Florida Law Review

Volume 25 | Issue 2 Article 4

January 1973

American Indian Land Claims: Land Versus Money as a Remedy

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NOTES

AMERICAN INDIAN LAND CLAIMS: LAND VERSUS MONEY AS A REMEDY*

> Let us pay our debts to the Indian tribes that sold us the land that we live on. They sold it for little enough, generally a few cents an acre. Let us at least pay what we promised to pay, if we have not already done so, and let us see that the Indians have their fair day in court. . . . And let us make sure that when the Indians have their day in court they have an opportunity to present all their claims of every kind, shape, and variety, so that this problem can truly be solved once and for all . . . .[1]

Some eighty per cent of the surface of the United States has been subject to Indian claims at one time or another.[2] Although many of these claims were settled under special jurisdictional acts dating from 1881[3] to 1946,[4] Indian land claims are still of continuing importance. Between 1946 and 1951, 370 petitions involving over 600 claims were filed[5] under the Indian Claims Commission Act.[6] Almost forty per cent remain to be decided,[7] of which over 150 claims involve land.[8]

While the Indians have traditionally received money damages in settlement of land claims a new remedy has recently emerged; through congressional action the Indians' land has been returned in settlement of their claim. Whether the Indians should receive money damages or the disputed land in compensation for their claims is an important and unsettled question today. Therefore, this note will trace briefly the development of Indian land claim law with particular emphasis on recent trends affecting Indian claims.

THE INDIAN AND HIS LAND IN THE AMERICAN LEGAL SYSTEM

With the discovery of the North American continent by Columbus, relations began between the new residents of this hemisphere and its native

*EDITOR'S NOTE: This note received the *Gertrude Brick Law Review Apprentice Prize* for the best student note submitted in the summer 1972 quarter.

1. 92 CONG. REC. 5312 (1946) (remarks of Senator Jackson).

2. *Hearings on S. 750 and H.R. 471 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess. 217 (1970); The New Mexican (Santa Fe, N.M.), Nov. 3, 1970, §A at 6, col. 1.

3. Act of March 3, 1881, ch. 130, 21 Stat. 504 (the first jurisdictional act); *see* Choctaw Nation v. United States, 19 Ct. Cl. 243 (1884).

4. Date of the Indian Claims Commission Act, 25 U.S.C. §§70-70w (1970).

5. *Hearings on S. 2408 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 4, 15 (1971).

6. 25 U.S.C. §§70-70w (1970).

7. Interview with Robert L. Bennett, Director of Special Projects, American Indian Law Center, University of New Mexico School of Law, and former Commissioner of the Bureau of Indian Affairs, in Albuquerque, N.M., March 21, 1972.

8. *Hearings, supra* note 5, at 33.

inhabitants, mistakenly called "Indians."[9] The history of these relations has been long, sometimes bloody, and often hostile. Land disputes account for much of this animosity.[10] After invading the Indians' land, European immigrants continued to usurp territory necessary to their expanding population. Although agreements were made and treaties were signed,[11] the new residents continued to move westward forcing the Indians to abandon their ancestral homes. Disputes not only arose over who owned what land but also over what was a just price for the land. These disputes prompted litigation and the development of an entirely new field of law.

To better understand land claim law one should be cognizant of the special place the Indian occupies in our legal system.[12] The Constitution refers to the Indians only once, assigning to Congress the authority to regulate commerce with the Indians.[13] In *Worcester v. Georgia*[14] the United States Supreme Court concluded that this power, exercised in conjunction with the war[15] and treatymaking[16] powers was a sufficient basis for regulating intercourse with the Indians.[17] Under this authority Congress enacted numerous treaty provisions and special laws bringing the Indians under the care and control of the federal government.[18]

The courts, recognizing this relationship of care and control, have referred to Indian tribes as "communities"[19] or "domestic dependent nations," "wards" of the nation[20] or "in a state of pupilage."[21] These early descriptions must necessarily be considered in the light of popular opinion existing at the time. Although such phrases have often been repeated in judicial decisions, the Indians have come a great distance from dependent nationali-

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9. 7 ENCYCLOPEDIA AMERICANA 348 (1969).

10. *See generally* U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 18, 593-601 (1958) [hereinafter cited as FEDERAL INDIAN LAW]; Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

11. FEDERAL INDIAN LAW 26.

12. *See* Oliver, *Legal Status of the Indians*, 38 ORE. L. REV. 193 (1959) for in-depth analysis of this area.

13. U.S. CONST. art. I, §8, cl. 3. Other constitutional powers over the Indians include the power to make expenditures for the general welfare, to control property of the United States, to make treaties, and others. FEDERAL INDIAN LAW 22.

14. 31 U.S. (6 Pet.) 515 (1832).

15. U.S. CONST. art. I, §8, cl. 1.

16. U.S. CONST. art. II, §2, cl. 2.

17. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

18. *See* United States v. McGowan, 302 U.S. 535, 538 (1938); United States v. Payne, 264 U.S. 446 (1924); United States *ex rel.* Brown v. Lane, 232 U.S. 598, 602 (1914); FEDERAL INDIAN LAW 1.

19. United States v. Sandoval, 231 U.S. 28, 39 (1913); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

20. Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Williams v. Johnson, 239 U.S. 414 (1915).

21. United States v. Kagama, 118 U.S. 375 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). *See also* Kane, *Jurisdiction Over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237, 237-38 (1965).

ties in the early 19th century to citizenship today.[22] Nevertheless, the relationship existing between the United States and the Indian tribes is unique. While citizenship generally has the same meaning to the Indian as to other citizens there are areas where the consequences differ.[23]

The powers of the United States Government over the Indian remain unchanged by the grant of citizenship.[24] Citizenship is compatible both with federal powers of guardianship[25] and restrictions on property.[26] Although today there are few restrictions on Indian property, many restrictions did exist at the time that Indian claims arose.

