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Indian Law

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I. INTRODUCTION

The field of Indian Law—an amalgam of statutory and decisional law that arises out of the special and unique relationship between Indian tribes and the federal government[1] has been treated in the annual Survey issue only twice before.[2] Its inclusion at all may seem odd: the field is one of federal law, as to which state court decisions are not binding.[3] Given the unusual concentration of Indian tribes and Indian land in New Mexico,[4] it is an area of law that, however obscure to the average practitioner, will arise relatively often in otherwise routine litigation,[5] and on occasion will have at least potentially extraordinary impact.[6]

Since the last Indian law Survey article, Indian law cases arising in New Mexico have raised or decided numerous issues of far-reaching impact in the field. Among those issues are the power of Indian tribes to tax and otherwise regulate the conduct of non-Indians within Indian country;[7] the power of the state to tax transactions with Indians within Indian country;[8] the measure of

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1. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

2. Estes, *Indian Law*, 11 N.M. L. REV. 189 (1981); Hughes, *Indian Law*, 12 N.M. L. REV. 409 (1982).

3. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1 (1982 ed.)

4. New Mexico embraces the lands of 23 Indian tribes, including 19 Pueblo tribes, two Apache reservations, a sizable portion of the huge Navajo Reservation (including the three "satellite" reservations of the Ramah, Alamo and Canoncito Bands of Navajos), and a few thousand acres of the Ute Mountain Ute Reservation, which is primarily located in southwestern Colorado. Population estimates are rough, especially because Navajo census figures do not follow state lines, but the state's Indian population was estimated at 106,000 in 1980. A.N. GARWOOD, ALMANAC OF THE 50 STATES 252 (1986).

5. *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959), a simple suit to collect an open account for groceries that became a landmark United States Supreme Court decision on Indian country jurisdiction.

6. *See, e.g.*, Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987) (assertion of tribal title to more than two million acres of state, federal and privately-held lands).

7. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (tribes may tax the severance of tribally-owned minerals by non-Indians within Indian country); *see also* Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) (tribal tax statute valid notwithstanding lack of approval by Secretary of the Interior); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (tribe may regulate non-Indian hunting within Indian country, pre-empting contrary state regulations; *see* Hughes, *supra* note 2, at 441-43).

8. Ramah Navajo School Bd., Inc., v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982) (state may not collect gross receipts tax on proceeds of construction contract between Indian school board and non-Indian contractor, where school was constructed on trust land); *see* Hughes, *supra* note 2, at 443-58); Cotton Petroleum v. State of New Mexico, 106 N.M. 517, 745 P.2d 1170 (Ct. App.), *cert. quashed*, 106 N.M. 511 745 P.2d 1159 (1987), *prob. juris. noted*, 108 S. Ct. 1466 (1988) (No. 87-1327) (state may tax oil and gas production by non-Indian companies on Indian

Pueblo Indian water rights;[9] the ability of tribes to sue the United States to recover land;[10] the ability of the United States to sue a state on behalf of an Indian tribe for damages for trespass;[11] the ability of Indian allottees to recover allotments lost involuntarily to non-Indians;[12] the question whether particular areas constitute "Indian country," in which the special jurisdictional rules of Indian law apply;[13] the question whether state or tribal courts have jurisdiction of cases involving Indian people and property;[14] the right of Indians to practice their religion by engaging in practices otherwise in conflict with the law;[15] the nature of the federal trust responsibility in the management of tribal land and resources;[16] the reach of tribal sovereign immunity;[17] the availability of remedies

land, notwithstanding similar tribal taxes). The very recent *Cotton* decision raises potentially far-reaching questions, one of which, at least, will soon be decided in the United States Supreme Court. The Ninth Circuit Court of Appeals recently held, in Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 108 S. Ct. 685 (1988), that severance taxes imposed by the Crow Tribe on coal production on Crow tribal lands preempted similar taxes imposed by the state of Montana.

9. New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985); *see infra* text accompanying notes 245-76; *see also* United States v. Bluewater-Toltec Irrigation Dist., 580 F. Supp. 1434 (D.N.M. 1984), *aff'd*, No. 84-1851 (10th Cir. Dec. 11, 1986) (federal court will defer to state court suit for adjudication of rights to surface water even where federal suit was filed earlier than the state suit and is not, strictly speaking, a general stream adjudication).

10. Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987); *see infra* text accompanying notes 21-226.

11. United States v. Univ. of N. M., 731 F.2d 703 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984) (United States' trust responsibility over Indian land constitutes sovereign interest sufficient to overcome state's Eleventh Amendment defense to trespass suit on behalf of Indian tribe).

12. Begay v. Albers, 721 F.2d 1274 (10th Cir. 1983) (allottee may sue in federal court for cancellation of forged deed conveying Indian allotment to non-Indian; absent valid evidence of allottee consent, conveyance is void and land remains in trust for allottee).

13. New Mexico *ex rel.* Energy & Minerals Dep't v. United States Dep't of the Interior, 820 F.2d 441 (D.C. Cir. 1987); Pittsburgh & Midway Coal Mining Co. v. Saunders, No. 86-1442 M (D.N.M. Aug. 22, 1988); Blatchford v. Winans, No. 84-9384 HB (D.N.M., April 3, 1987), *appeal docketed*, No. 87-1547 (10th Cir., April 20, 1987); Blatchford v. Gonzales, 100 N.M. 333, 670 P.2d 944 (1983), *appeal dismissed, cert. denied*, 464 U.S. 1033 (1984); State v. Begay, 105 N.M. 498, 734 P.2d 278 (Ct. App. 1987); State v. Ortiz, 105 N.M. 308, 731 P.2d 1352 (Ct. App. 1986). *See infra* text accompanying notes 338-47.

14. Found. Reserve Ins. Co., Inc., v. Garcia, 105 N.M. 514, 734 P.2d 754 (1987); State *ex rel.* Dep't of Human Servs. v. Jojola, 99 N.M. 500, 660 P.2d 590 (1983), *appeal dismissed, cert. denied*, 464 U.S. 803 (1983); Lonewolf v. Lonewolf, 99 N.M. 300, 657 P.2d 627 (1982); *In re* Adoption of Baby Child, Pino v. Natural Mother, 102 N.M. 735, 700 P.2d 198 (Ct. App. 1985). *See infra* text accompanying notes 277-337.

15. United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986); Toledo v. Nobel-Sysco, Inc., 13 Ind. L. Rep. 3114 (D.N.M. April 2, 1986). *See infra* text accompanying notes 448-66.

16. Jicarilla Apache Tribe v. Supron Energy Co., 728 F.2d 1555 (10th Cir. 1984), *on rehearing*, 782 F.2d 855, *modified*, 793 F.2d 1171 (10th Cir. 1986) (*en banc*), *cert. denied*, 107 S. Ct. 471 (1986) (holding that government's pervasive responsibilities in overseeing leasing of Indian minerals creates fiduciary relationship, under which Secretary is obliged to insure computation of royalty by method most favorable to tribe, and enforce other lease terms); Pueblo de San Felipe v. Hodel, 770 F.2d 915 (10th Cir. 1985) (holding that Secretary acted correctly in escrowing portion of right-of-way compensation attributable to area disputed by two tribes, until title issue resolved); McClanahan v. Hodel, 14 Ind. L. Rep. 3113 (D.N.M. Aug. 14, 1987) (holding that Secretary lacks authority to approve allotment mineral lease with less than unanimous consent of owners, and that Secretary's handling of lease negotiations in this case constituted breach of fiduciary duties to allottees).

17. Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982) (holding tribe immune from suit over construction contract; limited waiver of immunity strictly

against tribes under the Indian Civil Rights Act;[18] and the applicability of general federal laws to Indian tribes.[19] Other cases have dealt with a variety of other Indian law issues.[20] To cover such a broad range of material adequately would require an article of inordinate length. This article thus will review key decisions coming within four major categories: land, water, jurisdiction, and religion.

II. INDIAN LAND CASES: THE LONG SHADOW OF THE ICCA

A. *Navajo Tribe v. New Mexico*

Unquestionably, one of the most remarkable judicial pronouncements in the modern era of Indian land claims can be found in the recent Tenth Circuit opinion in *Navajo Tribe v. New Mexico*.[21] The case was conceived on a grand scale, and it is tempting to conclude that it collapsed under its own weight, but the court of appeals went to extra lengths in disposing of the suit, and its novel holdings will very likely play hob with the most unassuming Indian claims hereafter.

1. Background of the Litigation

Navajo Tribe was a suit that the Tribe brought in late 1982 against the state of New Mexico, the United States, and various individuals, mining companies, and others.[22] The Tribe contended that two executive orders[23] that added to the

construed); United Nuclear Corp. v. Clark, 584 F. Supp. 107 (D.D.C. 1984) (holding Navajo Tribe immune from suit to compel extension of plaintiff's uranium lease, and rejecting "commercial activity" exception to such immunity); Padilla v. Pueblo of Acoma, 107 N.M. 174, 754 P.2d 845 (1988) (holding Pueblo's sovereign immunity inapplicable to cause of action arising off reservation).

18. 25 U.S.C. § 1302 (1976); White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984) (holding tribe immune from suit and plaintiff without federal remedy under ICRA, at least where plaintiff makes no effort to avail self of tribal remedy); Dunigan Enters., Inc., v. Pueblo of Santo Domingo, No. 84-348 (D.N.M. July 26, 1985) (holding that Pueblo's sovereign immunity precludes ICRA suit over disputed land, especially where plaintiff was offered, but rejected, tribal remedy).

19. Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982) (holding Federal Occupational Health and Safety Act inapplicable to Navajo tribal enterprise in light of treaty provisions).

20. *See, e.g.*, Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) (holding, probably wrongly, that Congress intended by § 17 of the Pueblo Lands Act, ch. 331, 43 Stat. 636, to confer on pueblos unqualified power to enter into consensual transactions involving conveyances of their lands); Pueblo of Santa Ana v. Baca, 844 F.2d 708 (10th Cir. 1988) (holding that American survey of Spanish grant not conclusive in land dispute between private parties, both of whose titles derive from Spanish period, where better evidence is available to establish original boundaries of grant); Navajo Tribe v. Bank of N.M., 700 F.2d 1285 (10th Cir. 1983) (holding that Navajo Housing and Development Enterprise is not so closely integrated with Navajo tribal government that tribe's assets can be offset against NHDE's debts); Pueblo of Acoma v. AT&SF Ry. Co., No. 82-1550 (D.N.M. Dec. 18, 1986) (holding Pueblo barred from challenging Secretary's purported ratification, under § 17 of Pueblo Lands Act, of invalid deeds to railroad); Pueblo of Acoma v. New Mexico & Ariz. Land Co., No. 82-1551 JB (D.N.M. Sept. 29, 1986) (holding Pueblo barred by judgment in Indian Claims Commission Act case from claiming, on basis of aboriginal title, minerals granted to railroad; *see infra* text accompanying notes 207-24.

21. 809 F.2d 1455 (10th Cir. 1987). The district court opinion, which the Tenth Circuit affirmed, is unreported. The Tribe did not seek Supreme Court review.

22. *Id.* at 1462.

23. Exec. Order No. 709 (1907), *reprinted in* 6 H.R. Rep. No. 1663, 60th Cong., 1st Sess. 2 (1908); Exec. Order No. 744, *reprinted in* H.R. Rep. No. 1663, 60th Cong., 1st Sess. 2-3 (1908). The area added by E.O. 709 reached from the existing reservation boundary eastward to the Jicarilla

Navajo Reservation a vast area of northwestern New Mexico had never been validly revoked, and that the Tribe still held beneficial title to the entire area added by the orders.[24] An understanding of the claim, and of the reach of the Tenth Circuit decision, requires a brief historical digression.

The Navajo Indians first migrated from the far north into what is now northwestern New Mexico perhaps as early as the 16th century,[25] and for centuries inhabited the region extending from the lands of the Rio Grande Pueblos westward into what is now Arizona. The Navajos were a constant threat to the Pueblos and to non-Indian settlements in New Mexico, raiding and menacing ranches and towns until open hostilities broke out with the American military in the mid-1800's. In the early 1860's Brig. Gen. James H. Carleton, with the able assistance of the famous Taoseno scout, Kit Carson, forcibly rounded up all the Navajos he could find—eventually some 8,000 in all—and in 1864 herded them on the infamous "Long Walk" to the Bosque Redondo, a small, dry, inhospitable reservation on the Pecos River at Ft. Sumner, New Mexico. This bitter exile nearly finished the Navajo; those who had survived the Long Walk faced near-starvation, disease, and the fierce extremes of weather common on New Mexico's eastern plains. After three years many had died, and their once-vast sheep herds were totally lost.[26] Even the government found the Navajos' condition intolerable, and in 1868 negotiated a treaty by which the Navajos agreed to resettle on a new reservation that included much of their old homeland in northwestern New Mexico and northeastern Arizona.[27]

It is likely that, having been told they could return home, the Ft. Sumner Navajos simply went back to exactly where they had been before the Long Walk.[28] Unfortunately, much of the original Navajo homeland was east and south of the treaty reservation—the region of arid mesas and canyons stretching from Mt. Taylor northward to southern Colorado. Many of the returnees evidently resettled there, on lands to which they no longer had any legal right, and where, for the next thirty years, they were basically ignored by the Indian Service. In the early 1900's, their poverty and desperation finally became a matter of concern to the government.[29] The discovery of artesian water supplies was attracting non-

Apache Reservation, and south almost to the AT&SF Railroad line. It nearly doubled the area of the Navajo Reservation in New Mexico. The second order made a correction in the description of the area added by the first, so as to delete two townships that were already part of the Jicarilla Apache Reservation.

24. Navajo Tribe v. New Mexico, 809 F.2d at 1462.

25. Or earlier. *See, e.g.*, L.C. KELLY, THE NAVAJO INDIANS AND FEDERAL INDIAN POLICY 1 (1968); F. MCNITT, NAVAJO WARS 3-5 (1972); R. UNDERHILL, THE NAVAJOS 14-22 (1967). The Indian Claims Commission found that the Navajos entered the Southwest "sometime between 1300 A.D. and 1500 A.D." Navajo Tribe v. United States, 23 Ind. Cl. Comm. 244, 246 (1970).

26. L.R. BAILEY, THE LONG WALK 173-233 (1964).

27. Treaty Between the United States and the Navajo Tribe of Indians, June 1, 1868, art. 2, 15 Stat. 667. The treaty reservation, rectangular in shape, was about 60 miles wide, its center line the boundary between Arizona and New Mexico, and about 90 miles long, extending from the north boundary of Arizona and New Mexico southward to just north of what is now Window Rock, Arizona. The treaty has been held to have constituted a cession of the tribe's aboriginal title lands. Navajo Tribe v. United States, 23 Ind. Cl. Comm. at 248.

28. *See* L. KELLY, *supra* note 25, at 17-25; R. UNDERHILL, *supra* note 25, at 144-54.

29. L. KELLY, *supra* note 25, at 23.

Indian ranchers to this area for the first time, and the squatter Navajo population was coming under severe pressure. Officials of the Indian Service conceived a plan whereby a large area, encompassing the entire Eastern Navajo population, would be withdrawn by executive order, after which the Navajos living there would be issued individual 160-acre Indian allotments under the General Allotment Act of 1887.[30] Once that process was complete, the excess land would be restored to the public domain.[31] In late 1907, the plan was set in motion with the issuance of Executive Order (E.O.) Number 709, which added about 3,000 square miles to the reservation.[32]

As the Tenth Circuit observed in *Navajo Tribe*, "[t]he ink was barely dry" on E.O. 709 when concern arose among New Mexico ranchers and politicians over this huge addition to Navajo land holdings.[33] Hoping to speed the restoration of surplus lands to the public domain, Congress quickly added a provision to an omnibus Indian affairs bill that provided,

> That whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation in New Mexico and Arizona created by Executive Orders of November ninth, nineteen hundred and seven, and January twenty-eighth, nineteen hundred and eight, have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain and opened to settlement and entry by proclamation of the President.[34]

The Indian Service hurriedly sent allotment agents to start collecting allotment applications from the Eastern Navajos, but political pressure from ranchers unwilling to let the process run its course grew even more intense. The President buckled. Just over a year after he had made the withdrawal, on December 30, 1908, President Roosevelt signed Executive Order Number 1000, restoring to the public domain the unallotted lands in the eastern half of the withdrawn area.[35] The balance of the withdrawn lands in New Mexico was restored by Executive Order Number 1284, signed by President Taft in 1911.[36] According to the Tribe's

30. *As amended*, 25 U.S.C. §§ 331-58 (1982). The Act was Congress' first attempt to effect a general solution to what Congress viewed as the Indian "problem." Under it, tribal members on reservations designated by the President would each select parcels of 160 acres (quarter-sections), to which they would receive individual trust patents. The rest of the reservation would be opened for sale to and settlement by non-Indians. The good examples set by their new white neighbors, some thought, would inspire the Indians to become yeoman farmers. *See generally*, D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (F. Prucha ed., 1973). The Navajo case is unusual in that the Act was used as a way of enlarging, rather than diminishing and disrupting, the Indian land base. The Navajo Reservation proper was never opened to allotment.

