," a symposium at the 1999 Annual Meetings, American Association of State and Local History, Baltimore, 29 September–2 October 1999; see also their paper, "The Role of Spatial Information in the Assessment of Cultural Affiliation," in "Native American Graves Protection and Repatriation Act, Hearings before the Committee on Indian Affairs," US Senate, 106th Cong., 1st sess. (April 1999). As the authors point out, tribes such as the Southern Ute and Ute Mountain in Colorado that did not receive any adjudication have no recourse when the ICC "Indian Land Areas Judicially Established" is mandated. In this case, numerous burial sites of the former are shown to lay within territory of the Utes farther north. See also ICC, *Final Report* and C. C. Royce, comp., *Indian Land Cessions in the United States, 18th Annual Report, 1896–97,* pt. 2 (Washington, DC: Bureau of American Ethnography, 1899); and see Sutton, *Irredeemable America,* chap. 5 for discussion of errors in Royce maps. In regard to earlier ethnographic maps, see Alfred L. Kroeber, *Cultural and Natural Areas of Native North America, University of California Publs. in American Archaeology and Ethnography,* 38 (Berkeley: University of California Press, 1939; reprint 1963). On the larger issue of the 'rights' of scientists to excavate and examine Native American remains, see Michelle Hibbert, "Galileos or Grave Robbers?: Science, the Native American Graves Protection and Repatriation Act, and the First Amendment," *American Indian Law Review* 23:2 (1998–1999): 425–458.

107. *Havasupai Tribe* v *United States,* 752 F. Supp. 1471 (D.Ariz., 1990); 943 Fed. 2d 32 1991), cert. denied, 503 US 959 (1992); Cf. Getches et al., *Federal Indian Law,* 635. Grand Canyon Enlargement Act, 1975, 16 USCA §§ 228 et seq.; see Fig. 12.2 in Martin, in *Irredeemable America,* 277; *Havasupai Tribe* v *United States,* 21 ICC, 341 (1969).

108. John F. Martin, "Havasupai," in Davis, *Native America,* 231–233.

109. The federal government eventually set aside the "GO-Road" high country as a wilderness area, preserving its sacred sites (Thomas Buckley with the Yurok Transition Team, "Yurok," in Davis, *Native America,* 720).

110. Renee Thakali, district ranger, Tusayan Ranger Dist., Kaibab National Forest, Arizona, phone conversation with author, February 1999.

111. My earlier effort to review land restorations raised the question: "Incident or Event?: Land Restoration in the Claims Process," in Sutton, *Irredeemable America,* 211–232. See also my statement supporting land restoration as applied to Southern California: "Indian Land, Whiteman's Law: Southern California Revisited," *American Indian Culture and Research*

Journal 18:3 (1994): 265–272. There is no stated national policy for the return of land to indigenous Americans. See discussion in this issue ("Concludng Commentary").

112. Dean B. Suagee, "Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground," *Vermont Law Review* 21 (1996): 114–224, on ARPA see 196–203; John R. Wunder, *'Retained by the People': A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994).

113. 25 USC §2206 (1994), see §207 of the act; Michelle M. Lindo, "*Youpee v Babbitt*—The Indian Land Inheritance Problem Revisited," *American Indian Law Review* 22:1 (1997): 223–246. On earlier legislative actions, see Anon., "Land Consolidation: Indian Land Consolidation Act Amendments (*Youpee* v *Babbitt,* 67 F. 3rd 194 (9th Cir. 1995)," in *American Indian Law Review* 20:1 (1986): 254–256.

114. 481 US 704 (1987).

115. 67 Fed. 3rd 194 (1995).

116. For an older discussion of the heirship problem, see Kirke Kickingbird and Karen Ducheneaux, *One Hundred Million Acres* (New York: Macmillan, 1973), esp. chap. 5. For a recent study, see Elizabeth A. C. Thompson, "*Babbitt* v *Youpee:* Allotment and the Continuing Loss of Native American Property and Rights to Devise," *University of Hawai'i Law Review* 19 (1997): 265–310.