In *Johnson v. McIntosh*[27] the Supreme Court concluded that since the formation of the United States Government fee title in Indian land has been vested in the federal government.[28] *Johnson* involved an individual claim to land privately purchased from an Indian tribe. Consumated without consent of the sovereign, the Indian's deed was judged invalid against the United States where the United States had acquired the land from the Indians by treaty.[29] Mr. Chief Justice Marshall declared that discovery gave sovereign title to the Government by whose authority discovery was made.[30] This classical view[31] of the sovereign's fee title, a pragmatic principle recognized by all Europeans, acknowledged one law as controlling the right of acquisition and thus avoided conflicting settlements and bloody confrontation.[32] However, the Supreme Court clearly stated in *Worcester v. Georgia*[33] that title by discovery did not affect the validity of Indian title.[34] The conclusion was that absolute (legal) title was in the United States subject only to the Indian right of occupancy (equitable title).[35] The United States took title to the land through Britain,[36] Spain, Mexico, and France;[37] and the Indians continued in their right to perpetual occupancy of the land with the privilege of using it.[38]

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22. Act of June 2, 1924, ch. 924, 43 Stat. 253; FEDERAL INDIAN LAW 2.
23. FEDERAL INDIAN LAW 523-26.
24. *Id.* at 525.
25. Winton v. Amos, 255 U.S. 373, 391 (1921); United States v. Boylan, 265 F. 165, 171 (2d Cir. 1920), *aff'g* 256 F. 468 (1919).
26. FEDERAL INDIAN LAW 526. *See generally* FEDERAL INDIAN LAW 773-818.
27. 21 U.S. (8 Wheat.) 543 (1823).
28. *Id.* at 587.
29. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).
30. *Id.* at 573.
31. FEDERAL INDIAN LAW 593-94.
32. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-44 (1832).
33. 31 U.S. (6 Pet.) 515 (1832).
34. *Id.* at 544.
35. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). *See also* FEDERAL INDIAN LAW 593-601; Cohen, *supra* note 10, at 47-50.
36. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832).
37. *See* Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967).
38. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); United States v. Santa Fe Pac. R.R., 314 U.S. 339, 345 (1941).

Nevertheless, the rights of the sovereign after discovery went beyond mere legal title. Discovery gave the sovereign the exclusive right to extinguish the Indian right of occupancy, either by purchase, by treaty, or by conquest.[39] This policy, first announced in *Johnson v. McIntosh*,[40] only confirmed with supporting rationale the practices of 200 years of American history.[41]

Indians hold one of two distinguishable titles to their land, either Indian title or "recognized" title. Indian title, or aboriginal title, is title in a tribe derived from extended occupancy and use of a specific area.[42] "Recognized" title is title to a specific area existing because the United States has recognized the interest of an Indian tribe in certain land, usually by statute or treaty.[43] The United States may confiscate land held by Indian title and the owners have no remedy whereas compensation is required for the taking of "recognized" title land.

Although these title concepts give rise to differing rights, each may be extinguished by the United States.[44] Extinguishment can be effected by treaty, conquest, purchase, occupancy, exercise of complete dominion adverse to the right of occupancy or otherwise.[45] Indian title can be extinguished by either Presidential order[46] or congressional act.[47] However, the real power to dispose of lands constitutionally[48] resides in Congress,[49] and this power may defeat even an Executive land grant.[50]

Since the taking of land held by Indian title does not fall within the just compensation provision of the fifth amendment,[51] nothing compels the

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39. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 280 (1955).

40. 21 U.S. (8 Wheat.) 543, 587 (1823).

41. Since the early 1600's the white man had obtained land from the Indians through any means available. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 280 (1955); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 339 (1945).

42. INDIAN CLAIMS COMMISSION, ANNUAL REPORT 5 (1968).

43. *Id.* at 7.

44. *See* Friedman, *Interest on Indian Claims: Judicial Protection of the Fisc*, 5 VALPARAISO U. L. REV. 26 (1970) (discussing "recognized" and Indian title and the question of interest on Indian land claims).

45. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941); Beecher v. Wetherby, 95 U.S. 517, 525 (1877).

46. *See* Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942).

47. It should be noted that the extinguishment of Indian title is solely within the powers of the legislative and executive branches and its justness is not open to inquiry in the courts. Plenary authority over relations with the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 345, 347 (1941); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Buttz v. Northern Pac. R.R., 119 U.S. 55, 66 (1886); Beecher v. Wetherby, 95 U.S. 517, 525 (1877). *See* Berger, *Indian Mineral Interest — A Potential for Economic Advancement*, 10 ARIZ. L. REV. 675, 676 (1968).

48. U.S. CONST. art. IV, §3, cl. 2.

49. Hynes v. Grimes Packing Co., 337 U.S. 86 (1949); United States v. 2,005.32 Acres of Land, 160 F. Supp. 193 (N.D.S.D. 1958); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 95 (1942).

50. Hynes v. Grimes Packing Co., 337 U.S. 86 (1949); Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942).

51. "[N]or shall private property be taken for public use, without just compensation."

Government to pay for such land. *Hynes v. Grimes Packing Co.*[52] held that the Indians' right of occupancy was not a compensable right in the absence of specific federal recognition. Moreover, in *Tee-Hit-Ton Indians v. United States*[53] it was specifically held that the taking of land held by Indian title was not compensable.[54] Two earlier cases, the *United States v. Santa Fe Pacific Railroad*[55] and the first *United States v. Alcea Band of Tillamooks*[56] decision, had been misinterpreted by some writers[57] as permitting compensation. This misinterpretation resulted from phrases in the decisions such as "the Indian right of occupancy is considered as sacred as the fee simple of the whites."[58] This initial misunderstanding was rectified in the *Hynes* and *Tee-Hit-Ton Indians* decisions. The court in *Tee-Hit-Ton Indians* attributed the holding in the first *Tillamooks* decision to a special jurisdictional act permitting recovery in that one case.[59]

Until 1871 acquisition of Indian lands was generally accomplished by the process of negotiation and treaty.[60] The treaty would contain a formal act of cession that would cede the land to the United States and extinguish any Indian claims to the area.[61] In 1871, however, Congress declared that further dealings with the Indians would be conducted through legislation.[62]

A recent example of such legislation is the Alaska Native Land Claims Act.[63] After Alaska was purchased from Russia[64] the United States made no special treaty with the natives regarding their land. The Organic Act of 1884,[65] which established civil government in Alaska, provided that Alaskan natives should not be removed.[66] The statute, however, left the title acquisition of native land for future legislation.[67] In response to claims by Alaskan natives

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U.S. CONST. amend. V. *See* Higgins, *International Law Consideration of the American Indian Nations by the United States*, 3 ARIZ. L. REV. 74, 77 (1961).

52. 337 U.S. 86 (1949).

53. 348 U.S. 272 (1955).