31. L. KELLY, *supra* note 25, at 23-24.

32. *See supra* note 23.

33. 809 F.2d at 1458.

34. Act of May 29, 1908, ch. 216, § 25, 35 Stat. 444, 457. By this enactment, Congress apparently intended that restorations be made piecemeal, so that as soon as all Navajos in any area had been allotted, the surplus lands in that area would be restored without waiting for the process to be completed throughout the entire addition. L. KELLY, *supra* note 25, at 24.

35. Exec. Order No. 1000, December 30, 1908.

36. Exec. Order No. 1284, January 16, 1911. Neither order restored to the public domain lands in Arizona that had also been added to the Navajo Reservation by E.O. 709, and those lands continue to be recognized as part of the Navajo Reservation.

complaint in *Navajo Tribe v. New Mexico*, fewer than half of the Navajos in the withdrawn area had been allotted when the restorations were made.[37]

The theory of the Tribe's complaint in *Navajo Tribe*, in essence, was that Congress had conditioned restoration of the unallotted lands to the public domain on the issuance of allotments to all eligible Navajos. That condition, the Tribe claimed, had not been fulfilled when Executive Orders 1000 and 1284 issued, and those Orders were thus unlawful. The land remained part of the Navajo Reservation and beneficially owned by the Navajo Tribe, the complaint alleged, and the patents and leases for lands within the E.O. 709 area issued by the United States to the state and hundreds of non-Indians were void.[38]

All the defendants moved to dismiss the complaint on a variety of grounds. The district court granted the motions in early 1984, primarily on the grounds that the claim against the United States should have been brought under the Indian Claims Commission Act (ICCA),[39] and was now barred, and that the claims against the other parties could not go forward in the United States' absence.[40] The Tenth Circuit affirmed, on both points.

2. The Tenth Circuit Opinion

Judge McKay's opinion for the unanimous Tenth Circuit panel began by tackling head-on the Tribe's contention that the ICCA was not intended to encompass claims of unextinguished Indian title.[41] The court's analysis was straightforward. The court reviewed the language and legislative history of the ICCA, and concluded that Congress had intended the jurisdiction of the Indian Claims Commission under Section 2 of the Act to have the broadest possible sweep.[42] "Claims" under the Act, the court held, included not only claims for damages for lands taken, but also "claims" of unextinguished title to land. Claims such

37. 809 F.2d at 1459 & n.9. The allotment process nonetheless continued thereafter. At the same time, however, homestead entries, railroad grant lands and, later, patents to the state, became thoroughly intermingled with the federal and Indian lands throughout this area, leading it to earn the term by which it is familiarly known today, "the Checkerboard Area." From the Indian law perspective, the area has become something of a jurisdictional quagmire. *See* Hughes, *supra* note 2, at 410-41.

38. 809 F.2d at 1462. More than mere land was at stake. The area has been found to contain immense reserves of low-sulfur coal, minable by surface methods; and its vast oil, gas and uranium deposits have been known, and mined, for the past half-century. The tribe claimed an unspecified sum in damages for trespass, and mesne profits and restitution of all rents and profits derived from the land. Complaint at 13.

39. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70-70v-2 (1976); omitted from current United States Code because Commission existence terminated on Sept. 30, 1978).

40. Navajo Tribe v. New Mexico, No. 82-1148 JB (D.N.M. Jan. 23, 1984), *aff'd*, 809 F.2d 1455 (10th Cir. 1987).

41. 809 F.2d at 1464-71. The Tribe raised a preliminary issue, whether the district court had properly relied upon two Eighth Circuit opinions, Oglala Sioux Tribe v. United States, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), and Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407 (8th Cir. 1983). The Tenth Circuit determined that it need not decide that question, however, as it felt that grounds wholly independent of the *Oglala* rationales justified affirmance of the decision below.

42. 809 F.2d at 1465-66, 1471.

as the Navajo Tribe's claim here, the court held, should have been filed under the ICCA, and otherwise were barred.[43] Moreover, the Tenth Circuit said, in a ruling that is utterly without precedent, if the Indian Claims Commission (ICC) had found that the Tribe did indeed have a valid claim of title, it would simply have awarded the tribe "just monetary compensation" for the land, rather than the land itself, so as not to disrupt the titles of non-Indians.[44] Alternatively, the court held,[45] the Tribe's suit to quiet its title against the United States was time-barred by the twelve-year limitation period of the Quiet Title Act.[46]

The court further affirmed the district court's dismissal as to the non-federal parties, holding that a determination that a case should be dismissed due to the indispensability of an absent and unjoinable party (here, the United States) is reversible only for abuse of discretion.[47] The court set out the district court's holding on this issue verbatim, then conducted its own "brief review" of the factors governing indispensability[48] and reached the same conclusion as the district court. The Tenth Circuit dismissed as "inapposite" contrary precedent cited by the Tribe.[49]

Finally, the court dispensed with the Tribe's arguments founded on *Solem v. Bartlett*,[50] a case decided after the district court's decision. That case, the court said, would be relevant, if at all, only to the jurisdictional question whether E.O. 1000 and E.O. 1268 annulled the extension of the reservation boundaries effected by E.O. 709. It would not bear at all on the issue of title to the lands within those boundaries.[51] The court viewed the Tribe's complaint as not having raised the jurisdictional issue, and added, in a footnote, "we would not be surprised if the status of the Executive Order reservation at issue here is litigated someday in an analogous context [to that in *Solem*]."[52]

While it remains to be seen just how far the Tenth Circuit will extend these

43. *Id.*

44. *Id.* at 1467.

45. *Id.* at 1468-69.

46. 28 U.S.C. § 2409a(g) (1982). The Tribe had pleaded the action as one in ejectment, but on appeal repeatedly characterized it as a suit to quiet title. Because the complaint had not alleged clearly that the Tribe was in present possession of the land, the Tenth Circuit doubted that an action to quiet title would lie. 809 F.2d at 1462 n.15. *But see infra* note 54.

47. 809 F.2d at 1471.

48. *Id.* at 1472-73. *See* Fed. R. Civ. P. 19(b).

49. 809 F.2d at 1473. *See infra* text accompanying notes 166-82.

50. 465 U.S. 463 (1984). The case arose from a federal habeas corpus petition challenging the conviction in a South Dakota state court of a Cheyenne River Sioux Indian for rape of another tribal member. The crime occurred in Eagle Butte, a town within the portion of the Cheyenne River Sioux Reservation that had been opened to allotment and white settlement. The Supreme Court held that despite the opening legislation, the opened portion remained part of the Reservation, and that the state court thus lacked jurisdiction over the crime. *See infra* text accompanying notes 395-403.

51. 809 F.2d at 1474-76.

52. *Id.* at 1475 n.30. As it happens, exactly such a case already has reached the Tenth Circuit. *See* Blatchford v. Winans, No. 84-0384 HB (D.N.M. April 3, 1987), *appeal docketed*, No. 87-1547 (10th Cir. Apr. 20, 1987). *See infra* text accompanying notes 363-423. In another case decided just before publication of this article, moreover, the New Mexico federal district court held that the E.O. 709 reservation has *not* been diminished. Pittsburgh & Midway Coal Mining Co. v. Saunders, No. 86-1442 M (D.N.M. Aug. 22, 1988). *See infra* note 405.

holdings in future cases, the potential impact of this case on Indian land claims in New Mexico is undoubtedly substantial. That the ICCA provided the exclusive means for adjudication of pre-1946 tribal claims for money damages against the United States has never been doubted, but nothing in the Act suggests it was meant to handle live title disputes. And to say, as the Tenth Circuit did in *Navajo Tribe*, not only that such title claims had to be filed under the ICCA, but also that Congress intended that those proven valid were to be liquidated, is unsupported by anything in the language of the Act or the entire mass of litigation under the Act.[53] It may be that the court was correct that there is no jurisdiction for the Navajo claim against the United States asserting title to the federally held lands within the E.O. 709 reservation,[54] but an analysis of the ICCA and the

53. Approximately 370 petitions were filed under the ICCA. The decisions of the Indian Claims Commission on those cases fill 43 volumes of the Indian Claims Commission Reports, totalling more than 22,000 pages. Many appeals were taken to the United States Court of Claims under § 20 of the Act (formerly 25 U.S.C. § 70s), and a few reached the Supreme Court. In 1978, when Congress terminated the Commission's existence, Act of Oct. 8, 1976, Pub. L. 94-465, 90 Stat. 1990, the 102 remaining cases were transferred to the Court of Claims (since renamed the United States Claims Court; *see* Act of April 2, 1982, Pub. L. 97-164, Title I, 96 Stat. 34), where several are still pending.

54. Or more precisely, that the claim is barred. In particular, the court's holding as to the bar of the Quiet Title Act, 28 U.S.C. § 2409a (1982), seems entirely sound, and that is the only avenue Congress has opened for suits claiming title to land as against the government. Virtually all Indian claims of unextinguished title arose (by federal interference with the tribe's right of use and occupancy) long ago, and they thus would be barred by the 12-year limitations period of that Act. 28 U.S.C. § 2409a(g). The Act does not apply to claims to "trust or restricted Indian lands," § 2409a(a), but as the Tenth Circuit noted, the Supreme Court held in United States v. Mottaz, 106 S. Ct. 2224 (1986) that that provision only precludes suits by non-Indians seeking to try title to lands held in trust for Indians; it does not exempt from the Act Indian claims to land under exclusive federal control. 809 F.2d at 1469.

In Block v. North Dakota, 461 U.S. 273 (1983), also discussed by the Tenth Circuit, 809 F.2d at 1468-69, the Supreme Court held that Congress' enactment of the Quiet Title Act precluded any implication of any other means by which to try title against the United States, as, for example, by a suit under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982). (Similarly, in *Mottaz* the Court rejected the contention that 25 U.S.C. § 345 (1982), a provision of the General Allotment Act that waives the government's immunity for suits to compel the issuance of Indian allotments, could be used to contest the government's title to an allotment purportedly purchased from the allottees by the Forest Service.) A title suit barred by the limitation provision of the Quiet Title Act, thus, may simply not be brought against the government. *Cf.* Dunigan Enters., Inc., v. Pueblo of Santo Domingo, No. 84-348 (D.N.M. July 26, 1985) (no APA claim available against Secretary of the Interior to challenge tribe's title to disputed land, where plaintiff's Quiet Title Act claim is barred by statute of limitations).

The Tenth Circuit exhibited some uneasiness with whether the Navajo suit was one in ejectment or to quiet title. *See*, 809 F.2d at 1462 n.15, 1468 (text at n. 20). At common law, an allegation of possession by the plaintiff was an essential requirement of the equitable action to quiet title. *See, e.g.*, Wood v. Phillips, 50 F.2d 714 (4th Cir. 1931). The distinction is important in private litigation, since a defendant in possession may insist that the action be deemed one in ejectment, and demand a jury. No jury is available under the Quiet Title Act, 28 U.S.C. § 2409a(f), but it is highly doubtful that Congress intended jurisdiction under the Act to turn on the often highly technical issue of possession. The language of the Act is broad, providing jurisdiction (and a corresponding waiver of the government's immunity) for any civil action "to adjudicate disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). There appear to be no reported decisions in which actions under the Act were dismissed for lack of jurisdiction on the ground that the plaintiff failed to allege or establish possession of the disputed property. In short, the technical

hundreds of decisions under it, and a review of other Indian land cases of the past twenty years, yields little support for the court's primary basis for that conclusion.

3. The Opinion Analyzed—The ICCA and the *Yankton Sioux* Case

Enacted in 1946, the Indian Claims Commission Act undoubtedly was intended, as the Tenth Circuit said,[55] to put an end to Indian claims litigation, by affording all tribes an opportunity to bring all their old claims for alleged wrongs by the United States before the Indian Claims Commission. For long prior to the ICCA's enactment, Congress had been deluged with requests by tribes for special jurisdictional acts to enable them to litigate such claims.[56] The ICCA, Congress hoped, would obviate the need for future such acts, and, as the Supreme Court said in *United States v. Dann*, "dispose of the Indian Claims problem with finality."[57]

Congress' ability, in 1946, to design an act that would indeed conclude all old Indian claims, however, was necessarily limited by what Congress knew of such claims, based on the claims Congress had considered in the context of special jurisdictional acts, and the testimony of Indian claims attorneys regarding the kinds of claims yet to be brought. For whatever reasons, up to that time (and for several years thereafter), the idea that Indian tribes still had claims of unextinguished title to lands not under their control was not one that had many adherents in the Indian claims bar. Indian claims pertaining to land routinely, and almost invariably, sought money damages for takings of land. That is not

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rules of pleading applicable to actions to try title at common law ought to be regarded as irrelevant to suits under the Quiet Title Act. That statute should be seen as providing the exclusive means of suing the United States to determine title, regardless of who has possession of the land.

One may wonder why, when it had this very clear and uncontroversial ground for disposing of the Navajo claim against the United States, the Tenth Circuit did not rest its holding entirely on the Quiet Title Act, instead of treating that ground as an alternative to its wholly novel and frankly dubious interpretation of the ICCA.

55. 809 F.2d at 1460-61, 1464-66.

56. In 1863, in an act amending in various respects the jurisdiction and structure of the Court of Claims, Congress excluded from that court's purview claims by Indian tribes based on treaties. Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765, 767. Attorneys for tribes began approaching Congress for special acts to permit individual treaty claims to be brought. Over time, the practice became so ingrained that special jurisdictional acts were sought for all manner of tribal claims, including many non-treaty-based claims that probably could have been brought under the Tucker Act, Act of March 3, 1887, ch. 359, 24 Stat. 505, the source of the modern jurisdiction of the Claims Court. Hundreds of such special acts were passed. Most of them were compiled by Felix Cohen in the original edition of his monumental HANDBOOK OF FEDERAL INDIAN LAW 373-78 (1942). In addition to creating a forum for pre-1946 Indian Claims, the ICCA also, at § 24 (now 28 U.S.C. § 1505 (1982)), permanently assured tribes of the right to sue the United States in the Claims Court for Tucker Act-type claims arising thereafter. The "treaty claim" exclusion was finally repealed by the Act of May 24, 1949, ch. 139, § 88, 63 Stat. 89, 102. *See* Hebah v. United States, 428 F.2d 1334 (Ct. Cl. 1970).

57. 470 U.S. 39, 45 (1985) (quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)). The line was quoted by the Tenth Circuit in *Navajo Tribe*, 809 F.2d at 1464. To be sure, Congress' hope in this regard has not been entirely realized. On occasion, Congress still has to deal with old Indian claims. *See, e.g.*, Act of May 15, 1978, Pub.L. 95-280, 92 Stat. 244 (conferring jurisdiction on the Court of Claims to hear claims by the Zuni Pueblo for ancient wrongs).

to say that the Indians did not want their land back; they almost always did, but that was not a choice presented to them by their claims counsel. Most Indian land, moreover, had indeed been "taken" by express governmental action,[58] usually treaties or agreements whereby tribes ceded their lands to the United States, and occasionally by a unilateral act of Congress (as in the infamous Black Hills case, where Congress "ratified" a treaty of cession that it knew did not have the assent of the Sioux[59]). Even had Congress been aware of the existence of outstanding or potential tribal claims of unextinguished title to lands, moreover, it would be remarkable for Congress to have decided that all such claims were to be forcibly liquidated under the Act, and there is no hard evidence that it did so.

That point, as the Tenth Circuit recognized,[60] is crucial to the holding in *Navajo Tribe*, and the court thus tried to demonstrate that Congress *did* intend the ICCA to dispose of tribal claims of unextinguished title to land in that way. The only example the Tenth Circuit could unearth purportedly showing that Congress had previously considered such claims was *Yankton Sioux Tribe v. United States*,[61] a case that preceded the ICCA by twenty years. In a real sense, the correctness of the *Navajo Tribe* court's novel interpretation of the ICCA hinges on that obscure 1926 decision.

The Tenth Circuit characterized *Yankton Sioux* as a case in which the Tribe pleaded and proved present title to its ancient Red Pipestone Quarry, but rather than return the land to the Tribe the Supreme Court held that the Tribe was "entitled to just compensation as for a taking under the power of eminent domain."[62] In the Tenth Circuit's view, *Yankton Sioux* illustrated exactly what Congress intended would happen under the ICCA to claims like that of the Navajo Tribe.[63] Closer analysis of the Yankton Sioux claim for the pipestone quarry, however, undermines the Tenth Circuit's proposition.