117. Mark Fogarty, "The Dawes Act Legacy: Indians Moving Vigorously to Recover Their Lost Land," *American Indian Report* 15:3 (1999): 8–10, 10 (quotes).

118. The section received considerable assistance from Professor Jon Van Dyke, Richardson School of Law, University of Hawai'i at Manoa, who not only shared several of his publications including a manuscript pending publication in 1999, but also reviewed the penultimate draft of this section. It also relies, in part, on Getches et al., *Federal Indian Law.* I assume all obligations for errors and misinterpretation of facts.

119. See Noelle M. Kahanu and Jon M. Van Dyke, "Native Hawaiian Entitlement to Sovereignty: An Overview," *University of Hawai'i Law Review* 17:2 (1995): 27–46; Jeffrey Wutzke, "Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims," *American Indian Law Review* 22:2 (1998): 509–565. Note that the courts interpreted *Indian,* a word that has also been interpolated to mean "aborigines of America," to include Aleuts and Eskimos. Perhaps this broader meaning embraces Native Hawaiians as well as indigenous peoples of the flag possessions of the Pacific. See *United States* v *the Native Village of Unalakleet,* 411 F 2d, 1255 (1969).

120. Imre Sutton, "Indian Land Rights and the Sagebrush Rebellion," *Geographical Review* 72:3 (1982): 357–359.

121. For earlier legal history, see David H. Getches, "Alaska and Hawaii," in Sutton, *Irredeemable America,* 303–318; fig. 13.1 shows the regional corporations and their individual acreage by symbol.

122. Getches et al., *Federal Indian Law,* 899.

123. PL 103–150, 107 Stat. 1510, "Joint Resolution to Acknowledge the 100th Anniversary of the Jan. 17, 1893 Overthrow of the Kingdom of Hawaii" (1993); Getches et al., *Federal Indian Law,* 901, citing the previously mentioned law, §3.

124. Getches et al., *Federal Indian Law,* 901.

125. 915 F 2nd 469 (9th Cir. 1990), cert. denied 112 S. Ct 436 (1991).

126. PL 100-579 (1988); 42 USCA §2881a.

127. Daniel G. Mueller, "The Reassertion of Native Hawaiian Gathering Rights

Within the Context of Hawai'i's Western System of Land Tenure," *University of Hawai'i Law Review* 17:1 (1995): 165–192.

128. 73 Haw. 578; 837 P 2d 1247 (1992).

129. Mueller, "The Reassertion of Native Hawaiian," 171.

130. For a fuller explication of gathering rights, see Getches et al., *Federal Indian Law*, 911– 922.

131. Jon M. Van Dyke, "The Special Political Status of the Native Hawaiian People," unpublished manuscript, fall 1998, 4–5. The manuscript was later published as "The Political Status of the Native Hawaiian People," *Yale Law and Policy Review* 17:1 (1998): 95–147. See also Van Dyke, Carmen Di Amore-Siah, and Gerald W. Berkley-Coats, "Self-Determination for Non-self-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i," *University of Hawai'i Law Review* 18:2 (1996): 623–643.

132. PL 103-150, 107 Stat. 1510 (1993).

133. Act 200, sec. 2 (1994).

134. Hawaiian Revised Statutes, Sec. 6K-9.

135. Act 329 (1997).

136. Kahanu and Van Dyke, "Native Hawaiian Entitlement," review the range of arguments but sustain the position that Native Hawaiians are entitled to equivalent rights and justice.

137. PL 344, 42 Stat. 108 (1921).

138. Sec. 5(f).

139. Van Dyke, "The Special Political Status," 17 (emphasis added).

140. Admissions Act (1959), PL 86-3, 73 Stat. 4, sec. 5(0b).

141. See Hawaiian Constitution, §XII, secs. 4, 5–6.

142. Cir. Ct., 1st Cir, Civil 94-4207-11, Oct. 19, 1998.

143. Ibid., 2 (from the brief).

144. Ibid., 3.