54. *Id.* at 285; *see* United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); Hynes v. Grimes Packing Co., 337 U.S. 86 (1949).

55. 314 U.S. 339 (1941).

56. 329 U.S. 40 (1946).

57. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 56-58 (1947).

58. United States v. Santa Fe Pac. R.R. 314 U.S. 339, 345 (1941).

59. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 284-85 (1955). *See* text accompanying notes 92-100 *infra*, discussing jurisdictional acts.

60. United States v. Alcea Band of Tillamooks, 329 U.S. 40, 47 (1946). The first treaty was one of alliance with the Delaware Indians. Articles of Agreement and Confederation with the Delaware Nation, Sept. 17, 1778, 7 Stat. 13.

61. *See, e.g.*, United States v. Omaha Tribe of Indians, 253 U.S. 275 (1920); United States v. Cherokee Nation, 202 U.S. 101 (1906).

62. 25 U.S.C. §71 (1970).

63. Pub. L. No. 92-203 (Dec. 18, 1971). See Block, *Alaskan Native Claims*, 4 NATURAL RESOURCES LAW. 223 (1971), for extensive discussion of the Alaska claims.

64. Treaty with Russia on Cession of Russian Possessions in North America, March 30, 1867, 15 Stat. 539.

65. Act of May 17, 1884, ch. 53, 23 Stat. 24.

66. *Id.*

67. *Id.*

and after many months of consideration[68] the Alaska Native Land Claims Act of 1971 was finally passed.[69] As noted by Congressman James A. Haley,[70] the Act is similar "to the many Indian treaties that ceded some Indian land to the United States and retained some Indian land for the tribe."[71] All but forty million acres retained by the Indian population was ceded to the United States in consideration for $962.5 million.[72] The Act not only extinguished all aboriginal titles and claims,[73] but also provided that the natives retain only the surface rights and not the mineral rights to the land.

Since claims have not been limited to those stemming from treaties or statutes, but include any wrongful act that resulted in a taking of Indian land, great areas of the United States have been subject to such claims.[74]

EARLY INDIAN LAND CLAIMS

In 1947 the late Felix S. Cohen, Associate Solicitor with the Department of the Interior and author of the *Handbook of Federal Indian Law* stated that many myths and legends exist concerning Indian land.[75] At that time there was widespread fear that title to much of the United States might be in jeopardy of Indian claims. Cohen noted the common impression that we took the land from the Indians by force and confined them to reservations[76] was not supported by the facts. Most real estate acquired by the United States since 1776 was purchased from the original Indian possessors. The United States practiced respect for Indian title, and Indians sold the land to the United States while "reserving" some income producing land to themselves. In Cohen's words the United States was probably the one great nation in the world that "consistently sought to deal with an aboriginal population on fair and equitable terms."[77]

While agreeing with Cohen's major premise that the lands were purchased from the Indians, other commentators maintain that the means to that end were often less than legal or honorable.[78] They assert that our government's treatymaking with the Indians is not a proud chapter of American history. The application of constraint and power over the Indians on some treaty-

68. *See* 3 AMERICAN INDIAN LAW NEWSLETTER, INDEX (1971). The NEWSLETTER is an invaluable aid in locating current litigation, legislation, and commentary on Indian affairs.

69. Pub. L. No. 92-203 (Dec. 18, 1971).

70. Letter from Congressman James A. Haley, Chairman of the Subcommittee on Indian Affairs, to Richard Nielsen, May 26, 1972, on file with the *University of Florida Law Review.*

71. *Id.*

72. This amount included $462.5 million in federal grants and $500 million in state and federal mineral revenues. Pub. L. No. 92-203 (Dec. 18, 1971).

73. *Id.*

74. Virtually every acre of land west of the Mississippi River has been subject to at least one claim. INDIAN CLAIMS COMMISSION, ANNUAL REPORT 4 (1968).

75. Cohen, *Original Indian Title,* 32 MINN. L. REV. 28 (1947).

76. *Id.* at 34-35.

77. *Id.* at 34.

78. *E.g.,* Brown, *The Indian Problem and the Law,* 39 YALE L.J. 307, 320 n.51 (1930).

making occasions raised questions as to the legality of many treaties. Both history books[79] and judicial decisions[80] document the authenticity of this position and reflect the great dissatisfaction felt among the Indians. While reasons for dissatisfaction differ with the facts of each case, they can generally be placed into one or more of four categories: (1) delay in payment,[81] (2) inadequate consideration,[82] (3) duress or constraint in treatymaking,[83] and (4) forceful removal.[84] This dissatisfaction has led to court actions for damages.

To sue on a land claim the Indians had to overcome two major obstacles. It was first necessary that their claim involve land held by "recognized" title. Early cases[85] held that before an Indian tribe could complain of damages arising under the fifth amendment for taking of land the title to the land must have been recognized by the United States as residing in the Indians. Where title was recognized under treaty or statute[86] any subsequent taking of that land resulted in liability in the United States.[87] For example, in *Sac & Fox Tribe of Indians v. United States*[88] an action was brought for increased compensation for an area ceded to the United States. The court found that the tribe did not have "recognized" title and denied recovery, noting that the Congress must be the source of such recognition. Simple acknowledgment that the Indians physically lived in a certain region was insufficient.[89] There must have been a grant of legal rights of permanent occupancy within a sufficiently defined territory for title to be considered "recognized."[90] If, however, the Indians held the land by aboriginal or Indian title, title could be extinguished without liability.[91]

The second obstacle confronting Indian tribes in bringing suit was the necessity of a special congressional jurisdictional act. The jurisdiction of the

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79. *See, e.g.*, G. FOREMAN, INDIAN REMOVAL (1932).

80. Heckman v. United States, 224 U.S. 413, 436-37 (1912); United States v. Seminole Indians, 180 Ct. Cl. 375 (1967); United States v. Emigrant New York Indians *ex rel.* Danforth, 177 Ct. Cl. 263 (1966).

81. *See generally* Cohen, *supra* note 57, at 28.

82. *See, e.g.*, Osage Nation of Indians v. United States, 119 Ct. Cl. 592, 97 F. Supp. 381 (1951).

83. *See* United States v. Emigrant New York Indians *ex rel.* Danforth, 177 Ct. Cl. 263 (1966); Sac & Fox Tribe of Indians v. United States, 167 Ct. Cl. 710, 340 F.2d 368 (1964).