In 1858, the Yankton Sioux entered into a treaty[64] by which they ceded to the United States all of their lands except for a tract of 400,000 acres on the Missouri River. Article VIII of the treaty preserved for the Tribe "the free and unrestricted use" of its Red Pipestone Quarry, "for the purpose of securing stone for pipes."[65] A survey was done of the quarry area, which totalled 648.2 acres, but the

58. The principle that Indian land can be taken (*i.e.*, that a tribe can lose its title voluntarily or otherwise) only by an express and deliberate act of the sovereign is rooted in international law doctrines that long predate American independence. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Cohen, *supra* note 3, at 50-58. One of the earliest pieces of legislation enacted under the American Constitution, the first Indian Trade and Intercourse Act, Act of July 22, 1790, ch. 33, 1 Stat. 138, included a codification of this elemental doctrine at § 4, and it has been part of the positive law of the nation ever since. *See* 25 U.S.C. § 177 (1982) (often called the "Nonintercourse Act"). The Supreme Court has emphasized the strict standard applied to determining whether Congress intended a particular act to extinguish Indian title. *See, e.g.*, United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941).

59. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 374-84 (1980).

60. 809 F.2d at 1466.

61. 272 U.S. 351 (1926).

62. *Id.* at 359; 809 F.2d at 1467.

63. 809 F.2d at 1466-67.

64. Treaty Between the United States and the Yancton [sic] Tribe of Sioux, or Dacotah Indians, February 16, 1859, 11 Stat. 743.

65. *Id.*, art. VIII.

government's actions over the next thirty years with respect to that tract showed marked inconsistency on the question of the Tribe's rights therein.[66] In 1892, the government negotiated a second agreement with the Tribe[67] to obtain a cession of another 150,000 acres of tribal land. At the Indians' insistence that agreement included article XVI, which said, in essence, that if the Secretary of the Interior did not, within one year after Congress ratified the agreement, refer to the United States Supreme Court for decision the question of ownership of the quarry, the United States would be deemed to have waived all its claims of ownership, and the quarry would thereafter be "solely the property of the Yankton tribe."[68]

The Secretary, deeming it impracticable to comply with that condition, made no such referral. In 1897, Congress authorized the Secretary to negotiate the purchase of the quarry land (on which an Indian school had been built) from the Tribe. A price of $100,000 was agreed on in 1899, but Congress refused to ratify the purchase.[69] Then the claims lawyers stepped in.

In 1910, Congress enacted a special jurisdictional act enabling the Court of Claims to "report a finding of fact . . . as to the interest, title, ownership, and right of possession" of the Tribe in the quarry land.[70] The court's decision in the case brought by the Tribe pursuant to that act set out the factual history of title to the quarry, but deeming the ultimate question of title to be a matter of law, rather than of "fact", the court regarded itself as precluded by the jurisdictional act from making a determination of title.[71] Another special act, passed in 1925,[72] led to the litigation that the Tenth Circuit viewed as pivotal to its view of the ICCA in *Navajo Tribe*.

The *Navajo Tribe* court characterized the Tribe's claim in *Yankton Sioux* as one seeking "clarification of [the tribe's] asserted title to lands—not compensation for a taking of lands."[73] In support of its premise the court quoted a passage from the jurisdictional act, showing that the object of the suit was a declaration of the character of the Tribe's title.[74] The act that the Tenth Circuit quoted, however, was the *1910* act, not the 1925 act. As noted, the 1910 act only authorized the Court of Claims to make factual findings.[75] The 1925 act, however, authorized that court to determine titles on the basis of the facts found

66. Yankton Sioux Tribe v. United States, 53 Ct. Cl. 67, 78-80 (1917). In United States v. Carpenter, 111 U.S. 347 (1884), the Supreme Court held that a patent issued under the public land laws for an entry within the quarry area should be cancelled, because the reservation of that area by the treaty put those lands beyond the Land Department's power to dispose of.

67. Agreement With the Yankton Sioux or Dakota Indians, December 31, 1892, 28 Stat. 286, 314-19 (1894).

68. 28 Stat. 317-18.

69. *Yankton Sioux*, 53 Ct. Cl. at 80-81.

70. Act of April 4, 1910, ch. 140, § 22, 36 Stat. 269, 284.

71. *Yankton Sioux*, 53 Ct. Cl. at 81.

72. Act of January 9, 1925, ch. 59, 43 Stat. 730. Actually, the Yankton Sioux had filed their petition in the Court of Claims under an earlier, more general Act, allowing the filing of "all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States." Act of June 3, 1920, ch. 222, 41 Stat. 738. The court regarded the 1925 Act as definitely establishing its jurisdiction over the quarry claim. Yankton Sioux Tribe v. United States, 61 Ct. Cl. 40, 55 (1925), *rev'd on other grounds*, 272 U.S. 351 (1926).

73. 809 F.2d at 1466.

74. *Id.*

75. *See supra* note 70 and accompanying text.

in the prior litigation, and to determine "what amount, if any, is legally and equitably due from the United States to the said Yankton Band of Santee Sioux Indians for the said quarries, and enter judgment thereon."[76]

The course of the *Yankton Sioux* litigation is even more revealing. The Court of Claims found that the 1858 treaty had recognized not Indian *title* to the quarry, but a use right or easement, with which the government had never interfered and which it had never extinguished. The court rejected the Tribe's argument that because the Secretary never referred the title question to the Supreme Court as required by the 1892 agreement, the United States had waived its claim of title to the quarry. The court viewed the referral as an impossible condition, because the Supreme Court could not consider such questions absent a real case or controversy,[77] and it thus refused to enforce the waiver provision.[78] Because the court regarded the Tribe's rights as use rights only, that were fully intact, it held that the Tribe was entitled to no compensation, and it dismissed the petition.[79] The Tribe sought review in the Supreme Court, without opposition from the government. Its statement of its position was clear and to the point:

> Petitioners do not claim the present value of their right in the Pipestone Reservation, nor do they resort to the legal remedy of an action in ejectment to recover the exclusive possession of the property. *Their sole desire is to obtain just compensation for that which was taken from them for public use* to which under the Constitution of the United States they are entitled.[80]

Thus, the Tribe's unmistakable object was *not* to establish its rights to the quarry—which the Court of Claims held were intact—but to obtain compensation for their taking.

The Tenth Circuit, in *Navajo Tribe*, said that the Supreme Court in *Yankton Sioux* had found that the Tribe owned the quarry lands "'in fee,'"[81] but that to avoid interference with the titles of numerous persons who had since settled on the land the Supreme Court directed payment to the Tribe "'of just compensation *as for* a taking under the power of eminent domain.'"[82] The Tenth Circuit again seems to be mistaken about the facts in this concededly confusing case. The Tribe had argued that if article XVI of the 1892 agreement (waiving the United States' title if no referral were made to the Supreme Court) was not enforced, the entire treaty should be declared void, because resolution of the question of title to the quarry had been an essential element of the consideration for the Tribe's cession of land in that treaty. The Supreme Court agreed.[83] It was the titles of purchasers of the ceded 150,000 acres about which the Court was thus concerned; the only occupant of the quarry land was the government Indian

76. Act of January 9, 1925, ch. 59, 43 Stat. 738.

77. Muskrat v. United States, 219 U.S. 346 (1911).

78. *Yankton Sioux*, 61 Ct. Cl. at 56.

79. *Id.* at 57.

80. Yankton Sioux Tribe v. United States, 272 U.S. 351 (1926), Petitioner's Brief in Support of Petition for Writ of Certiorari at 26-27 (emphasis added). Essentially the same statement appears in the Tribe's brief-in-chief. *See* Brief for Petitioners at 14, 66, 70-71.

81. 809 F.2d at 1466 (quoting *Yankton Sioux*, 272 U.S. at 359).

82. 809 F.2d at 1467 (quoting *Yankton Sioux*, 272 U.S. at 359) (emphasis by the court).

83. *Yankton Sioux*, 272 U.S. at 357.

school.[84] The Court held that the condition article XVI imposed on the Secretary was not void for impossibility, that the Secretary's failure to perform vested full fee title in the Tribe, and that, as the Tribe urged, the United States had taken the land.[85] When seen in context, further, the Court's specification of damages "as for a taking under the power of eminent domain,"[86] did not mean, as the Tenth Circuit seemed to think, that the Supreme Court was awarding payment even though there was no taking. The taking was conceded by all.[87] Rather, the passage is a response to the Tribe's argument that the damages for the taking should be the $100,000.00 for which the Tribe had agreed to sell the land in 1899[88]—essentially a contract theory, one the Court would not buy.

In short, *Yankton Sioux* appears not to be the case for which Judge McKay was looking: one that shows that the government was in the business of liquidating Indian claims of extant title to land, over tribal objection. Rather, *Yankton Sioux* looks more like the all too common variety of Indian claims, in which the Tribe (probably on the advice of counsel) claimed that its lands were taken, and sought damages, even though, in all likelihood, no taking had in fact occurred.[89] In such situations, of course, the government normally is disposed to agree that there was a taking, and pay the Tribe, rather than have lingering tribal claims to cloud titles.[90]

That the Tenth Circuit's premise—the proposition *Yankton Sioux* was supposed to prove—is erroneous, is further suggested by another case decided ten years after *Yankton Sioux*. *Shoshone Tribe v. United States*,[91] was yet another Indian claim brought pursuant to a special jurisdictional act.[92] The Tribe contended that the jurisdictional act itself had effected a taking of its lands.[93] In his opinion for the Court, Justice Cardozo stated that such a view was "to mistake utterly the design and meaning of the statute," explaining that

> the claimant is not subject to a duty either under that act or any other to sue the Government at all. In the event of a failure to sue or to prosecute the suit to a decree, rights and liabilities will remain as they were before any

84. *Id.*

85. *Id.* at 358-59. Just how the taking had occurred, admittedly, was not discussed, but both parties agreed that there had been a taking, so the Court had no reason to rule otherwise.

86. *Id.* at 359.

87. *Id.* ("That the United States has taken and holds possession of the entire Quarry tract of 648 acres is not in dispute; . . .").

88. Brief of Petitioner at 70-73.

89. *See infra* text accompanying notes 96-114.

90. *See infra* note 94. *But see* Menominee Tribe v. United States, 391 U.S. 404 (1968). There, the tribe claimed damages for the taking of its treaty hunting and fishing rights by a 1954 statute terminating the federal trust relationship with the tribe. Menominee Indian Termination Act of 1954, ch. 303, 68 Stat. 250 (repealed 1973) (formerly codified at 25 U.S.C §§ 891-902 (1970)). The Court agreed with the United States that termination had left the tribe's hunting and fishing rights unaffected, and, thus, no compensation was due.

91. 299 U.S. 476 (1937).

92. Act of March 3, 1927, ch. 302, 44 Stat. 1349.

93. *Shoshone Tribe*, 299 U.S. at 492. Since such Acts were passed only at the urging of the tribes and their claims attorneys, this argument seems astonishing. It was motivated, plainly, by the claims attorneys' wish to set the "taking date" as late as possible, so as to maximize the valuation of the land "taken."

> act was passed. The sovereign power is not exercised to extinguish titles or other interests against the will of tribal occupants by force of eminent domain.[94]

The Tenth Circuit's interpretation of the ICCA in *Navajo Tribe* flies directly in the face of *Shoshone Tribe*'s general statement of the government's policy toward Indian land claims.

4. Land Cases Under the ICCA

The Tenth Circuit's theory of the intended impact of the ICCA on claims of unextinguished Indian title should not, however, be tested solely by cases brought and decided decades before the ICCA was enacted. So important a proposition ought to be evidenced somewhere in the Act itself, or in the cases decided under it.

The language of the Act, however, is of no help to the Tenth Circuit, apart from the admittedly broad categories of claims allowed under it. Liquidating valid, existing titles poses special problems: for example, as of what date are the titles valued? Does the extinguishment of title affect only lands held by the United States, or also those patented to third parties? What title records are filed to clear the tribal claim? Does possession matter, or can a tribe liquidate its claim to its entire reservation?[95] The utter silence of the Act on any of these problems (not to mention the absence of any reference to the fundamental prop-

94. *Id.* at 492-93. The tribe sought damages for the taking of a half-interest in its Wind River Reservation in Wyoming, by the government's settlement thereon, in 1878, of the Northern Arapahoes (a traditional enemy of the Shoshone). The Court held that the taking occurred at the time of the settlement, but that the Tribe was entitled to interest from that date.

Shoshone Tribe exemplifies the principle, established in non-Indian cases such as United States v. Lynah, 188 U.S. 445 (1903), and United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884), that a party whose property rights have been invaded by the government normally will be accorded the right to waive its claim to an extant title, and, "electing to regard the action of the government as a taking under its sovereign right of eminent domain," *Great Falls*, 112 U.S. at 656, sue in the Claims Court for just compensation. The government ordinarily will not dispute the claimant's choice of remedy (although in some instances, as in Menominee Tribe v. United States, 391 U.S. 404 (1968), *see supra* note 90, where the United States has done nothing whatever to impair the property right at issue, the fact of a taking itself may be contested). If a taking is claimed, the only issue will be when the government action reached such a point that the taking could be considered accomplished. If the claimant asserts title, only then will the court consider *whether* a lawful taking occurred. This is the only basis on which the cases cited and discussed *infra* at notes 96-114 and accompanying text can be justified.

95. The Tenth Circuit's failure to address the question whether possession is relevant to the kind of relief a tribe would have received from the Indian Claims Commission on a claim based on continued title is especially bothersome. The court asserts that the Navajo Tribe's entire claim to the E.O. 709 lands simply would have been liquidated by the ICC if found valid, presumably at present-day value. Yet, as the Tribe pointed out in its Petition for Rehearing and Suggestion for Rehearing En Banc at 1, *Navajo Tribe*, 809 F.2d 1455, 55% of those lands are already in Indian possession (either by allotment, purchase, or withdrawal for tribal use), and another 21% are administered by the Tribe under a cooperative agreement with the government. Would the Tribe's use and occupancy rights to these lands cease under the Tenth Circuit view? Indeed, were a tribe to claim under the ICCA virtually any tortious interference by the United States with the tribe's land rights, the Tenth Circuit theory seems to require that the tribe would emerge from the proceeding with a large check, but suddenly landless. It is difficult to believe that this, or anything like it, is what Congress had in mind.

osition that liquidation of extant titles was intended) would be perplexing if the Tenth Circuit's view were correct. One can readily agree with the opinion that the Act was only intended to afford the remedy of damages. It does not, however, follow that Congress intended to compound the old wrongs done to Indians—which this Act was to remedy—by creating a device for inverse condemnation of all remaining tribal land claims.

Similar doubts arise from the decisional law under the ICCA. Several claims were brought under the Act involving tribal lands that, so far as appears from the record, were never actually ceded by the tribe or otherwise acquired by the United States.[96] The Commission and the Court of Claims' disposition of these claims is not at all supportive of the Tenth Circuit's interpretation of the Act.

Most of the hundreds of land cases filed under the ICCA complained that the United States had acquired the tribe's lands (by treaty or otherwise) for inadequate consideration. The treaty or agreement fixed the date of taking; the only task facing the Commission was to ascertain the area taken, fix its value as of the taking date, and arrive at the damage award. Problems arose, however, in claims for a number of southwestern tribes whose lands had never been formally taken by the United States.[97] Were the Tenth Circuit view of what Congress intended

96. The principal decisions include United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 206 Ct. Cl. 64 (1975); Gila River Pima-Maricopa Indian Community v. United States, 494 F.2d 1386, 204 Ct. Cl. 137, *cert. denied*, 419 U.S. 1021 (1974); United States v. Northern Paiute Nation, 393 F.2d 786, 183 Ct. Cl. 321 (1968). Especially illustrative is the bizarre and complex Western Shoshone litigation, in which elaborate efforts by elements of the tribe to discharge the claims attorneys and stay the proceedings to keep the case from going to final judgment were repeatedly rebuffed by the Commission and the Court of Claims. Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 387 (1962); Western Shoshone Identifiable Group v. United States, 35 Ind. Cl. Comm. 457 (1975), *aff'd sub nom.* Western Shoshone Legal Defense and Educ. Ass'n v. United States and Western Shoshone Identifiable Group, 531 F.2d 495 (Ct.Cl.), *cert. denied*, 429 U.S. 885 (1976); Western Shoshone Identifiable Group v. United States, 40 Ind. Cl. Comm. 311 (1977); Western Shoshone Identifiable Group v. United States, 40 Ind. Cl. Comm. 304 (1977), *aff'd sub nom.* Temoak Bands of Western Shoshone Indians v. United States and Western Shoshone Identifiable Group Represented by the Temoak Bands of Western [Shoshone] Indians, 593 F.2d 994 (Ct.Cl.), *cert. denied*, 444 U.S. 973 (1979) (a phase of the case in which the Temoak Bands apparently ended up being aligned against themselves); and Western Shoshone Identifiable Group v. United States, 652 F.2d 41 (Ct.Cl. 1981). *See also* the discussion of United States v. Dann, *infra* notes 133-52 and accompanying text.

Other ICCA cases in which no apparent "taking" appears in the record include: Goshute Tribe v. United States, 31 Ind. Cl. Comm. 225 (1973), *aff'd*, 512 F.2d 1398 (Ct.Cl. 1975) (aboriginal title to 6 million acres in western Utah and eastern Nevada extinguished by gradual encroachment of settlers as of 1875); Hopi Tribe v. United States, 23 Ind. Cl. Comm. 277 (1970) (creation of executive order reservation said to have extinguished aboriginal title); Papago Tribe v. United States, 19 Ind. Cl. Comm. 394 (1968), *additional findings of fact*, 21 Ind. Cl. Comm. 403 (1969) (aboriginal title said to be extinguished by creation of executive order reservation); Pueblo of Acoma v. United States, 18 Ind. Cl. Comm. 154 (1967), *additional findings of fact*, 23 Ind. Cl. Comm. 219 (1970) (stipulated "taking" of 1.5 million acres); Southern Paiute Nation v. United States, 14 Ind. Cl. Comm. 618 (1965), (combined with Chemehuevi Tribe v. United States, 14 Ind. Cl. Comm. 651 (1956)) ("taking" of 30 million acre aboriginal area in Nevada, Utah and Arizona stipulated, though no date or event of taking identified); Pueblo of Taos v. United States, 15 Ind. Cl. Comm. 666 (1965) (creation of national forest by president extinguished title to 130,000 acres, some of which was not even included in the forest).

97. In 1947, Felix Cohen, who had been Associate Solicitor of the Department of the Interior and author of the first great Indian law treatise, HANDBOOK OF FEDERAL INDIAN LAW, observed that

by the ICCA correct, these cases would have been easy and lucrative: the claims attorneys would simply have asserted valid, unextinguished title, and claimed present value of the land "as for a taking." That did not occur. Without exception, the Commission, the Court of Claims, and the claims attorneys operated on the explicit premise that unless a pre-1946 taking of the tribe's lands was established, no compensation was obtainable.[98] The attorneys thus resorted to, and the courts indulged, novel theories of "takings" in utter disregard of the Supreme Court's command that only Congress can extinguish Indian title and then only by express and deliberate act.[99]

For example, in *Gila River Pima-Maricopa Indian Community v. United States*,[100] the Commission found that the Tribe had had aboriginal title to more than 3.75 million acres in the central valley of Arizona (embracing the entirety of present-day Phoenix). The claims attorneys and the government stipulated that the title had been extinguished, but fought vigorously over how and when that had occurred. The Commission selected 1883, which happened to be the year President Arthur, by Executive Order, added 180,000 acres to the reservation that Congress created for the Tribe in 1859.[101] Both parties appealed. The Court of Claims affirmed, observing that although

> there was here no formal cession by the Indians, no express indication by Congress (or its delegate) of a purpose to extinguish at a specified time, and no single act (or contemporaneous series of acts) of the Federal Government which indisputably erased native ownership at one swoop,[102]

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the popular myth that America had been stolen from the Indians was incorrect. "The fact," he explained, "is that *except for a few tracts of land in the Southwest*, practically all of the public domain of the continental United States (excluding Alaska) has been purchased from the Indians." Cohen, *Original Indian Title, 32 Minn. L. Rev.* 28, 33-34 (1947)(emphasis added). After leaving the government, Cohen went to work with a Washington law firm that was getting in on the ground floor of ICCA litigation, and he apparently helped draft some of the initial petitions for several tribes, including those of some New Mexico Pueblos. Cohen's awareness that those tribes had never had their lands taken shows through in these petitions, as they allege that the tribes retained unextinguished title to all their aboriginal lands, and that the government was liable *not* for any taking, but for interfering with or failing to protect the tribes' rights of use and possession. *See, e.g.*, Pueblo of Santo Domingo v. United States, Dkt. No. 355 (Cl.Ct., filed August 11, 1951), Petition at 2-3, ¶6; 11-14, ¶¶20-26. Unfortunately, Cohen died suddenly in 1953, at the age of 46. Other attorneys in his firm who handled the Pueblo cases thereafter may not have had his understanding of the status of the Pueblo lands, for in 1969 they stipulated, perhaps without their clients' knowledge, that the titles to all of the tribes' aboriginal lands had been extinguished by the United States. *See* Pueblo of Santo Domingo v. United States, 647 F.2d 1087, 227 Ct. Cl. 265, *cert. denied*, 456 U.S. 1006 (1981).

98. *See, e.g.*, Gila River Pima-Maricopa Indian Community v. United States, 494 F.2d 1386, 1394-95, 204 Ct. Cl. 137, 151-52 (1974) (Nichols, J., concurring).

99. United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 353 (1941). *See* Cohen, *supra* note 3, at 224, 488-93. *See* cases cited *supra* note 96.

100. 494 F.2d 1386, 204 Ct. Cl. 137, *cert. denied*, 419 U.S. 1021 (1974). (There are numerous other opinions on other aspects of this claim, some of which are still pending.)

101. *Gila River*, 27 Ind. Cl. Comm. 11 (1972), *aff'd*, 494 F.2d 1386, 204 Ct. Cl. 137, *cert. denied*, 419 U.S. 1021 (1974). Other additions were made to the reservation, both before and after 1883. 494 F.2d at 1388, 204 Ct. Cl. at 140. In *Hualpai Indians*, 314 U.S. at 351-54, the Supreme Court rejected the argument that the creation of a reservation, even by Congress, extinguished any aboriginal rights of the Tribe, unless Congress clearly expressed an intention to effect such an extinguishment.

102. 494 F.2d at 1392, 204 Ct. Cl. at 147.

the Commission "had discretion to choose the 1883 event" as the taking date.[103] Concurring, Judge Nichols philosophized on the claims process and its problems, in terms that bear quoting at some length:

> I join in the opinion and judgment of the court, with the caveat that in my view nothing happened in 1883 that could have constituted a taking of these Indians' heritage, at least not in the traditional eminent domain sense. In a true Fifth Amendment case such looseness in fixing a taking date would be unacceptable, even though at times it must be a jury verdict sort of thing as to the exact hour. . . . Here, however, we are not talking in an eminent domain sense and we are dealing with an "extinguishment" of aboriginal title rather than a true taking. The idea that the Commission has a broad discretion to choose among a number of conceivable dates, in the situation we have here, has the sanction of necessity. *An extinguishment date we must have.* Yet the truth is, we know the Indians once had their 3,750,000 acres and by 1946, by common understanding, had them no longer, but when they lost them defies determination. The United States was acting, it was at all times supposed, with undeviating benevolence. The idea of expropriation was never entertained, yet in a fit of absentmindedness the deed was somehow done. . . . The use of average, composite, or jury verdict taking dates is an accepted example of the powers the Commission has. . . . The Commission is not a court but a body in the executive branch. The task of righting Indian wrongs was characterized long before the 1946 Act as not judicial but political. Under the Act the task is made to look primarily judicial, but management rather than adjudication must occasionally be the dominant theme. They must at times adjudicate the unjusticiable. We must approach our tasks of judicial review with our minds wary of legalisms and tolerant of the compromise legalism must make if these ancient wrongs are to be settled in any of our lifetimes. Our decision herein satisfies me on these stated grounds.[104]

Had Congress really intended the ICCA as a device for inverse condemnation of Indian lands from which the Indians had been removed, but to which their title was intact, such rationalizations would obviously have been unnecessary, as would the labored efforts to find takings that were, legally, impossible. Instead, the firm and apparently correct conviction that compensation was available under the ICCA only for land that had been actually taken, before 1946, led to a line of decisions on "extinguishment" of Indian title that cannot be harmonized in any respect with the relevant Supreme Court authorities. Thus, in *United States v. Northern Paiute Nation,*[105] the parties jointly proposed, and the Commission accepted, a "taking" date of December 31, 1862, although nothing happened on that date (or any other, evidently) to effectuate a real taking of Northern Paiute tribal land.[106] In *Shoshone Tribe v. United States*, the Commission found

103. *Id.* at 1393, 204 Ct. Cl. at 149.

104. *Id.* at 1394-95, 204 Ct. Cl. at 151-52 (Nichols, J., concurring) (citations omitted; emphasis added). *See also*, United States v. Northern Paiute Nation, 393 F.2d 786, 803-807, 183 Ct. Cl. 321, 352-58, (1968) (separate views of Nichols, J.); *and see* Pueblo of Santo Domingo v. United States, 647 F.2d 1087, 1089-93, 227 Ct. Cl. 265, 268-75 (Nichols, J., dissenting), *cert. denied*, 456 U.S. 1006 (1981).

105. 393 F.2d 786, 183 Ct. Cl. 321 (1968).

106. Writing separately, Judge Nichols noted that the principal significance of the date seems to have been that it was the point at which the highest value attached to the minerals within the

extinguishment of tribal aboriginal title to a vast area—some 22 million acres in all—by "gradual encroachment" of white settlers.[107] Later, the parties stipulated that for purposes of compensation, the lands would be valued as of July 1, 1872,[108] although no act even arguably constituting a legal taking occurred on that date. In *United States v. Pueblo of San Ildefonso*,[109] the parties stipulated to extinguishment of the tribes' aboriginal title, but fought over the date. The Court of Claims saw no merit in the dates that the government urged, and thus accepted the dates proferred by the attorneys for the Pueblos.[110] All of those dates were of various administrative actions. Congress had no hand in any of them.

It must be acknowledged that these cases, and others like them,[111] in a sense, effectively accomplished exactly what the Tenth Circuit said Congress intended to happen under the ICCA—the liquidation of what had probably been extant tribal aboriginal title claims as against the United States.[112] They did so, however, only because the claims attorneys handled the claims as they did, proceeding on the apparently unshakable belief that the land *had* been taken, and simply asking for compensation. In none of these cases did any party or the court ever suggest the obvious—that *no* taking had occurred, and that the tribal title was unextinguished. At the most, the cases illustrate the continued force of Justice Cardozo's declaration in *Shoshone Tribe v. United States*,[113] that the government is not forcing any tribe to liquidate a title claim, but will accommodate those that choose to do so.

In at least two of these cases, moreover, the tribes (or parts of them) strenuously sought to change the course of the claims by getting out from under the stipulations of extinguishment. The Court of Claims rebuffed both efforts,[114] but *never*

aboriginal area (which included the legendary Comstock Lode), and thus its selection, and the court's ruling that the Indians were entitled to compensation for the minerals, effectively maximized the damages award. *Id.* at 803-04, 183 Ct. Cl. at 352-54 (Nichols, J., separate statement). Judge Nichols ended his separate statement with his own thoughts on how the tribe's lands had been taken, concluding, "As to land still in the public domain, still vacant, I do not think it has been taken yet." *Id.* at 807, 183 Ct. Cl. at 358.

107. 11 Ind. Cl. Comm. 387, 416 (1962). *See supra* note 96.

108. Western Shoshone Identifiable Group v. United States, 29 Ind. Cl. Comm. 5 (1972).

109. 513 F.2d 1383 (Ct. Cl. 1975). (The decision dealt with the consolidated claims of three New Mexico Pueblos.)

110. *Id.* at 1386-92.

111. *See* cases cited *supra* note 96.

112. Under § 22 of the Act (formerly codified at 25 U.S.C. § 70u (1976)), payment of the final judgment on a claim constituted "a full discharge of the United States," and acted to "forever bar any further claim or demand against the United States arising out of the matter involved in the controversy." *See* United States v. Dann, 470 U.S. 39 (1985).

113. 299 U.S. 476 (1936). *See supra* note 94 and accompanying text.

114. Pueblo of Santo Domingo v. United States, 647 F.2d 1087, 227 Ct. Cl. 265, *cert. denied*, 456 U.S. 1006 (1981); Temoak Bands of Western Shoshone Indians v. United States and Western Shoshone Identifiable Group Represented by the Temoak Bands of Western [Shoshone] Indians, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979); Western Shoshone Legal Defense and Educ. Ass'n v. United States and Western Shoshone Identifiable Group, 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976). In each case, it was the passage of time since the stipulations, and subsequent adjudications on the basis thereof, and the desire to wind up the claims business, that precluded reopening the title issue. Similarly, in United States v. Oneida Nation, 576 F.2d 870, 217

on the ground that Congress intended that the titles be liquidated anyway. Neither the Commission, the Court of Claims, nor the United States ever suggested such a notion. Were the Tenth Circuit correct in *Navajo Tribe*, however, that would have been the obvious and complete answer for tribes trying to avoid the inadvertent loss of unextinguished titles.

Similarly, in *Osceola v. Kuykendall*,[115] a Miccosukee Seminole sued the Indian Claims Commission itself contending that the Act that created it was unconstitutional. Osceola argued that the ICCA enabled parties claiming to represent the Seminole Nation to seek compensation for extinguishment of Seminole aboriginal title to lands (among others) still occupied by the plaintiff and his band of Seminoles.[116] The three-judge court dismissed the complaint, holding that the "plaintiff's right of possession and occupancy will not be affected" by the judgment in the Seminole ICCA case, and that until the plaintiff could demonstrate a palpable threat to his right of occupancy by the United States he had failed to present a concrete controversy over which the judicial power could be exercised.[117] Plainly, the Tenth Circuit would have had a much different answer to Osceola's complaint. These cases seem to demonstrate, thus, that the Tenth Circuit's view of Congress' intent in the ICCA, if correct, was utterly unknown to the courts that heard ICCA claims, or the attorneys who litigated them.

Another ICCA case, in which the court allowed the tribal plaintiff to seek recovery of lands it claimed but that had long been under federal control, is an even stronger refutation of the Tenth Circuit's position. In *Yakima Tribe v. United States*,[118] the Tribe sought compensation for four tracts of land alleged to have been wrongfully omitted from its treaty reservation as surveyed. The Tribe's claims were based on its interpretation of the boundaries of the reservation, as set forth in the treaty that was negotiated by Isaac Stevens (Governor of the Washington Territory) with the Yakimas and other tribes, at Walla Walla, Washington, in 1855.[119] In its initial consideration of the Tribe's claim,[120] the ICC

Ct. Cl. 45 (1978), the Court of Claims refused to abate the Oneida claim (that the United States breached its duty to the Oneidas by failing to dissuade them from selling their lands to New York State) while the Tribe pursued litigation seeking to establish that it still held good title to the lands it had sold. The Tribe therefore dismissed its ICCA claim altogether, and went on to succeed in its title claim. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 250 n. 25 (1985). That result plainly would have been impossible under the Tenth Circuit's view of the ICCA.

115. No. 76-492 (D.D.C. March 11, 1977) (three-judge court).

116. Osceola contended that the Miccosukee Band (which was not recognized by the United States until 1962) held unextinguished aboriginal title to its lands. In the Camp Moultrie Treaty, 7 Sept. 18, 1823, United States—Florida Tribes of Indians, 7 Stat. 224 (1823), however, the Seminoles relinquished "all claim or title which they may have to the whole territory of Florida" in exchange for a reservation in Florida. Later, in the Treaty of Payne's Landing, May 9, 1832, United States—Seminoles, 7 Stat. 368 (1832), they consented, albeit under duress, to relinquish their reservation and relocate to the Indian Country (now Oklahoma). In Seminole Indians v. United States, 23 Ind. Cl. Comm. 108, 134 (1970), the Commission ultimately awarded more than $12,000,000 for these takings of Seminole land.

117. Osceola v. Kuykendall, No. 76-492, slip op. at 8-10 (D.D.C. March 11, 1977).

118. 158 Ct. Cl. 672 (1962), *on remand*, 16 Ind. Cl. Comm. 536 (1966).

119. Treaty Between the United States and the Yakima Nation of Indians, June 9, 1855, art. I, 12 Stat. 951 (1859). *See Yakima Tribe*, 158 Ct. Cl. at 675.