84. *See* G. FOREMAN, INDIAN REMOVAL (1932); FEDERAL INDIAN LAW 188-99. *See also* Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967).

85. *See* Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); FEDERAL INDIAN LAW 18-20.

86. Minnesota Chippewa Tribe v. United States, 161 Ct. Cl. 258, 266-67, 315 F.2d 906, 911 (1963).

87. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277 (1955).

88. 161 Ct. Cl. 189, 315 F.2d 896 (1963).

89. *Id.* at 192-93, 315 F.2d at 897. *See also* Confederated Tribes v. United States, 177 Ct. Cl. 184 (1966).

90. *See* Minnesota Chippewa Tribe v. United States, 161 Ct. Cl. 258, 315 F.2d 906 (1963); Miami Tribe v. United States, 146 Ct. Cl. 421, 175 F. Supp. 926 (1959).

91. *See* text accompanying notes 51-60 *supra*.

Court of Claims[92] specifically excepted "any claim against the U.S. government . . . dependent on any treaty stipulation entered into . . . with the Indian tribes."[93] It was therefore necessary that Congress first create a cause of action and recognize governmental liability before the court had power to adjudicate Indian claims.[94]

Several problems inhered in the jurisdictional act method of considering Indian claims. It was not always easy to persuade Congress to enact the necessary legislation. In the period between 1926 and 1945 over 140 claims were litigated, but many more were stalled in congressional committees awaiting jurisdictional acts.[95] The process was slow and expensive, generally taking several years.[96] For example, it took the Turtle Mountain Band of Chippewa Indians from 1892 until 1964 to get final action on their claim.[97]

Even after jurisdiction was obtained there was a high mortality rate of tribal claims in the Court of Claims. This has been attributed to two factors.[98] First, many of the jurisdictional acts contained unclear relief provisions by inadequately defining what claims the Indians could bring before the court. If a claim did not fit precisely within these vague provisions the court would dismiss it for what amounted to lack of jurisdiction.[99] Second, where jurisdiction was assumed the Indians' success was limited because of the narrow construction given the acts. Often new facts developed that were unavailable when the jurisdictional bill was drafted and jurisdiction was then deficient to cover all the issues.[100] Thus, a better procedure was needed to deal with Indian claims.

THE INDIAN CLAIMS COMMISSION

The necessity for a prompt and just disposition of Indian claims and the failure of the jurisdictional act method to dispose of such claims[101] led to

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92. Act of March 3, 1863, ch. 92, 12 Stat. 765.

93. *Id.*

94. Otoe & Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593, 607, 131 F. Supp. 265, 275 (1955); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945).

95. *See Hearings on H.R. 1198 and H.R. 1341 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 79th Cong., 1st Sess. 162-75 (1945) (tables on tribal claims before the Court of Claims, including dismissals, recoveries, and pending suits).

96. U.S. CODE CONG. & AD. NEWS 1347, 1352 (1946) *quoting* H.R. REP. No. 1466, 79th Cong., 2d Sess. (1946).

97. The claim resulted from a cession agreed to in 1892. After years of lobbying and negotiating, the Indian Claims Commission awarded money damages in 1964. Red Lake, Pembina & White Earth Bands v. United States, 164 Ct. Cl. 389 (1964). *See* Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511, 512-13 (1966).

98. Wilkinson, *supra* note 97, at 513-17.

99. *See* Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945); Cohen, *supra* note 75, at 57 n.71.

100. U.S. CODE CONG. & AD. NEWS 1347, 1352-53 (1946) *quoting* H. R. REP. No. 1466, 79th Cong., 2d Sess. (1946).

101. *Hearings, supra* note 95, at 113.

consideration of a uniform procedure for handling the claims of all Indian tribes. Legislation was considered in every Congress between 1928 and 1946.[102] Finally in 1946 the Indian Claims Commission Act[103] was passed creating the Indian Claims Commission, a temporary administrative agency to hear all Indian claims.[104]

The Indian Claims Commission was given jurisdiction over Indian claims arising prior to August 13, 1946,[105] which included (1) claims in law or equity; (2) tort claims; (3) claims based on fraud, duress, unconscionable consideration, mutual or unilateral mistake; (4) claims based on the taking of land without payment of the agreed compensation; and (5) claims based upon fair and honorable dealings not recognized by existing rules of law or equity.[106] "Identifiable" groups of Indians were given a five-year period in which to present their claims to the Commission.[107] Failure to present a claim within the prescribed time resulted in the claim being forever barred from consideration by Congress or the courts.[108] Within the five-year period some 610 claims were filed. A recent appraisal of those claims[109] shows that 340 have been disposed of, leaving 270 pending[110] of which 172 involve land.[111] Although the Indian Claims Commission was intended to finish its work in

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102. Wilkinson, *supra* note 97, at 518 n.58.

103. 25 U.S.C. §§70-70w (1970).

104. The provisions of 25 U.S.C. §70a (1970) include all claims and are not limited to land.

105. 25 U.S.C. §70k (1970). Those arising after that time are under the Court of Claims, 28 U.S.C. §1505 (1970).

106. 25 U.S.C. §70a (1970) provides: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission."

107. *Id. See also* Upper Chehalis Tribe v. United States, 140 Ct. Cl. 192 (1957).

108. 25 U.S.C. §70k (1970).

109. *Hearings on S. 2408 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs,* 92d Cong., 1st Sess. 4, 15 (1971).

110. *Id.* at 15-16.

111. *Id.* at 33.

five years,[112] its life has been extended on four occasions[113] and is now scheduled to be dissolved in 1977.[114]

The Commission approach has several advantages over other methods of handling Indian claims. First, the Commission is granted jurisdiction over all Indian claims,[115] thereby obviating the requirement that each tribe individually seek a jurisdictional act. Second, the Commission approach is faster. In a short thirty-year span the Commission will have disposed of *all* of the old Indian claims. Last and most important is the fact that the Act actually recognized new causes of action brought by the Indians. Revision of contracts for mutual or unilateral mistake of law or fact was now permitted,[116] revision of treaties that had not been allowed previously was also permitted;[117] and tribes were now allowed to recover damages for extinguishment of Indian title to land.[118]

The important case of *Otoe & Missouria Tribe of Indians v. United States*[119] recognized these new causes of action. Appealing from the Indian Claims Commission's final determinations in seven causes of action, the Government argued that the Indian Claims Commission Act did not create new causes of action.[120] In rejecting this contention the court applied the language from those sections mentioning revision of treaties[121] and fair and honorable dealings.[122] Since the words "treaties" and "dealings" were not qualified nor limited only to recognized title, the court held they must therefore include "treaties" and "dealings" with Indian title as well as "recognized title."[123] Thus, the Claims Commission regarded Indian (or aboriginal) title as valuable as a fee simple title.[124]

Although claims have been brought under each clause of section 70a,[125]

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112. Act of Aug. 13, 1946, ch. 959, §23, 60 Stat. 1049.