120. 2 Ind. Cl. Comm. 443 (1953).

held against the Tribe on the merits as to one tract, and held in its favor as to part of a second.[121] As to the other two, Tracts B and D, both located along the western border of the reservation, the ICC held that the Supreme Court decision in *Northern Pacific Ry. Co. v. United States*[122] barred the Tribe from re-litigating the correct location of the western boundary of the reservation.[123] On appeal, the Court of Claims reversed as to Tracts B and D, holding that the lack of identity of the fact issues, and the lack of adversity of the present parties in the original litigation, precluded application of *res judicata*, and it remanded for consideration of the claim to these two tracts on the merits.[124] The ICC held further hearings, and in 1966 ruled against the Tribe on its claim as to Tract B, but in its favor on Tract D. That parcel, the ICC held, should have been included in the reservation as surveyed.[125]

In 1968, the Tribe and the government entered into a stipulation, approved by the ICC, under which 21,008.66 acres of Tract D (which embraced the peak and eastern slope of Mount Adams) were placed in a separate sub-docket, which would be held in abeyance while the Tribe sought restoration of the land to its reservation.[126] The Tribe's effort was successful. On January 18, 1972, Attorney General John Mitchell advised President Nixon, in a long and thoughtful opinion, that the area in question had been intended to be included in the Yakima Reservation, but was mistakenly omitted. Despite the subsequent inclusion of the land by President Roosevelt within the national forest, the Attorney General said, the Tribe still held valid, unextinguished title to it.[127] Four months later, acting in express reliance on that opinion, President Nixon ordered the 21,008.66 acres to be removed from the national forest and restored to the Yakimas as part of their reservation.[128]

There can be no doubt but that under the Tenth Circuit view of the ICCA, the Yakimas would never have been allowed to stay their claim to the Mount Adams tract to seek its return, but rather would have been forced to accept compensation for it. And the Attorney General certainly would have advised the President that the Tribe's pending ICCA claim[129] was intended by Congress to

121. *Id.* at 477-59.

122. 227 U.S. 355 (1913). That case arose when the United States, responding to the complaints of the Yakimas, determined that the original survey of the western boundary of the reservation had located it some 20 miles or so east of the line described in the treaty ("the main ridge of [the Cascade] mountains"). The government resurveyed the line so as to add nearly 300,000 acres to the reservation, then sued to cancel patents that had been issued to the railroad within the omitted lands. The Supreme Court affirmed that the new boundary correctly located the reservation line established by the treaty, and, thus, the patents were void. *See Yakima Tribe*, 16 Ind. Cl. Comm. at 540-46 (1966).

123. *Yakima Tribe*, 2 Ind. Cl. Comm. at 444-47.

124. *Yakima Tribe*, 158 Ct. Cl. at 680-82.

125. *Yakima Tribe*, 16 Ind. Cl. Comm. 536.

126. 20 Ind. Cl. Comm. 76, 89-93 (1968).

127. 42 Op. Att'y. Gen. 441 (1972). The opinion discusses at length, and rejects, the proposition that Congress had implicitly ratified the deletion of these lands from the reservation.

128. Executive Order 11670, 3 C.F.R. 208 (1971-1975 Comp.) (May 20, 1972). The ICC subdocket to which the claim for these lands had been assigned was dismissed shortly after. 29 Ind. Cl. Comm. 125 (1972).

129. The claim was cited and discussed in the opinion. 42 Op. Att'y. Gen. at 444-45.

be the Tribe's exclusive remedy with respect to those lands, were that in fact the case. Neither Mitchell's opinion, however, nor any of the ICC or Court of Claims opinions in the *Yakima* case, even hint at such a proposition.

5. Implications From Post-ICCA Land Claims

In recent years several other Indian claims to federally controlled lands have arisen outside of ICCA litigation. Their treatment, by Congress and the courts, has likewise been utterly inconsistent with the Tenth Circuit's view that all such claims were to have been concluded under the ICCA. The most notable such claim, that of Alaskan natives to virtually all of the state of Alaska, was resolved legislatively by Congress in 1968, in the Alaska Native Claims Settlement Act (ANCSA).[130] That the aboriginal title of Alaskan natives to the lands they had customarily used and occupied was unextinguished and unimpaired was regarded as a given in the late 1960's, and was considered to be the principal obstacle to construction of the Alaska Pipeline. ANCSA was enacted to effectuate an honorable settlement of the native claims, and to clear the way for the pipeline.[131] There is no suggestion anywhere in the legislative history of the Act that the land claims of the Alaskan natives were to have been resolved under the ICCA. Congress regarded those rights as sufficiently meritorious to warrant a settlement of 40 million acres of land and nearly $1 billion in cash.[132]

Another case involving live Indian claims of title against the United States is *United States v. Dann*.[133] Now in its fifteenth year of litigation, and on its third trip to the Ninth Circuit Court of Appeals, the case illustrates as well as any can the unfortunate complications visited upon Indians trying to hold onto their land in the face of baseless stipulations of "takings" of those lands in ICCA cases. The case does not, however, lend support to the Tenth Circuit view of the ICCA as set forth in *Navajo Tribe*.

130. 43 U.S.C. §§ 1601-24 (1982). The Act affirmatively extinguished all aboriginal titles in Alaska, including hunting and fishing rights. *Id.* at 1603.

131. 43 U.S.C. § 1601(a); H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 3, *reprinted* in 1971 U.S. CODE CONG. & ADMIN. NEWS 2192,-2194.

132. *Id.* §§ 1605, 1611, 1613. Alaskan natives had been expressly included within the groups entitled to file claims under the ICCA, as set forth in § 2 of that Act (formerly codified at 25 U.S.C. § 70a (1976)).

Congress has also in the past 20 years enacted legislation restoring other federally controlled lands to tribes claiming them under unextinguished aboriginal title. *See, e.g.*, Act of December 15, 1970, Pub. L. 91-550, 84 Stat. 1437 (restoring Blue Lake to Taos Pueblo); Act of Oct. 21, 1978, Pub. L. 95-498, 92 Stat. 1676 (restoring approximately 18,000 acres to Pueblo of Santa Ana); Act of August 28, 1984, Pub. L. 98-408, 98 Stat. 1533 (restoring 11,000-acre religious site to Zuni Pueblo); *and see* Act of July 9, 1984, Pub. L. 98-244, 98 Stat. 315 (restoring to Pueblo of Cochiti so-called Ojo de Santa Cruz tract, on ground that recently discovered Spanish documents demonstrated Pueblo had recognized title to tract under Spanish crown). Congress has furthermore acted on several occasions to settle legislatively the land claims of various Eastern tribes, by obtaining land and other benefits for them. *See, e.g.*, 25 U.S.C. §§ 1701-16 (1982) (settling land claims of Narragansett Tribe of Rhode Island); 25 U.S.C. §§ 1721-35 (1982) (settling land claims of Passamaquoddy Tribe and Penobscot Nation of Maine). While these were not claims to federally controlled lands, their resolution seems inconsistent with the contention that Congress intended the ICCA to liquidate any extant tribal claims of title.

133. 470 U.S. 39 (1985), *on remand*, 13 Ind. L. Rep. (D. Nev. Sept. 16, 1986), *appeals docketed*, Nos. 86-2835, 86-2890 (9th Cir. Oct. 27, 1986).

Dann began as a civil trespass suit that the United States brought against Mary and Carrie Dann in 1974.[134] The Dann sisters are Western Shoshone Indians who live in Crescent Valley, Nevada, on their family's ancestral lands.[135] For years they have run a sizable herd of cows and horses under a claim of Western Shoshone aboriginal title on several hundred thousand acres claimed by the government to be public domain.[136] The government sought an injunction against further unpermitted grazing by the Danns and damages for past trespasses.[137] The Danns moved for summary judgment on the title issue, but the district court held they were collaterally estopped by the liability decision in the pending Western Shoshone ICCA case[138] from asserting unextinguished title.[139]

On appeal, the Ninth Circuit held that there could be no estoppel against the Danns on the title issue, because the parties in the ICCA case had stipulated, not litigated, the issue of *whether* Western Shoshone aboriginal title had been extinguished, and that in any event the ICCA litigation was not final.[140] The court therefore remanded to the district court expressly "for the purpose of deciding title."[141] On remand, the case sat inactive until the Western Shoshone ICCA judgment became final. On April 25, 1980, the district court judge issued a two-page order, holding that the finality of the ICCA case constituted an extinguishment of Western Shoshone aboriginal title *as of December 6, 1979*, and enjoining the Danns from unpermitted grazing thereafter.[142] The Ninth Circuit reversed again.[143] It held, after a detailed examination, that the United States had never acted to extinguish Western Shoshone aboriginal title.[144] The court further ruled that the bar of Section 22 of the ICCA,[145] if it applied,[146] had not fallen, because the money awarded by the Commission in the Western Shoshone claim had not been "paid" within the meaning of that section; it had merely been deposited into a special account managed by the Secretary of the Interior, pending adoption of a distribution plan.[147]

134. United States v. Dann, No. R-74-60 BRT (D. Nev., filed May 6, 1974).

135. Brief of Appellants at 3, United States v. Dann, Nos. 86-2835, 86-2890 (9th Cir., filed October 27, 1986).

136. *Id.* at 3-5.

137. United States v. Dann, 470 U.S. 39, 43 (1985).

138. Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 387 (1962). The Commission had held that Western Shoshone aboriginal title had been extinguished by the "gradual encroachment" of settlers. *See supra* text accompanying note 113.

139. United States v. Dann, No. R-74-60-BRT (D. Nev., Feb. 22, 1977), *rev'd*, 572 F.2d 222 (9th Cir. 1978).

140. United States v. Dann, 572 F.2d 222 (9th Cir. 1978).

141. *Id.* at 223.

142. United States v. Dann, No. R-74-60-BRT (D. Nev., April 25, 1980), *rev'd*, 706 F.2d 919 (9th Cir. 1983), *rev'd on other grounds*, 470 U.S. 39 (1985).

143. United States v. Dann, 706 F.2d 919 (9th Cir. 1983), *rev'd*, 470 U.S. 39 (1985).

144. 706 F.2d at 927-33. The court considered in turn each of the actions claimed by the government to have effected a taking, and found that none of them met the requirements of *Santa Fe Pacific*.

145. *See supra* note 112.

146. The Danns also contended that they were not parties to or otherwise represented in the ICCA case, and that in any event their defensive assertion of title was not a "claim" within the meaning of § 22 of the Act. The Ninth Circuit did not address these arguments.

147. 706 F.2d at 926-27. The judgment fund, now amounting to close to $40 million with accumulated interest, still has not been distributed to the Shoshones, due to the continuing demands by the tribes for a land settlement.

The United States did not challenge the court's holding that there had never been any taking of Western Shoshone aboriginal title lands by the government. It sought review in the Supreme Court *only* on the question whether "payment" of the ICCA judgment had occurred within the meaning of Section 22 of the Act.[148] The Supreme Court decided the narrow payment issue in favor of the government. At the conclusion of the opinion, however, the Court noted that the Danns had asserted both tribal and individual aboriginal rights, and that since only tribal rights were at issue in the ICCA case, the claim of individual rights was not barred.[149] The Court left the issue of individual aboriginal rights for consideration on remand.[150]

The Court seemed to view its determination of the payment issue as foreclosing any further assertions by the Danns based on tribal aboriginal title.[151] But the Court indicated plainly that Indian rights of use and occupancy, such as were found to exist in *Cramer v. United States*,[152] might nonetheless survive. This position is directly at odds with the Tenth Circuit's view in *Navajo Tribe*, that all Indian claims of title as against the United States were to have been concluded under the ICCA. Indeed, at no time in the entire *Dann* litigation has it been suggested that the Danns' aboriginal land rights, however characterized, could not have survived the ICCA.

It would, moreover, be of more than passing interest if it turned out that, in enacting a statute intended to remedy the old wrongs done to Indians, as the ICCA expressly was,[153] Congress decided to effect a few more wrongs, by unilaterally extinguishing all unextinguished tribal titles to lands now claimed by the United States. Indeed, the Navajos made that argument in *Navajo Tribe*: to hold that claims such as the Tribe's claim to the E.O. 709 reservation could be brought only under the ICCA effected a backhanded extinguishment of the Tribe's title.[154] The Tenth Circuit's response is, in context, hard to fathom. The court said that far from being a backhanded extinguishment, the Act gave tribes an opportunity to litigate the validity of their titles, and to receive compensation for them.[155] Of course, for a tribe claiming it still owns certain lands, to be told it has a valid title but that that title is now being liquidated for "fair compensation" must look suspiciously like extinguishment. The court went on, however, to

148. *Dann*, 470 U.S. at 40-41.

149. *Id.* at 50.

150. *Id.* at 50. On remand, the district court found that the Danns retained treaty and aboriginal grazing rights as extensive as those they had exercised on the day the ICCA judgment became final, and exclusive aboriginal title to one section of land. United States v. Dann, No. R-74-60-BRT, (D. Nev., Sept. 17, 1986), *appeals docketed*, Nos. 86-2835, 86-2890 (9th Cir. Oct. 27, 1986). Both sides have appealed to the Ninth Circuit.

151. *But see supra* note 146. The arguments discussed there, of course, were not before the Court.

152. 261 U.S. 219 (1923). In *Cramer* (which was cited by the Supreme Court in *Dann*, 470 U.S. at 50 n. 14, in the Court's discussion of the "individual aboriginal title" issue, *see supra* text accompanying note 149), the Court held that a patent to public domain land occupied by an Indian family would be cancelled to avoid interfering with the Indians' rights of use and occupancy. 261 U.S. at 233-34.

153. *See* Otoe and Missouria Tribes v. United States, 131 F. Supp. 265, 131 Ct. Cl. 593, *cert. denied*, 350 U.S. 848 (1955).

154. 809 F.2d at 1469.

155. *Id.*

explain that because the Navajos failed to bring their E.O. 709 claim to the Indian Claims Commission, that claim was barred by the five-year limitation period of Section 12 of the ICCA.[156] The court then quoted a lengthy passage from the Supreme Court decision in *Chase Secs. Corp. v. Donaldson*,[157] in which the Court set forth its view that statutes of limitations "go to matters of remedy, not to destruction of fundamental rights."[158]

The implication of the Tenth Circuit's citation to *Chase Securities* is striking. Just a few years ago, the Tenth Circuit itself had occasion to apply the *Chase Securities* principle in a suit involving the Quiet Title Act,[159] *United States v. Gammache*.[160] Gammache resided at the village of La Bajada, located within the La Majada Grant in north central New Mexico, a Spanish land grant that the government purchased in the 1930's.[161] Gammache had tried to quiet his title against the government by a suit under the Quiet Title Act, but the suit was deemed barred by that statute's twelve-year limitations period.[162] The United States then sued Gammache to quiet *its* title, reasoning (in part) that since Gammache had lost his right to assert his title against the government, he no longer had a defense to the government's assertion of title as against him.[163] The district court agreed with that argument,[164] but the Tenth Circuit reversed. Relying on the principle articulated in *Chase Securities*, that statutes such as the Quiet Title Act extinguish only remedies, not rights, the court held that Gammache still could litigate the merits of his title claim in the government's suit against him.[165]

In *Navajo Tribe*, the court emphasized that it was holding only that the Tribe was barred by the limitations period of the ICCA from bringing its claim of title against the United States.[166] Yet under the principle set out in the court's quote from *Chase Securities*, and as applied in *Gammache*, it seems arguable that the merits of the Tribe's claim of title remain unimpaired. The Tribe could thus assert and litigate the title claim defensively should the United States (or anyone else) ever find itself forced to sue the Tribe over rights to E.O. 709 land. Yet that proposition, in turn, seems wholly inconsistent with the Tenth Circuit's view

156. Formerly codified at 25 U.S.C. § 70k (1976).
157. 325 U.S. 304, 313-14 (1945).
158. *Id.* at 314.
159. 28 U.S.C. § 2409a (1982). *See supra* note 54.
160. 713 F.2d 588 (10th Cir. 1983).
161. *Id.* at 594-95. (The court erroneously refers to the "La Bajada Grant".)
162. 28 U.S.C. § 2409a(g); *see* 713 F.2d at 589-90.
163. 713 F.2d at 590.
164. *Id.* at 590-91.
165. *Id.* at 591-94. The court further decided that the merits of the complex title question could not be determined on summary judgment, and remanded the case for trial. *Id.* at 595.

In Block v. North Dakota, 461 U.S. 273, 291-92 (1983), the Supreme Court explicitly held that the Quiet Title Act is not an adverse possession statute, and

> does not purpose to effectuate a transfer of title. If a claimant has title to a disputed tract of land, he retains title even if his suit to quiet his title remains time-barred under § 2409a(f). A dismissal pursuant to § 2409a(f) does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title. . . .

166. 809 F.2d at 1469-71.

that the ICCA was intended as a device to conclude such title claims forever.

None of these considerations, admittedly, decisively refutes the Tenth Circuit's view of the ICCA. It nevertheless seems odd that in all the Indian land litigation under the ICCA and subsequently, there is not a single decision that tends to *support* the Tenth Circuit's remarkable interpretation of the Act. Despite the finality of the decision in *Navajo Tribe* and despite the fact that the bar of the Quiet Title Act will, as a practical matter, probably preclude most tribal land claims against the government anyway, the correctness of the Tenth Circuit interpretation of the ICCA (in what appears to be the court's first encounter with this forty-year-old legislation) must be regarded as, at best, highly doubtful.

6. The Indispensable Parties Issue

The second part of the *Navajo Tribe* opinion, affirming the dismissal of the claims against the non-federal parties for lack of an indispensable party (the United States), is also troubling. Fortunately, perhaps, the court began by noting that the determination of indispensability "depends to a large degree on the careful exercise of discretion by the district court"[167] and would only be reversed for abuse of discretion. The finding of indispensability here, thus, should not be seen as a directive to district courts in other cases. In light of the facts in *Navajo Tribe*, moreover, the claim of unfairness in letting the Tribe litigate its case in the absence of the United States has arguable merit. All of the events that gave rise to the Tribe's claim of title were actions of the federal government, and the success of its claim depended on establishing that two executive orders were violative of an Act of Congress.[168] The non-federal defendants were innocent of any wrongdoing as against the Tribe; moreover, the Tribe's pleading expressly sought cancellation of their leases and patents,[169] relief that has been held to be unavailable except in a direct action by the United States.[170]

It must be said, however, that the opinion's own analysis of the factors governing indispensability,[171] its treatment of apparently contrary precedent,[172] and its disregard of congressional action that seemingly compels a different result,[173] do warrant at least raised eyebrows.

The district court's reasoning on the indispensability issue, which the Tenth Circuit adopted verbatim,[174] was that leases and patents issued by the United States could not be cancelled unless the parties thereto were before the court.

167. *Id.* at 1471 (quoting Glenny v. American Metals Climax Inc., 494 F.2d 651, 653 (10th Cir. 1974)).

168. That is, that E.O. 1000 and E.O. 1284, *see supra* notes 35, 36, and accompanying text, were void in that they restored unallotted lands to the public domain before all Navajos in the E.O. 709 addition to the Reservation had been allotted, contrary to § 25 of the Act of May 29, 1908, ch. 216, 35 Stat. 444, 457. *See supra* note 34 and accompanying text.

169. Complaint at 13.

170. *See, e.g.*, St. Louis Smelting & Ref. Co. v. Kemp, 104 U.S. 636, 647 (1882); Raypath v. City of Anchorage, 544 F.2d 1019, 1021 (9th Cir. 1976).

171. 809 F.2d at 1472-73.

172. *Id.* at 1473.

173. *See* 28 U.S.C. § 1362 (1982); *and see infra* text accompanying notes 193-206.

174. 809 F.2d at 1471-72.

That rule is generally invoked as to leases,[175] but plainly it cannot prevent title litigation over patented lands, else no titles west of the original thirteen states could ever be litigated. Virtually all private titles, especially in the western states, are ultimately traceable to federal patents. If disputes over title to patented lands could not occur without the presence of the United States, they would never be resolved.[176]

The notion that private title disputes must be litigable in the United States' absence further serves to answer Judge McKay's principal point in his own analysis of the factors underlying indispensability: that a decision in the Tribe's favor against the non-federal parties "undoubtedly prejudices" the United States' interests.[177] It is elemental that a party is not bound by a judgment rendered in its absence.[178] That rule has been expressly applied to land suits brought by Indians, to which the United States was not party.[179] The Tenth Circuit gave no explanation why the principle was inapplicable in *Navajo Tribe*.

The Tribe had cited several cases involving Indian claims to land as against non-federal parties, in which the government was explicitly held not to be indispensable.[180] The court distinguished those cases on the ground that in each of them the United States' interests were aligned with those of the tribes, because the government "was the putative fee owner of the trust lands in which the Indians asserted beneficial ownership."[181] In the case before it, the court explained, "[t]he Tribe and the United States are adversaries, each claiming sole title to the same land . . . [they] are not aligned together against the countervailing interests of third parties."[182]

175. *See, e.g.*, Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

176. The cases cited *supra* note 170 are not to the contrary. Those decisions concern attacks on the validity of the instruments themselves, for fraud, for example, or on the ground that necessary prerequisites to issuance were not followed. No such claim was made in *Navajo Tribe*. Rather, the Tribe's contention was, in effect, that since its title remained fully in force, the United States had nothing to convey to third parties (although, to be sure, the Tribe had asserted its claim rather more forcefully than the case called for, and did ask for cancellation of the patents; Complaint at 13).

177. 809 F.2d at 1472.

178. *See generally*, RESTATEMENT (SECOND) OF JUDGMENTS, Ch. 4 (1982). The general rule has, of course, the usual exceptions, discussed in the cited authority, but none would seem to apply here.

179. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 371 (1968); United States v. Candelaria, 271 U.S. 432 (1926); Choctaw & Chickasaw Nations v. Seitz, 193 F.2d 456, 459 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952). In *Poafpybitty*, the Supreme Court quoted approvingly a passage from *Choctaw & Chickasaw* in which the Tenth Circuit had recognized "the rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands, although the United States would not be bound by the judgment in such an action, to which it was not a party . . ." *Poafpybitty*, 390 U.S. at 371 (quoting *Choctaw & Chickasaw*, 193 F.2d at 459).

180. Choctaw & Chickasaw, 193 F.2d 456; Idaho v. Andrus, 720 F.2d 1461 (9th Cir. 1983); Puyallup Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); Narragansett Tribe v. Southern R. I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976); *and see* Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 544-45 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part, rev'd in part*, 470 U.S. 226 (1985); Ft. Mojave Tribe v. LaFollette, 478 F.2d 1016 (9th Cir. 1973) (reversing lower court's dismissal on ground of United States' indispensability).

181. 809 F.2d at 1473.

182. Plainly, the Tenth Circuit cannot be saying that because the government *sided* with the Tribe in each case, it was not indispensable. In *Puyallup* and *Narragansett*, the court nowhere mentions

This attempt to distinguish the Navajo claim from the cited cases seems clearly wrong. The Tribe was merely claiming "title" under an executive order, not a deed. The United States, even under the Tribe's theory, would still retain the underlying fee, but in trust for the Tribe.[183] The case was, thus, in that respect no different at all from *Choctaw & Chickasaw Nations v. Seitz*,[184] *Idaho v. Andrus*,[185] *Puyallup Tribe v. Port of Tacoma*,[186] or *Narragansett Tribe v. Southern R. I. Dev. Corp.*,[187] the decisions cited by the Tribe.

The court's attempted distinction, moreover, misses altogether the reasoning in the cited cases for finding the United States not indispensable. Each case viewed the government's underlying interest in the land at issue (should the Tribe's claim succeed), and the fact that the government would not be bound by a judgment *against* the Tribe, as an argument *in favor* of indispensability,[188] not against it, as the Tenth Circuit seems to suggest. Each court saw as far more important, however, the interest in ensuring that Indian tribes have the ability to vindicate their rights in their lands.[189] The 1951 Tenth Circuit decision in *Choctaw & Chickasaw*[190] remains one of the most frequently cited statements of that principle. There, the court noted that the Supreme Court had on several

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the attitude of the United States toward the litigation. In *Andrus*, the government had initiated the suit, but then abandoned it on appeal, and in *Choctaw & Chickasaw* the government had refused for 20 years to bring the suit for the Tribe, or to enter it when its joinder was attempted. 193 F.2d at 457-58. Regardless, the subjective judgments of government officials toward tribal land litigation cannot be determinative of indispensability under Fed. R. Civ. P. 19.

183. *See* Cohen, *supra* note 3, at 493.

184. 193 F.2d 456. There, the two tribes sought to quiet their joint title to 700 acres within their reservation. The Tenth Circuit, in an often-quoted opinion, held that the suit could go forward without the presence of the United States.

185. 720 F.2d 1461 (9th Cir. 1983). In this rather involved case, the United States had sued Idaho to enforce a reverter clause in a conveyance of land that had been withdrawn from the Coeur d'Alene Reservation for use as a state park. The Tribe intervened, alleging it had a reversionary interest in the property. After the district court ruled in the state's favor, the United States and the Tribe appealed, but the United States then dismissed its appeal. The Ninth Circuit upheld the Tribe's claim of a reversionary interest, and held that it could prosecute the appeal on its own, despite the government's abandonment of the suit.

186. 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). The Tribe sued to quiet its title to a 12-acre tract that had been part of the riverbed within the Tribe's reservation, but that became dry land (and was developed by the Port of Tacoma) when the Corps of Engineers re-channeled the river. The court held that neither the United States nor the State of Washington were indispensable (even though the state, under the "equal footing" doctrine, might itself have a claim to ownership of the river bed; *see* Montana v. United States, 450 U.S. 544 (1981)) and it ruled in the Tribe's favor on the merits.

187. 418 F. Supp. 798 (D.R.I. 1976). One of the famous Eastern Indian land claims, this case sought recovery of lands allegedly conveyed by the Tribe in violation of the Nonintercourse Act, 25 U.S.C. § 177 (1982). The opinion cited contains the court's rulings striking state law affirmative defenses, and holding that the United States was not indispensable to the maintenance of the suit. The claim was ultimately resolved by Congress, generally favorably to the Tribe. 25 U.S.C. §§ 1701-16 (1982).

188. *E.g.*, *Puyallup*, 717 F.2d at 1254; *Choctaw & Chickasaw*, 193 F.2d at 460-61; *Narragansett*, 418 F. Supp. at 811.

189. *Cf.* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (unique protections afforded Indian title under federal law justify viewing Indian tribe's suit to recover land as one "arising under" federal law, and thus within federal court jurisdiction).

190. 193 F.2d 456.

occasions affirmed the capacity of restricted Indians and tribes to act on their own to assert their rights in land.[191] Further, the court observed, to say that Indians may sue to assert their titles to their lands "would be of no avail to them if the United States is an indispensable party to such an action . . ."[192]

Congress essentially adopted the rationale of *Choctaw & Chickasaw* in 1966 when it enacted 28 U.S.C. § 1362, which provides federal court jurisdiction for any civil action by a federally recognized Indian tribe that "arises under the Constitution, laws or treaties of the United States," without regard to jurisdictional amount.[193] Tribal claims to land were prominently mentioned, in both the House and Senate Committee reports on the proposed Act, as the kinds of claims for the prosecution of which Congress wanted to protect the tribes' access to federal courts.[194] In particular the reports state Congress' desire to insure the tribes could sue in federal courts "in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action."[195]

It has long been settled that Congress has the power to regulate the practice in federal courts, within the limits of constitutionally prescribed jurisdiction.[196] It is at least arguable that the enactment of 28 U.S.C. § 1362 amounted to a congressional determination that Indian tribes are not to be denied access to federal courts to assert rights to land solely as against non-federal parties, on the ground that those assertions come into conflict with the interests of the United States. Such a determination, it would seem, would necessarily overcome a non-constitutional procedural doctrine, such as that of indispensable parties, grounded

191. *See, e.g.*, Creek Nation v. United States, 318 U.S. 629 (1943); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Heckman v. United States, 224 U.S. 413 (1912).

192. 193 F.2d at 460. The court further noted the significant distinction, in this regard, between actions by tribes to protect or regain land, and actions by others that would have the effect of alienating Indian land. In the latter category of cases, the court pointed out, the United States is invariably, and properly, deemed indispensable. *Id.* at 460. *See* Jackson v. Sims, 201 F.2d 259, 262 (10th Cir. 1953).

193. Act of Oct. 10, 1966, Pub. L. 86-635, 80 Stat. 880. The section reads:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

194. *See* S. Rep. No. 1507, 89th Cong., 2d Sess. (1966) at 2, 3, 5; H.R. REP. No. 2040, 89th Cong., 2d Sess. (1966) at 2, 3, 5. Both reports contain a letter from Ramsey Clark, then Attorney General of the United States, to the respective committee chairmen, saying:

> Other suits which might be brought in the Federal Courts under the bill would include actions to quiet title to land claimed by Indian tribes, including actions to set aside patents where it is alleged the patents infringe upon rights claimed by the tribes, under the Constitution, laws or treaties of the United States . . .

S. REP. No. 1507 at 5; H.R. REP. No. 2040 at 5.

195. S. REP. No. 1507, 89th Cong., 2d Sess. (1966) at 2. *And see* H.R. REP. No. 2040, 89th Cong., 2d Sess. (1966) at 2 (bill provides jurisdiction "in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action").

196. Keary v. Farmers' & Merchants' Bank, 41 U.S. (16 Pet.) 89 (1842); Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

in the Federal Rules of Civil Procedure.[197] The same statute has been held to override a federal statute barring injunctions against collection of state taxes, 28 U.S.C. § 1341,[198] in an action by a tribe to enjoin assessment and collection of state taxes. In *Moe v. Confederated Salish & Kootenai Tribes,*[199] the Supreme Court held that Congress enacted 28 U.S.C. § 1362, to ensure that an Indian tribe would at least "in certain respects" have the same ability to sue to vindicate its rights as the United States would have in a suit on the Tribe's behalf.[200] Thus, like the United States, the Tribe in *Moe* was not barred by § 1341 from suing to prevent collection of the taxes there at issue.[201] Adopting that principle, in *Oneida Indian Nation v. State of New York,*[202] the Second Circuit held that § 1362 abrogates state sovereign immunity in a suit by a tribe, since such immunity would not be available in defense of the same suit if brought by the United States.[203] That ruling has since been followed by several district courts.[204]

In light of those cases, it is difficult to understand how a tribe could be prevented from pursuing a claim against non-federal parties on the ground that the United States is unjoinable, if jurisdiction is otherwise proper under 28 U.S.C. § 1362. The *Navajo Tribe* opinion unfortunately omits any mention of § 1362 at all; but that opinion appears to be the only reported case, at least since that

197. *Cf.* Sioux Nation v. United States, 448 U.S. 371, 391-407 (1980) (Act of Congress waiving defense of *res judicata*, so as to enable tribe to re-litigate issue of whether Congress' expropriation of the Black Hills was a Fifth Amendment taking, held not to violate separation of powers). FED. R. CIV. P. 19 does, to be sure, have a long and distinguished ancestry in equity practice, *see* Mallow v. Hinde, 25 U.S. (12 Wheat.) 193 (1827); Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152 (1825); 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1601 at 5-8, but it is described as a discretionary doctrine, not one of constitutional dimension.

198. That section precludes federal district courts from enjoining the assessment or collection of state taxes where state law provides an adequate remedy for challenges thereto. It has been held not to bar such suits by the United States, however. Department of Employment v. United States, 385 U.S. 355 (1966).

199. 425 U.S. 463 (1976). The Tribes were challenging the applicability of Montana's cigarette tax and vendor-licensing statutes to tribal members selling cigarettes within the Flathead Reservation, and the applicability of state personal property taxes to motor vehicles owned by tribal members residing on the Reservation. The Court found all of the taxes and the licensing act inapplicable, with the important exception that it upheld the cigarette tax as applied to sales to non-Indians. *See also* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

200. 425 U.S. at 476. The Court did not explain the reach of the quoted phrase, beyond the immediate holding of the case.

201. *See supra* note 198.

202. 691 F.2d 1070 (2d Cir. 1982). In this case, the Oneidas lay claim to lands that they conveyed away *prior* to the enactment of the Constitution. The claim recently was dismissed on the merits. Oneida Indian Nation v. State of New York, 649 F. Supp. 420 (N.D. N.Y. 1986).

203. 691 F.2d at 1079-80.

204. Charrier v. Bell, 547 F. Supp. 580 (M.D. La. 1982) (following district court *Oneida* decision, before it was affirmed by the Second Circuit); Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297 (N.D.N.Y. 1983); Lac Courte Oreilles Band v. Wisconsin, 595 F. Supp. 1077 (W.D. Wisc. 1984) (holding abrogation of immunity extends to claims for money damages; *cf.* United States v. University of N.M., 731 F.2d 703 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984) (Eleventh Amendment no defense to trespass damage suit by United States on behalf of Pueblo of Santa Ana against state agency)).

section became law, in which a tribe's suit against non-federal parties has been dismissed because of the indispensability of the United States. In this era of burgeoning Indian litigation to regain tribal lands,[205] the Tenth Circuit seems to be swimming against the tide.[206]

B. Pueblo de Acoma v. New Mexico & Arizona Land Co.

Before leaving this topic, note should be taken of another Indian land case decided by the same district judge who originally decided *Navajo Tribe*, just a few months before that decision was affirmed on appeal. In *Pueblo de Acoma v. New Mexico and Arizona Land Co.*,[207] the Pueblo asserted title to the mineral rights underlying some 86,404 acres within its reservation.[208] Most of the land in question had been patented by the United States to the Atlantic & Pacific Railroad in 1908.[209] The balance had been patented to the State of New Mexico, at various times, pursuant to the New Mexico Enabling Act of 1910.[210] By a rather involved series of transactions, the surface of these lands was eventually returned to the United States, in trust for the Pueblo, but the State and the Land Company (successor in interest to the Atlantic & Pacific) retained the minerals.[211] The Pueblo claimed that these lands were within its aboriginal title area, that its aboriginal title had never been extinguished, and that the patents to the Railroad and the State were ineffective to overcome that title.[212] Without reaching the merits, the court held the Pueblo's claim to be barred by *res judicata*, by virtue

205. *E.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), *on remand*, 528 F. Supp. 1359 (D. Conn. 1982); Joint Tribal Council of the Passamaquoddy v. Morton, 528 F.2d 370 (1st Cir. 1975); Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297 (N.D.N.Y. 1983), 667 F. Supp. 938 (N.D.N.Y. 1987); Schaghticoke Tribe v. Kent School Corp., 423 F. Supp. 780 (D.Conn. 1976); Narragansett Tribe v. Southern R. I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976).