113. 25 U.S.C. §70v (1970), *as amended*, Pub. L. No. 92-265 (March 30, 1972); Act of April 10, 1967, Pub. L. No. 90-9, 81 Stat. 11; Act of June 16, 1961, Pub. L. No. 87-88, 75 Stat. 92, Act. of July 24, 1956, Pub. L. No. 84-767, 70 Stat. 624.

114. 25 U.S.C. §70v (1970), *as amended*, Pub. L. No. 92-265 (March 30, 1972). See Vance, *Congressional Mandate and the Indian Claims Commission*, 45 N.D.L. REV. 325, 325-36 (1969), for a brief history of the Indian Claims Commission.

115. 25 U.S.C. §70a (1970).

116. Otoe & Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593, 599, 131 F. Supp. 265, 269, *cert. denied*, 350 U.S. 84 (1955).

117. *Id.*

118. *Id.* at 624, 131 F. Supp. at 285. Clause (5) of §70a in its wording admits of it being a new cause of action. *Id.* at 599, 131 F. Supp. at 269.

119. 131 Ct. Cl. 593, 131 F. Supp. 265 (1955).

120. *Id.* at 598, 131 F. Supp. at 268.

121. 25 U.S.C. §70a (3) (1970).

122. 25 U.S.C. §70a (5) (1970).

123. Otoe & Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593, 609, 131 F. Supp. 265, 275-76 (1955).

124. INDIAN CLAIMS COMMISSION, ANNUAL REPORT 8 (1968). However, if the claims fall outside of the Indian Claims Commission Act, Indian title is still not recognized. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

125. *See, e.g.*, United States v. Emigrant New York Indians *ex rel.* Danforth, 177 Ct.

the typical case involves a claim for additional compensation.[126] All claims go through three phases of adjudication before the Claims Commission.[127] In the title phase the Commission determines whether the Indian claimants held either Indian or recognized title to the specific area involved in the claim.[128] The valuation phase includes the determination of the area and its value at the date of taking.[129] Finally, the gratuitous offset phase concludes the claim by subtracting from the award any amount gratuitously expended by the United States for the benefit of the claimant.[130]

CLAIMS FOR MONEY DAMAGES UNDER THE INDIAN CLAIMS COMMISSION: THE FLORIDA EXPERIENCE — PLIGHT OF THE SEMINOLES

The Indian Claims Commission has decided hundreds of Indian claims in the last twenty-two years.[131] The experience of the Seminole Indians of the State of Florida, however, is in many ways representative. The Commission's procedures in this claim and the degree and type of proof necessary to bring recovery were similar to most other claims. In addition, the Seminole case involved the fact question[132] of the original Indian title.

Early History of the Seminole Indians

Those Indians known as "Seminoles," meaning "separatist" or "runaway"[133] did not move into Florida until after A.D. 1700.[134] Although the land was occupied by various aboriginal cultures at the time of the Spanish discovery and settlement in 1512, these Indian populations declined over the next 200 years.[135] In the early 18th century Indians from the Georgia and Carolina area, descendants of Creeks, Hitchiti, Yamasee, Yuchi, and a Negro element[136] migrated into Florida. By 1765 there were clear references to these

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Cl. 263 (1966) (fair and honorable dealings); United States v. Kiowa, Commanche & Apache Tribes, 143 Ct. Cl. 534, 163 F. Supp. 603, *cert. denied*, 359 U.S. 934 (1958) (fair and honorable dealings); Osage Nation of Indians v. United States, 119 Ct. Cl. 592, 97 F. Supp. 381, *cert. denied*, 342 U.S. 896 (1951) (unilateral mistake and fair and honorable dealings). *See also* Editorial Notes, 15 GEO. WASH. L. REV. 388 (1947).

126. *See* Miami Tribe v. United States, 146 Ct. Cl. 421, 175 F. Supp. 926 (1959); INDIAN CLAIMS COMMISSION, ANNUAL REPORT (1968).

127. *See* INDIAN CLAIMS COMMISSION, ANNUAL REPORT (1968) (for explanation as to matters of proof, sources for proof, methods of determining value and other aspects of Claims Commission litigation).

128. *Id.* at 4.

129. *Id.* at 8.

130. *Id.* at 10. *See* 25 U.S.C. §70a (1970) (provisions for offsets and exceptions).

131. *See* text accompanying notes 109-111 *supra*.

132. INDIAN CLAIMS COMMISSION, ANNUAL REPORT 5 (1968).

133. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 60 (1946); G. FOREMAN, INDIAN REMOVAL 315 (1932).

134. G. FOREMAN, INDIAN REMOVAL 315 (1932).

135. United States v. Seminole Indians, 180 Ct. Cl. 375, 378-79 (1967).

136. F. COHEN, *supra* note 133.

Indians as "Seminoles."[137] Under English and then Spanish rule the Seminole population increased. After American expansionism turned toward Florida,[138] attempts to capture escaped Negro slaves led to the First Seminole War, which ended in 1818.[139]

In 1819 the United States purchased Florida from Spain and sought treaties with the Seminoles. The Camp Moultrie Treaty[140] signed on September 18, 1823, provided that the Indians would relinquish "all claim or title which they may have to the whole territory of Florida." In return the Indians were to be removed from the fertile lands on the Suwanee and Apalachicola Rivers to the swampy interior country below Tampa Bay.[141] They also received monetary consideration totaling 152,500 dollars.[142] It was this treaty that formed the basis of the Seminoles' claim later brought against the United States.[143]

The Seminole Indian Land Claim

On August 14, 1950, the Seminole Indians filed a claim with the Indian Claims Commission alleging inadequacy of consideration received from the United States under the Camp Moultrie treaty.[144] Following the Claims Commission's practice of dividing the litigation into phases,[145] the title phase was tried first. The Seminoles were required to prove Indian title by showing continuous use and occupancy for an extended period of time[146] by means of original sources and expert witnesses.[147] Sufficient proof was also required to show that the land not actually occupied was used by the Seminoles to an extent indicating Indian title.[148]