206. It must be said, too, that the court's failure to attempt to rationalize the two parts of the opinion discussed in the text—the discussion of the dismissal as against the United States, and that of the dismissal as against the non-federal parties—leaves additional doubt about the court's view of the ICCA. If, as the court said, Congress intended that all extant tribal land claims would be liquidated under the ICCA, it seems extremely unlikely that it would have limited the reach of that remedy to lands under federal control, and left third parties open to title claims. Especially because, according to the logic of the Tenth Circuit, the purpose of this scheme was to avoid disturbance of subsequent titles, 809 F.2d at 1467, surely Congress would have intended to benefit third parties whose titles derived from the United States. Yet the ICCA itself makes no provision for claims against third parties, and the bar provision, § 22 (formerly codified as 25 U.S.C. § 70u (1976)) runs only in favor of the United States. Congress has, moreover, taken pains to preserve old damage claims on behalf of tribes against third parties, 28 U.S.C. § 2415(a) (1982), and the Supreme Court has squarely held that, as to claims against non-federal parties, "[t]here is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 (1985). The inconsistent treatment accorded lands patented to third parties, if the Tenth Circuit view of the ICCA were correct, begs explanation.

207. No. 82-1551-JB (D.N.M. Sept. 29, 1986).

208. *Id.* at 1-2.

209. *Id.* at 5.

210. Ch. 310, 36 Stat. 557.

211. The chain of title, to the extent ascertainable by the court, is set out in the slip opinion at 4-12.

212. That contention, at least, is fully supported by the Supreme Court's decision in United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941).

of the final judgment in the Pueblo's claim under the ICCA, *Pueblo de Acoma v. United States*.[213] That was a claim in which the "taking" of the Pueblo's aboriginal lands (of more than 1.5 million acres) was stipulated but never identified.[214] In fact, there probably never was a taking; but the Pueblo accepted the settlement amount, of more than $6 million, and thus the bar of § 22 of the ICCA[215] had plainly fallen.

The Pueblo's principal argument was that the minerals were not covered by the settlement of the ICCA claim, and the final judgment thus did not preclude this assertion of title as to them.[216] The court's opinion, however, cites substantial evidence that although the minerals were not mentioned specifically in the stipulation that set out the basis of the settlement, that omission was an oversight that was later caught; that although the stipulation itself was never amended, the minerals were included in the rights to be compensated by the settlement; and that even the Pueblo understood that it was being compensated for the minerals as part of the settlement.[217] The court's conclusion that the ICCA judgment could fairly be interpreted to cover the minerals at issue in this action appears to be well-supported.

The one aspect of the decision that warrants further discussion is the brief passage in which the court decided that the Land Company and the State both are entitled to the benefit of the *res judicata* defense because they are in privity with the United States.[218] While it is, of course, true that *res judicata* applies where the prior judgment involved the same parties or their privies,[219] this rule is limited, in the case of successors in interest to property. It has been held, by the Tenth Circuit Court of Appeals, among others, that only where the transfer of property occurred *after* commencement of the prior suit is the judgment against the predecessor conclusive as to the successor.[220] Here, the transfer to the Land Company and the State occurred long before the Acoma ICCA case (and before any "taking" of Acoma aboriginal title). To be sure, the correct analysis here can depend on whether the ICCA judgment in the Acoma case is characterized as being favorable or unfavorable to the United States,[221] and requires consideration of the expanding circumstances under which the courts have justified abandonment of the mutuality rule in the application of the doctrine of claim preclusion.[222] Those questions are beyond the scope of this article, other than to note that they were presented by the district court decision in *Acoma*, but not

213. 18 Ind. Cl. Comm. 154 (1967), *additional findings of fact*, 23 Ind. Cl. Comm. 219 (1970). *See* Pueblo de Acoma v. New Mexico & Ariz. Land Co., No. 82-1551 JB (D.N.M. Sept. 29, 1986), slip op. at 16-22; *see also supra* note 96 and accompanying text.

214. 213 Ind. Cl. Comm. 219 (1970).

215. Formerly codified at 25 U.S.C. § 70u (1976). *See supra* note 112.

216. *Pueblo de Acoma*, slip op. at 2, 23.

217. *Id.* at 24-27.

218. *Id.* at 28.

219. *Id.* at 27; Nevada v. United States, 463 U.S. 110, 129-30 (1983).

220. Wight v. Chandler, 264 F.2d 249 (10th Cir. 1959); Archer v. United States, 268 F.2d 687 (10th Cir. 1959); New Amsterdam Casualty Co. v. Murray, 242 F.2d 549 (6th Cir. 1957); 1B J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE, § 0.411[1] at 394; 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 4462.

221. *See* 1B J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE, § 0.411[1] at 394-96.

222. *See, e.g.*, 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE §§ 4463-65 (1987 Supp.).

addressed.[223] Given the utter absence of any litigation in the ICCA case of the issue of whether a "taking" of Acoma land ever occurred, however, it would seem that the Tribe may have had some good arguments against the invocation of non-mutual preclusion.[224]

III. PUEBLO WATER RIGHTS: THE WATERS GET MUDDIER

A. *The Background of* New Mexico v. Aamodt

It has long been acknowledged that the nature and extent of the water rights of Indian tribes on their reservations are governed by the seminal 1908 United States Supreme Court decision, *Winters v. United States*.[225] There, the Court held that the setting aside by the United States of lands for the use and occupancy of Indians carries, by implication, a reservation of sufficient water rights for the present and future needs of the Indians.[226] Because the "reserved rights" doctrine (or "*Winters*" doctrine, as it is often called) depends on a "reservation" of lands by the United States[227] for Indian occupancy, conceptually it is apparent that the doctrine might not apply directly to the Pueblo Indians of New Mexico. Elsewhere in the United States, the government was deemed to take title to all the lands it acquired, subject only to Indian rights of use and occupancy, rights that the government could extinguish.[228] In contrast, the core of Pueblo land holdings consists of lands either granted to the Pueblos by the Spanish authorities, or recognized under Spanish law as being their exclusive domain.[229] The United

223. In support of its holding that the Land Company and the State were entitled to invoke the prior judgment, the court cited only the two recent Eighth Circuit *Oglala* decisions, *see supra* note 41, its own decision in *Navajo Tribe v. United States*, *see supra* text accompanying notes 21-224, and RESTATEMENT (SECOND) OF JUDGMENTS § 41(d) (1982). *Pueblo de Acoma*, slip op. at 28. None of those authorities has a word to say about the rule of privity as applied to successors to property.

224. *Cf.* United States v. Dann, 572 F.2d 222 (9th Cir. 1978) (stipulation in earlier ICCA claim that aboriginal title had been extinguished held not to bar subsequent litigation of that issue, even though Danns arguably were represented in earlier claim); *followed*, United States v. Dann, 706 F.2d 919 (9th Cir. 1983), *rev'd on other grounds*, 470 U.S. 39 (1985). In Cayuga Indian Nation v. Cuomo, 667 F. Supp. 938 (N.D.N.Y. 1987), the court reasoned that since the ICCA was designed only to address claims against the United States, a judgment under that act should not be viewed as supplanting claims against other parties.

225. 207 U.S. 564 (1908). The United States brought the case to enjoin Henry Winter and others from damming and diverting water from the Milk River in Montana, on the ground that such dams and diversions would impair the rights of the Gros Ventre and Assiniboine tribes, then settled on the Ft. Belknap Reservation (downstream from the defendants' dams and canals), who had a large irrigation project underway. That reservation had been created by an agreement with the tribes ratified by Congress on May 1, 1888, 25 Stat. 113.

226. *See also*, Arizona v. California, 373 U.S. 546, 597, 601 (1963), *decree entered*, 376 U.S. 340 (1964) (holding that "practicably irrigable acreage" within the reservation is an appropriate measure of the reserved right). Perhaps the clearest statement of the reserved rights doctrine (which, with certain qualifications, is now held to apply also to many other categories of land set aside by the United States for particular purposes), is contained in Cappaert v. United States, 426 U.S. 128, 138-39 (1976) (applying doctrine to protect water level in Devil's Hole National Monument from being lowered by nearby groundwater pumping).

227. Or conceivably by the Indians themselves, from lands otherwise ceded to the United States. *See* United States v. Winans, 198 U.S. 371 (1905).

228. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974).

229. *See* Cohen, *supra* note 3, at 485.

States never had any legal interest whatever in these lands; upon confirmation of the Pueblos' titles by Congress, titles to those lands were deemed fully vested in the Pueblos,[230] although also subject to restrictions on alienation.[231] Because the efficacy of the Pueblos' titles depended in no way on federal action,[232] there arguably was no federal reservation of water rights appurtenant to those lands.[233] The question of what water rights the Pueblos possessed, their nature, origin, and extent, thus, has been very much up in the air.

In the late 1960's the New Mexico State Engineer initiated general stream adjudications of five stream systems in northern New Mexico to determine the water rights of seven northern Pueblos.[234] In the lead case, *New Mexico ex rel. Reynolds v. Aamodt*,[235] the district court decided in 1974 that Pueblo water rights were subject to state law. On an interlocutory appeal, the Tenth Circuit reversed, holding that Pueblo rights are governed by federal, not state law.[236] The court

230. *See* United States v. Maxwell Land Grant, 121 U.S. 325 (1887), *on rehearing*, 122 U.S. 365 (1887). Congress confirmed seventeen Pueblo grants (including that of the by then defunct Pueblo of Pecos) by the Act of December 22, 1858, ch. 5, 11 Stat. 374. Of those, only 10 had actual paper grants, nine of which were the so-called "Cruzate" grants issued in 1689. (Sandia Pueblo had a grant issued in 1748.) The other seven Pueblos testified to the Surveyor General of New Mexico that they had had grant documents from the Spanish authorities, but that they were now lost. The Surveyor General and Congress accepted that testimony, and confirmed the grants.

231. By the Act of February 27, 1851, ch. 14, § 7, 9 Stat. 587, Congress expressly applied the provisions of the Indian Non-intercourse Act (25 U.S.C. § 177 (1976); *see supra* note 58) to the lands of the Indians in the territories acquired from Mexico under the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). That this statute actually applied to Pueblo lands, however, was not definitely settled until 1926, by the Supreme Court decision in United States v. Candelaria, 271 U.S. 432 (1926). *See infra* note 252.

232. In Ainsa v. New Mexico and Arizona R.R. Co., 175 U.S. 76 (1899), the Supreme Court held that perfected Spanish and Mexican grants in Arizona and New Mexico are fully valid and effective regardless whether they are confirmed by Congress. To be sure, there have been numerous additions to Pueblo landholdings, by executive and congressional action, and *Winters* rights presumably do attach to these lands. New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985) (holding that lands set aside for Nambe Pueblo by Executive Order on September 4, 1902, have *Winters* rights). Because most such additions occurred in this century, however, they would carry priority dates junior to those of many non-Indian appropriators on the streams.

233. It was argued in the *Aamodt* litigation that the extension of the Nonintercourse Act to New Mexico, *see supra* note 231, and the confirmation of the Pueblo grants by Congress, *see supra* note 230, conferred *Winters*-type rights on the Pueblos. New Mexico v. Aamodt, 537 F.2d 1102, 1109 (10th Cir. 1976). The court did not, however, accept that proposition. Such rights, in any event, would have had little value unless they were given an ancient priority, because many of the streams on which the Pueblos are located were already fully appropriated by the time of the American annexation of New Mexico. *See* C. DUMARS, M. O'LEARY & A. UTTON, PUEBLO INDIAN WATER RIGHTS 42-54 (1984) (hereinafter, "DuMars").

234. New Mexico *ex rel.* Reynolds v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *on remand*, 618 F. Supp. 993 (D.N.M. 1985), (Rio Nambe-Tesuque-Pojoaque; Pueblos of Tesuque, Nambe, Pojoaque, and San Ildefonso) (hereinafter *Aamodt*); New Mexico *ex rel.* Reynolds v. Aragon, No. 7941C (D.N.M., filed March 5, 1969) (Rio Chama; Pueblo of San Juan, Jicarilla Apache); New Mexico *ex rel.* Reynolds v. Abeyta, Nos. 7896 and 7939C (D.N.M., filed Feb. 4, 1969) (Rio Pueblo de Taos, Rio Lucero, Rio Hondo; Pueblo of Taos); New Mexico *ex rel.* Reynolds v. Abbott, Nos. 8499 and 9750C, (D.N.M., filed Mar. 22, 1968) (Rio Santa Cruz, Rio de Truchas; Pueblos of San Ildefonso, San Juan, Santa Clara). All but *Aamodt* were held in abeyance until recently.

235. 537 F.2d 1102 (10th Cir. 1976), *on remand*, 618 F. Supp. 993 (D.N.M. 1985).

236. 537 F.2d at 1108-13. The court also reversed the district court's refusal to permit the Pueblos to intervene through their own counsel, rather than be represented by the United States Attorney. *Id.* at 1106-1107.

held that the Pueblos must, further, be accorded a priority earlier than that of any non-Indian who obtained rights under the Pueblo Lands Act.[237] As to the appropriate measure of Pueblo rights, beyond suggesting that that might be determined by examination of the law of Spain or Mexico, the court of appeals confessed, "We do not know."[238] It remanded the case for determination of the priority and quantity issues.

On remand, the district court appointed a Special Master,[239] who conducted lengthy trials on applicable Spanish and Mexican law, on the historical irrigation of the Pueblos, on the irrigable acreage within Pueblo lands, and on the effect on Pueblo water rights of the Pueblo Lands Act.[240] Thousands of pages of expert reports were submitted by the United States, the Pueblos, the State Engineer and the attorneys for the 1300 or so individual (non-Indian) defendants, and testimony in the various trials consumed months of trial time.[241] The Special Master issued several sets of Findings of Fact and Conclusions of Law on different issues. He found that Spanish and Mexican law accorded the Pueblos the first right to all the water they required for their present and future needs.[242] He also found that Congress, by legislation enacted in 1933, had guaranteed the Pueblos water rights for all the irrigable lands remaining in their ownership, with a paramount priority.[243] Such lands totalled 10,045 acres, he found, entitling the four Pueblos to prior water rights amounting to 30,135 acre-feet/year.[244] The state, of course, vigorously contested those findings.

B. The Aamodt *Court's View of Pueblo Water Rights*

Following its receipt of the Special Master's recommendations, and further briefing by the parties, the district court issued its decision on the measure of Pueblo rights on September 18, 1985.[245] It rejected most of the Special Master's Findings of Fact, but generally adopted his view of Spanish and Mexican law, with a few significant changes. The final result was a new theory of the measure of Pueblo water rights, one not proposed by any party to the case, and seemingly contrary not only to the Tenth Circuit's prior decision,[246] but also to the governing principles that the district court itself announced.

237. *Id.* at 1113. The court viewed that as the consequence of § 9 of the Act of May 31, 1933, ch. 45, 48 Stat. 108. *See infra* note 256.

238. *Id.*

239. *See* FED. R. CIV. P. 53.

240. Act of June 7, 1924, ch. 331. 43 Stat. 636. The Act was supplemented by the Act of May 3, 1933, ch. 45, 48 Stat. 108. *See infra* note 257.

241. The complex issues in the case, and the evidence submitted on each, are discussed in DUMARS, *supra* note 233, at 11-80.

242. Special Master [sic] Amended Findings of Fact on the Rights of the Pueblos Under Spanish and Mexican Law, filed August 20, 1984, at 4, 16-17.

243. Special Master [sic] Findings of Fact on the Pueblos [sic] Water Rights Measured by Irrigable Lands, filed Sept. 13, 1982, at 3.

244. *Id.* at 3, 16. (This was the amount to be delivered to Pueblo land. The consumptive use right was 23,907 acre-feet/year. *Id.* at 17.) He found further that the Pueblos were entitled to additional rights, totalling 1001.6 acre-feet/year, for livestock and domestic use and instream flows at Nambe Falls. *Id.*

245. 618 F. Supp. 993 (D.N.M. 1985).

246. 537 F.2d 1102.