In 1964[149] the Claims Commission found that the Seminoles had established Indian title to all of Florida south of the Old Spanish Road (roughly south of a line from St. Augustine to Gainesville to Tallahassee), excluding certain lands sold in 1765 and 1804 and lands recognized by the United States as confirmed Spanish land grants.[150] The United States appealed but

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137. United States v. Seminole Indians, 180 Ct. Cl. 375, 380 (1967).
138. *Id.* at 392.
139. G. FOREMAN, *supra* note 134, at 317.
140. Treaty with the Florida Tribes of Indians, Sept. 18, 1923, 7 Stat. 224.
141. G. FOREMAN, *supra* note 134, at 318.
142. United States v. Seminole Indians, 180 Ct. Cl. 375, 377 (1967).
143. Additional attempts at removal and war continued to mar relations with the Seminoles. *See* G. FOREMAN, *supra* note 134, at 315-86; F. COHEN, *supra* note 133, at 60-62.
144. United States v. Seminole Indians, 180 Ct. Cl. 375, 378 (1967).
145. *See* text accompanying notes 127-130 *supra*.
146. United States v. Seminole Indians, 180 Ct. Cl. 375, 383 (1967). Indian title can be proved either by aboriginal use or use and occupancy for a long time.
147. INDIAN CLAIMS COMMISSION, ANNUAL REPORT 6 (1968).
148. United States v. Seminole Indians, 180 Ct. Cl. 375, 383 (1967).
149. United States v. Seminole Indians, 180 Ct. Cl. 375 (1967); *aff'g* 13 Indian Claims Comm'n 326 (1964).
150. *Id.* at 384 n.4.

the decision was affirmed by the Court of Claims.[151] Since the exact boundaries of the disputed area had not been determined a special hearing was deemed necessary[152] to determine the net acreage included in those boundaries and the fair market value on the date of taking.[153] The offsets were decided later that year[154] and a final judgment of more than $12 million was entered in full satisfaction of the claim.[155]

This case was a typical land claims case involving an Indian claim to title of land allegedly taken unjustly by the United States. The Indian group prevailed on the merits and received the only remedy available – money damages as compensation.[156] In 1970, however, a new remedy was obtained in satisfaction of an Indian claim. After many years of lobbying by the Pueblo de Taos Indians, Congress returned their lands. This new remedy has truly altered the land claim law, and its effects should be examined and contrasted with traditional claims.

Land Claims: Land in Lieu of Money

The Taos Indian petition with the Indians Claims Commission in 1951 was the only petition that requested return of a portion of land rather than a money judgment.[157] The eventual return of the land was hotly debated and viewed as a threat to the title to land in most of the United States.[158] Since there have been at least two other attempts to force the return of Indian lands subsequent to the Taos decision there is no doubt the decision has set a precedent.

Taos Blue Lake

The basis of the Taos claim relates back to the Indians' title in the land, their way of life, and their religious practices. The Taos Indians are Pueblo Indians and as such are a sedentary people.[159] They arrived in the disputed area from the Mesa Verde area about A.D. 1300. [160] By the year 1400 they

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151. United States v. Seminole Indians, 180 Ct. Cl. 375 (1967).
152. Seminole Indians v. United States, 19 Indian Claims Comm'n 179 (1968).
153. Seminole Indians v. United States, 23 Indian Claims Comm'n 108 (1970).
154. Seminole Indians v. United States, 24 Indian Claims Comm'n 1 (1970).
155. *Id.* at 20. Further proceedings on the claim included the possibility of overlapping claims, McGhee *ex rel.* Creek Nation v. United States, 194 Ct. Cl. 86, 437 F.2d 995 (1971), and a remand to the Claims Commission for more specific findings and reasoning as to valuation of the claim. Seminole Indians v. United States, No. 1-71 (Ct. Cl. Feb. 18, 1972).
156. *See* Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 354-58 (1945) (concurring opinion) (Jackson, J., comments on legal and moral duty owed the Indians and the relative merits of money judgments).
157. *Hearings on H.R. 471 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 70 (1969).
158. 116 Cong. Rec. 39,590 (1970) (remarks of Senator Jackson); *see* 116 Cong. Rec. 39,596 (1970) (remarks of Senator Metcalf).
159. Pueblo of Taos v. United States, 15 Indian Claims Comm'n 666, 669 (1965).
160. *Id.*

had established a central village as their permanent home and it has remained continuously occupied from that time to the present.[161]

Taos Indian religion is based on devotion to nature and is deeply associated with the land.[162] Their religion places great ceremonial significance in centuries-old shrines located on specific geographic sites,[163] the most sacred being Blue Lake, their "church."[164] The Blue Lake area symbolizes the source of their life and the sources of their spirit.[165] Religion permeates the Taos Indian way of life[166] and the significance of the shrines and Blue Lake in particular to the culture of the Taos people cannot be overemphasized.[167]

The Pueblo of Taos continued in their way of life under Spanish sovereignty (1598-1821), Mexican sovereignty (1821-1848), and United States sovereignty after acquisition of New Mexico in 1848.[168] It was not until 1906 that their Indian title[169] was interrupted when the President, in an attempt to preserve this area of natural beauty, set aside the Blue Lake area for a forest reserve.[170] Within a year the Taos Indians petitioned the Secretary of the Interior seeking exclusive use of the watershed of the Rio Pueblo, the river whose source is Blue Lake.[171] Between 1906 and 1918 the Indians were given exclusive use of the Blue Lake area.[172] However, in 1918 a permit allowing the grazing of non-Indian owned cattle ended exclusive Pueblo use.

In 1927 the Indians entered a cooperative agreement with the Forest Service believing it granted them exclusive use. The use, however, extended only to grazing and timber rights. Moreover, except for three days in August during their most important religious ceremonies visitors were permitted into the area.[173] In a 1928 Executive order the President withdrew the 30,000 acres covered by the 1927 agreement, but the order also eliminated some 14,000 acres left open for entry. Although the land withdrawn was to be reserved for the exclusive use of the Pueblo, the Forest Service continued to issue use permits in addition to other interference with Indian use.[174] This lack of exclusive use in the Indians continued into the 1950's.[175]

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161. *Id.*
162. *Id.* at 670-71.
163. *Id.* at 671.
164. *Id.*
165. TAOS BLUE LAKE DEFENSE FUND, THE BLUE LAKE AREA—AN APPEAL FROM TAOS PUEBLO (n.d.).
166. Pueblo of Taos v. United States, 15 Indian Claims Comm'n 666, 678 (1965).
167. *Id.* at 670-72, 674-79; *Hearings, supra* note 157, at 80-83.
168. Pueblo of Taos v. United States, 15 Indian Claims Comm'n 666, 677-81 (1965).
169. The Claims Commission found that by exclusive possession and use for a long time the Taos Indians had established Indian title. Pueblo of Taos v. United States, 15 Indian Claims Comm'n 666, 691 (1965).
170. *Hearings on H.R. 3306 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 26 (1968).
171. *Id.*
172. *Id.*
173. *Id.* at 28.
174. *Id.* at 29.
175. *Id.* at 30-34.

In 1951 the Pueblo of Taos filed a claim with the Indian Claims Commission, which included the Blue Lake area. They did so reluctantly because they did not want any action to jeopardize their claim to ownership of the land. Their petition requested return of the land rather than a money judgment.[176] After hearings in 1954, 1955, 1956, and 1962 to determine title the Indian Claims Commission in 1965 issued its opinion finding title to approximately 130,000 acres in the Taos Indians.[177] The claim, however, did not progress to the valuation and offset phases since the Claims Commission's jurisdiction extended only to money,[178] and the Indians sought recovery of land.

The Taos Indians renewed their efforts to regain the land through congressional hearings held on several bills each year between 1965 and 1970.[179] A Taos organization for lobbying and support was constructed throughout the country.[180] The opposition, however, was quite strong in making two significant arguments against return of the land.[181] Believing that the Taos religion was not dependent upon land, ownership opponents maintained that the Indians could be given exclusive use without giving them the land. In the Senate hearings much time was spent discussing the Taos Indian use of the land and interference with that use by outsiders.[182]

The strongest argument against return of the land was that it might set precedent for other land claims cases.[183] There was fear that land title in many parts of the country would be in doubt.[184] The opponents were able to list several Indian tribes that could make claims to land on grounds similar to those propounded by the Taos Indians.[185] Since the religion and philosophy of the Pueblo peoples are founded on similar principles,[186] the possibility was raised that all the Pueblo peoples would assert land return claims on

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176. *Hearings, supra* note 157.

177. Pueblo of Taos v. United States, 15 Indian Claims Comm'n 666 (1965).

178. *Hearings, supra* note 157.

179. H.R. Res. 471 was introduced by Congressman James A. Haley of Sarasota, Florida.

180. *See* TAOS PUEBLO COUNCIL, REPORT ON PROGRESS OF BLUE LAKE LEGISLATION (March 1970); Newsletter from the National Committee for Restoration of the Blue Lake Lands to the Taos Indians (n.d.). Many editorials were published supporting the claim. *See, e.g.,* Albuquerque (N.M.) Journal, July 16, 1968, §A at 4. col. 1; N.Y. Times, July 17, 1968, at 42, col. 1; Orlando (Fla.) Sentinel, July 16, 1966, at 6A, col. 1; Washington Post, July 30, 1968, §A at 8, col. 1.

181. *Hearings, supra* note 170, at 52-53; R. Bennett, Taos Blue Lake — A Great Victory 11-12, Feb. 1971 (paper presented to the Amerind Club, University of Arizona).

182. *See Hearings on S. 750 and H.R. 471 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 2d Sess. 36-41, 219-24 (1970).

183. *See, e.g., Hearings, supra* note 170, at 3, 52.

184. 116 CONG. REC. 39,590 (1970) (remarks of Senator Jackson); *see* 116 CONG. REC. 39,596 (1970) (remarks of Senator Metcalf).

185. 116 CONG. REC. 39,589-90, 39,594-96 (1970) (remarks of Senator Jackson); *Hearings, supra* note 182, at 46-52, 218-19, 224-25.

186. Pueblo of Taos v. United States, 15 Indian Claims Comm'n 666, 670-71 (1965).

the many pueblos in New Mexico.[187] There was even mention that the Seminole Indians would be able to request return of parts of Florida.[188]

The concern with precedent was countered by the House Committee on Interior and Insular Affairs in its report on the legislation.[189] The Committee did not regard enactment of the bill as setting a precedent and pointed out three facts that made the Taos Pueblo case unique. First, the land was essential to the preservation of their religion. One expert stated that to deny the Taos Indians the Blue Lake area would destroy their culture.[190] Second, the Indians continued to use the land despite extinguishment of Indian title in 1906. Last, the Government has continued to recognize such use and the special needs of the Indians for the land. No other tribe could make such claims to land.[191]

Due to the lobbying efforts of the Taos Indians and their supporters the bill was finally passed in 1970.[192] They were greatly aided by the support of President Nixon, which he announced in a message to Congress concerning federal policy toward the American Indian.[193] The act provided that 48,000 acres were to be held by the United States in trust for the Pueblo de Taos.[194]

Taos Blue Lake as Precedent

In reply to a recent inquiry, Congressman James A. Haley, Chairman of the Subcommittee on Indian Affairs, indicated there have been further claims for return of Indian land taken by the United States.[195] The Yakima Tribe is requesting return of 22,000 acres of land erroneously included in the Gifford Pinchot National Forest in the State of Washington.[196] The claim is based on a surveyor's error, and the land will be returned by an Executive order rather than by legislation.[197]

Another claim based on surveyor's error is being pursued by the Confederated Tribes of the Warm Springs Reservation of Oregon.[198] Under the treaty of June 25, 1855,[199] the Indians made certain cessions to the United States and reserved a part of the area to themselves. The reservation was described in the treaty and the boundaries were agreed

187. 116 CONG. REC. 39,587 (1970) (remarks of Senator Jackson).
188. *Hearings, supra* note 170, at 60.
189. *Id.* at 8.
190. 116 CONG. REC. 39,596-97 (1970) (remarks of Senator Goldwater).
191. *Hearings, supra* note 170, at 8.
192. Pub. L. No. 91-550 (Dec. 15, 1970).
193. *Hearings, supra* note 182, at 17, 20.
194. Pub. L. No. 91-550 (Dec. 15, 1970).
195. Letter from Congressman James A. Haley, Chairman of the Subcommittee on Indian Affairs, to Richard Nielsen, May 26, 1972, on file with the *University of Florida Law Review.*
196. *Id.*; 116 CONG. REC. 39,587 (1970) (remarks of Senator Jackson).
197. Letter, *supra* note 195.
198. *Id.*
199. Treaty with the Confederated Tribes and Bands of Indians in Middle Arizona, June 25, 1855, 12 Stat. 963.

upon. Three surveys were made later. Two of them did not conform to the treaty description and were not acceptable to the Indians.[200] Although a third survey more nearly conformed to the description set forth in the treaty, Congress decided the line as determined by the two earlier surveys was the proper boundary.[201] The controversy continued and Congress finally passed a special jurisdictional act permitting the Court of Claims to adjudicate the Indians' claim.[202]

In 1941 the Court of Claims determined that the third survey was correct and the Indians were entitled to recover the value of the lands appropriated by the United States.[203] Although their claim was good, the court found that gratuitous offsets exceeded the recovery and dismissed the case.[204] Recognizing the injustice of this conclusion, Congress agreed to credit the Tribes with any revenue derived from the appropriated land.[205] The Tribes were still dissatisfied, however, and in December 1971 a still pending bill[206] that would return title to the Indians was introduced into the House of Representatives.

It would seem that rather than being a unique case, the return of Blue Lake has, as opponents predicted, established a precedent. The two most recent efforts to secure the return of land support such a conclusion. First, both of these claims followed closely the success of the Taos Indians. These tribes must have at least been encouraged by this earlier success. Further, both claims were listed specifically among those claims where return might be sought if the Taos bill passed.[207] The most convincing indication that the Taos Act set a precedent is that these two later claims are based on grounds completely different from the Taos claim. The great concern over the continued existence of the Indian religion and culture cannot be argued in the Yakima and Warm Springs claims. It is therefore clear that the Taos claim was not unique, that it did set a precedent, and that there will be additional claims for land. With the inevitable claims to come it is time for the Government to develop guidelines for determining whose land should be returned.

GUIDELINES

Probably the greatest dilemma that will face the federal government will be determining the rightful ownership of land held privately. The Taos, Yakima, and Warm Springs claims all involve lands in national forest or

200. Warm Springs Tribe of Indians v. United States, 95 Ct. Cl. 23 (1941); Letter from W. O. Pecora, Under Secretary of the Interior, to Congressman Wayne N. Aspinall, May 22, 1972.
201. Act of June 6, 1896, ch. 93, 28 Stat. 86.
202. Act of Dec. 23, 1930, ch. 23, 46 Stat. 1033.
203. Warm Springs Tribe of Indians v. United States, 95 Ct. Cl. 23 (1941).
204. *Id.*
205. Act of July 3, 1948, ch. 822, 62 Stat. 1237; *see Hearings, supra* note 182, at 41.
206. H.R. 12,114, 92d Cong., 1st Sess. (1971).
207. 116 CONG. REC. 39,587 (1970) (remarks of Senator Jackson).

national wilderness areas.[208] The dispensing of public lands is clearly within the powers of Congress[209] and can be accomplished with little trouble. However, many problems would result if Congress decided to transfer privately held land to an Indian tribe in settlement of a claim. The title problems would be obvious, but the fears of the Taos Blue Lake critics would also be realized. Title to land in several areas of the country would be lost or in danger. Also, if there were transfers of private lands the amount necessary to compensate the present owners would be astronomical.[210] The logical solution to these problems lies in federal guidelines defining allowable claim limits. For example, Congress might allow only claims to be entered over federal lands.

Beyond the problem of what lands may be returned is the question of what claims warrant such return. Of course, the merits of each claim should be explored before any action is taken, for return of land is not the proper remedy in every claim. In most cases money damages are the only appropriate and proper means of settlement. The factor common to the Taos, Yakima, and Warm Springs claims was that the land was taken unjustly, without compensation. In each case the Indians had no say in the loss of their land. These claims thus went beyond the situation where there is only unconscionable consideration. The elements that supposedly made the Taos claim unique[211] actually did not go to the real issue, but served more as elements that gathered support for their cause. The important fact that demanded the return of the land was that the method used by the United States to take the land was unjust and entailed not one element of due process.

There are only a small number of claims where the method used by the United States to take the land was so unjust as to require return of the land. Most Claims Commission cases involve a claim for additional compensation. Where proper negotiations and dealings occurred and agreement was reached but the consideration was unconscionably low,[212] the proper remedy is money damages. However, where there were no dealings or unfair dealing or where negotiations were adversely affected by fraud or duress,[213] the proper remedy is return of the land.[214]

The Taos, Yakima, and Warm Springs claims indicate a trend that will undoubtedly continue. After examining these claims the possibility of problems arising with future claims seems great. The two areas of concern involve

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208. Pueblo of Taos v. United States, 15 Indian Claims Comm'n 666, 682 (1965); 116 CONG. REC. 39,587 (1970) (remarks of Senator Jackson).

209. U.S. CONST. art. IV, §3, cl. 2.

210. Consider, for example, the just compensation due the present owners if the title to Tampa or Miami were returned to the Seminoles.

211. *See* text accompanying notes 181-191 *supra*.

212. *See* Miami Tribe v. United States, 146 Ct. Cl. 421, 175 F. Supp. 926 (1959).

213. *See* Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967); United States v. Emigrant New York Indians *ex rel.* Danforth, 177 Ct. Cl. 263 (1966).

214. In all other claims the Indians would still be limited to money damages.

what lands are to be returned and what claims warrant return. The best way to overcome this concern is for the Congress to issue guidelines to be followed in acting on claims for return of land.

Conclusion

While the history of our government's dealings with the Indians has not always been honorable, the passage of the Indian Claims Commission Act represented an honest effort to right historical wrongs. Hundreds of tribes have been able to bring claims enforcing new causes of action created by the Act. In the past two years a new remedy has become available in the field of Indian land claims. Three tribes have sought return of their land where the United States had taken the land unjustly. The Taos Indians finally won return of their land and altered the law.

Although this remedy is a proper one, it is one that should not be applied indiscriminately. Since Congress is the constitutional repository of control over the lands in the United States, it is this body that must consider these claims and determine which support return of land. Since other claims for return of land will be made, Congress must fulfill its responsibility.

Richard Allen Nielsen