The court held that as recognized and protected under Spanish and Mexican law, the water rights of the Pueblos "were defined as a prior and paramount right to a sufficient quantity to meet their present and future needs."[247] Thus, the court held, the four Pueblos "are entitled to a first right . . . to enough water 'for their needs,' or the irrigation of their lands."[248] Under Spanish law, non-Indians were entitled to water only after Pueblo needs were satisfied, and, the court said, this principle did not change under Mexican sovereignty.[249] By the terms of the Treaty of Guadalupe Hidalgo,[250] the court said, the United States agreed to respect the property rights of all citizens of the ceded territory, including (by implication) their rights to water.[251]

The court discussed the checkered treatment of the Pueblos under American sovereignty,[252] and cited reports of the Pueblo Lands Board[253] in which the Board stated that the Pueblos were entitled to "such water . . . as may be necessary for the lands now in cultivation or which may be necessary for the proper cultivation by them of such available lands as may be required for their support and sustenance."[254]

The court determined that the rights the Pueblos held to their lands were "aboriginal" water rights, meaning that they originated prior to European conquest of the territory, and were thus entitled to an "immemorial" priority.[255] It

247. Conclusion of Law No. 4, 618 F. Supp. at 998.

248. Conclusion of Law No. 18, 618 F. Supp. at 999. (The source of the words placed in quotes by the court is not given.)

249. *Id.* at 1000.

250. 9 Stat. 922 (1848). The treaty ended the Mexican war, and accomplished the cession to the United States of most of what is now the American Southwest, including New Mexico.

251. *Id.*, art. VIII, 9 Stat. 929; *see* 618 F. Supp. at 1001.

252. In United States v. Joseph, 94 U.S. 614 (1877), the Supreme Court held that the Pueblos, being "peaceable, industrious, intelligent, honest and virtuous," *id.* at 616, were not "Indian tribes" within the meaning of federal statutes protecting Indian land from trespass. Thirty-six years later, in United States v. Sandoval, 231 U.S. 28 (1913), the Court reconsidered, in the face of evidence that Congress had consistently continued to treat the Pueblos as it treated other Indians, and held that the Pueblos were subject to the proscriptions of federal laws regulating the introduction of liquor into Indian country. *Joseph* was expressly overruled by United States v. Candelaria, 271 U.S. 432 (1926), where the Court held that Pueblo land was subject to the same restrictions on alienation applicable to other Indian land.

253. The Board was created by the Pueblo Lands Act, Act of June 7, 1924, ch. 331, 43 Stat. 636, to review the claims of non-Indians to see whether they met the criteria of § 4 of that Act, under which those who qualified could obtain titles to the Pueblo lands on which they had settled. *See infra* note 257.

254. 618 F. Supp. at 1005 (quoting Pueblo Lands Board Report Under Section 6 for Tesuque Pueblo, Ex. JP-32, at 5). Similar statements were made in the reports on the other three Pueblos involved in *Aamodt*. *Id.*

255. *Id.* at 1005-09. The court's discussion focuses on judicial treatment of aboriginal *land* rights, not water rights. The existence of true aboriginal water rights for irrigation has been endorsed by the commentators, *see, e.g.*, COHEN, *supra* note 3, at 590-91; DUMARS, *supra* note 233, at 11-25, but has remained somewhat theoretical. *But see*, Soboba Band of Mission Indians v. United States, 37 Ind. Cl. Comm. 326, 348-52 (1976) (holding that the Band retained unextinguished aboriginal water rights for a portion of its reservation); United States v. Adair, 723 F. 2d 1394, 1412-15 (9th Cir. 1983), *cert. denied sub nom.* Oregon v. United States, 467 U.S. 1252 (1984) (holding that tribal water right for irrigation had priority as of date of reservation but rights for hunting, fishing and gathering purposes were aboriginal, and had immemorial priority). The district court's conclusion that Pueblo water rights are true aboriginal rights, however, plainly has the weight of historical

further held that Congress, in Section 9 of the Act of May 31, 1933,[256] confirmed and recognized the priority of the Pueblos' rights.[257]

evidence behind it. There is no question but that all of the Pueblos engaged in irrigated agriculture for hundreds of years prior to the coming of the Spaniards. *Aamodt*, 618 F. Supp. at 996; DUMARS, *supra* note 233, at 7. The characterization of the rights as "aboriginal," however, does no more than establish for them paramount priority. There is no suggestion, in the district court opinion or elsewhere, that the nature or measure of an aboriginal right is different from that of a reserved right.

In its Memorandum Opinion and Order of February 26, 1987, ruling on various issues related to Pueblo lands, the district court further ruled that water rights appurtenant to lands confirmed to a Pueblo by Executive Order or by Act of Congress might also be entitled to aboriginal priority, if those lands were within the Pueblo's aboriginal use area, and its aboriginal rights thereto had not previously been extinguished. *Id.*, slip op. at 7-8. The court reviewed the Pueblos' history under American rule, and could find no act by which the United States had extinguished Pueblo aboriginal titles, although it noted that the question whether such lands were subject to Pueblo aboriginal title was a question of fact, yet to be determined.

256. Ch. 45, 48 Stat. 108 (1933). The Act was prompted by complaints that the compensation awards by the Pueblo Lands Board for the lands the Pueblos lost under the Pueblo Lands Act, *see infra* note 257, were below appraised fair market value. Section 9 of the Act reads:

> Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water, and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by non-use or abandonment thereof as long as title to said lands shall remain in the Indians. 48 Stat. at 111.

257. 618 F. Supp. at 1009. This issue was one of the most hotly contested points in the case, and the court's resolution of it in favor of the Pueblos would have made the decision a sweeping Pueblo victory were it not for the court's highly restrictive ruling on the quantity of the Pueblo right. *See infra* text accompanying note 259. Briefly stated, the problem arises out of the effort by Congress to limit what the Pueblos lost under the Pueblo Lands Act, without rendering the land obtained by the non-Indians worthless. The 1924 Act came about because, following the American accession to sovereignty over New Mexico, the Pueblos were subjected to major encroachments on their lands by non-Indians, which the United States was helpless to prevent after the *Joseph* decision. *See supra* note 252. After *Joseph* was thoroughly discredited by the 1912 *Sandoval* case, *see supra* note 252, the United States began to sue to eject the 12,000 or so non-Indians who had by then settled on Pueblo land. Congress devised the Pueblo Lands Act as a means of providing good titles to those settlers who had been in possession for so long that removing them seemed inequitable. The Pueblos were to receive fair market value for the land they lost.

Nothing in the Pueblo Lands Act specified what water rights would be appurtenant to the lands patented to non-Indians. The Pueblo Lands Board (the body created by the Act to investigate and make initial determinations on the non-Indian claims, and to determine the compensation due to the Pueblos) early on decided to award the Pueblos considerably less than fair market value for the lands they lost, possibly on a theory (as the Board claimed long afterward to Congress) that the non-Indians would not have water rights equivalent to those pertaining to the Pueblos' retained lands. Pueblo complaints over the low compensation awards brought the matter back to Congress in 1932. Congress understood that if the Pueblos kept a paramount priority for the water rights appurtenant to the lands they retained, the inadequacy of the available water supply probably would result in the non-Indians having no water rights of any value. In mid-Depression New Mexico, moreover, loss of one's water rights was a virtual eviction notice. But if the non-Indians were held to have received water rights bearing an early priority (i.e., one equivalent to that of the Pueblo lands), there might be inadequate water for the Pueblos to irrigate other lands to replace those they lost. This dilemma was especially acute for the four Pueblos involved in the *Aamodt* case, situated as they are on small water-poor tributaries of the Rio Grande, but with large numbers of non-Indian settlers in their midst, occupying much of the best farmland. The record of Congress' often fiery deliberations on this problem, as explained in DUMARS, *supra* note 233, at 61-80, does not reveal any clear resolution. Congress enacted the 1933 Act, *supra* note 256, giving the Pueblos greater compensation (thus arguably acknowledging the loss of valuable water rights), but containing the language of § 9, *supra* note 256 (thus ensuring that the Pueblos had a paramount priority for the water they needed to irrigate the lands they retained).

The court further held that non-Indians who acquired land under the Pueblo Lands Act did not acquire the Pueblo priority for water rights with that land. Rather, the non-Indians obtained state law (appropriative) rights with a priority as of the earliest non-Indian diversion for beneficial use.[258]

Up to this point, the court's opinion is generally consistent with the Pueblos' and the United States' arguments as to the nature and priority of the Pueblo rights. But in one of the final passages of the opinion, without further explanation or elaboration, the court stated,

> [t]he Pueblos have the prior right to use all of the water of the stream system necessary for their domestic uses and that necessary to irrigate their lands, saving and excepting the land ownership and appurtenant water rights terminated by the operation of the 1924 Pueblo Lands Act, *supra. The acreage to which this priority applies is all acreage irrigated by the Pueblos between 1846 and 1924.* Acreage under irrigation in 1846 was protected by federal law including the Treaty of Guadalupe Hidalgo, *supra*, and the 1851 Trade and Intercourse Act, *supra*. The Pueblo aboriginal water right, as modified by Spanish and Mexican law, included the right to irrigate new land in response to need. Acreage brought under irrigation between 1846 and 1924 was thus also protected by federal law. The 1924 Act, which gave non-Pueblos within the Pueblo four-square-leagues their first legal water rights, *also fixed the measure of Pueblo water rights to acreage irrigated as of that date.*[259]

For the Pueblos, this holding snatched defeat from the jaws of victory. To say that the Pueblos' rights are limited to that needed for the irrigation of lands *actually irrigated* during *any* period, imposes restrictions otherwise unknown in Indian water law. The court's position is more restrictive even than the position the State of New Mexico had argued for in the *Aamodt* litigation.[260] As it happened, the period 1846-1924 was the period during which the vitality of Pueblo irrigation, especially for the four tribes in the *Aamodt* case, reached its lowest ebb. The lax attitude of the Mexican regime toward Indian land rights from 1821

258. 618 F. Supp. at 1010. This ruling follows the guidance of the earlier Tenth Circuit decision. 537 F.2d at 1112. In Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981), the Ninth Circuit held that a non-Indian successor in interest to an Indian allotment acquired the allottee's ratable share of the reserved tribal water right, with the same priority date as the (unallotted) tribal lands, i.e., the date the reservation was created. The non-Indian did not, however, succeed to the Indian allottee's protection against non-use of the reserved right: if the non-Indian failed to put the full right to use, with "reasonable diligence", 647 F.2d at 51, the unused portion was lost. The different treatment accorded non-Indians in *Aamodt* is presumably a consequence of the fact that their occupancy began, not as the result of lawful consensual transactions, as in *Walton*, but unlawfully, and was legitimized only by the grace of Congress. *See Aamodt*, 537 F.2d at 1112. As explained *infra* at note 273, however, the *Aamodt* court's decision to penalize the non-Indians in this respect may be the factor that led it to impose an even more severe restriction on the measure of Pueblo rights.

259. 618 F. Supp. at 1010 (emphasis added).

260. Earlier in the case, the state's position was that the Pueblos' rights were governed by the law of prior appropriation, but without any forfeiture for non-use. *See* Brief for the Appellees at 1, 48, *Aamodt*, 537 F.2d 1102 (No. 75-1106). Under that theory, the Pueblos were entitled to sufficient water to irrigate all the lands they could prove they had *ever* irrigated, at any time in the past. The Special Master had found that such lands totalled 8,428 acres, of which 3,821 acres remained in Pueblo hands after the Pueblo Lands Act proceedings. Special Master Findings of Fact on The Pueblos' Historically Irrigated Acreage, filed September 13, 1982, at 4.

to 1846, and the apparent impotence of American authorities to help the Pueblos protect their lands after 1846, subjected several Pueblos in this period to significant encroachments on their lands and to diversions of their water that had near-catastrophic results.[261] The expected effect of this aspect of the *Aamodt* court's holding was realized in a subsequent opinion issued in the case on April 28, 1987[262] (modified by order of September 9, 1987). The court found that, under the theory it had adopted, the four Pueblos were entitled to water rights sufficient to irrigate a total of only 1094.027 acres,[263] one-tenth of what the Special Master had recommended.

From the Tenth Circuit's 1976 decision in the case until the judge's 1985 ruling, no party to this intensively litigated lawsuit ever proposed a measure of Pueblo rights delimited in the manner that the court adopted. This fact, by itself, should raise questions about the court's ruling. On its merits, moreover, the ruling creates numerous unresolved issues. For example, the rights the Pueblos enjoyed under Spain and Mexico, as found by the court, were rights to "a sufficient quantity to meet their present and future needs."[264] They were not fixed rights; they "could be changed as needs changed."[265] Specifically, the court found, "excess water should be granted to the Pueblos for their future expansion, based on need."[266] The Tenth Circuit has previously held that the Treaty of Guadalupe Hidalgo obliged the United States to protect property rights existing in the territory at the time of the treaty, and that Congress' confirmation of the Pueblos' titles to their lands[267] validated the Pueblos' existing rights.[268] The district

261. 618 F. Supp. at 1002; *See* Special Master Findings of Fact on the Pueblos' Historically Irrigated Acreage, filed September 13, 1982, at 6-7.

262. *Aamodt*, No. 6639-M (D.N.M. April 29, 1987) (findings and conclusions regarding Pueblos' historically irrigated acreage).

263. *Aamodt*, No. 6639 M at 12, 25, *modified* by Order entered on September 9, 1987. As noted above, the Special Master had found the Pueblos entitled to water rights sufficient to irrigate 10,045 acres, and even under the state's historical irrigation approach, found that the Pueblos' rights extended to 3,821 acres. *See supra* notes 243 and 244 and accompanying text & note 260. Because no party had put on evidence of actual irrigation between 1848 and 1924, the factual record the court drew upon to come up with acreage figures to fit its peculiar measure of the Pueblo right was ambiguous and confusing. *Compare* Requested Findings of Fact and Conclusions of Law of the United States and the Pueblos on the Quantity of Pueblo Water Rights Under the Court's September 18, 1985 Opinion, filed December 19, 1986, at 20 (presently owned grant lands to which court's theory applies total 3,792 acres) *with* New Mexico's Requested Findings of Fact on the Quantity of the Pueblos' Water Rights, filed February 27, 1987, at 9, 13, 14 (acreage Pueblos may have irrigated during relevant period, depending on source, could be 1,094.02, 1,687.35, or 1,247.93). The court seems to have adopted the lowest figure proposed by any party.

To be sure, the 1,094.027 acres is not the full measure of the water rights to be awarded the Pueblos in *Aamodt*. The court has not determined the additional rights to be awarded with respect to 597.40 acres of so-called "acquired" lands, *see* Memorandum Opinion and Order [Pueblo Lands] entered Feb. 26, 1987, at 2, or with respect to lands reserved for Nambe and San Ildefonso Pueblos by executive orders and Acts of Congress, *see id.* at 3.It appears that at least a substantial portion of the "acquired" lands will also have an aboriginal priority, *id.* at 5, but will be subject to the same quantity restriction imposed on other Pueblo grant land, i.e., actual irrigation between 1848 and 1924. *Id.*

264. Conclusion of Law No. 4, 618 F. Supp. at 998.

265. *Id.*

266. Conclusion of Law No. 18, *Id.* at 999.

267. Act of December 22, 1858, ch. 5, 11 Stat. 374; *see supra* note 230.

268. 537 F.2d at 1111.

court reiterated these points.[269] But if, under the treaty and by subsequent confirmation of their titles, the Pueblo's pre-existing water rights were validated and protected, it is difficult to see how such rights could be limited to actual use after 1848, without the entitlement to expanded quantities based on future need, an explicit aspect of the right as of 1848.[270]

Second, there is nothing whatever in the Pueblo Lands Act that expresses any intent on Congress' part to determine Pueblo water rights as of the date of enactment. A lively debate over the possible effect on Pueblo water rights of a determination that valuable water rights went with the lands lost to non-Indians under the 1924 Act preceded the passage of the 1933 Act.[271] This, alone, should utterly refute the proposition that the measure of Pueblo rights had been settled nine years earlier by the 1924 Act. Congress' consideration of the 1924 Act, moreover, was accompanied by unusually vigorous public debate, involving several Indian advocacy groups that had arisen to take up the cause of Pueblo land rights.[272] Every aspect of the bill that might increase the loss of Pueblo lands to the non-Indian settlers was intensely scrutinized; it is simply unthinkable that Congress nevertheless enacted by implication an unannounced and unprecedented lid on Pueblo water rights.

The district court's theory that the Pueblo Lands Act determined Pueblo water rights probably arises as a negative inference from the conclusion that the non-Indians who received titles to Pueblo lands under the Act also obtained valuable water rights; i.e., if Pueblo rights were not fixed as of that date, there would be no way to assure that the non-Indians, who held priorities junior to that of all the Pueblo lands, would ever be entitled to water from these perennially water-short streams.[273] If that were the district court's reasoning, however, one might

269. 618 F. Supp. at 1001.

270. Moreover, the non-Indian encroachments on Pueblo lands during the American period prevented the Pueblos from irrigating even to the extent of their needs, another strong reason why determining their rights by actual irrigation during that period appears to lead to an inequitable result.

271. *See* DUMARS, *supra* note 233, at 72-80.

272. *See* L. KELLY, THE ASSAULT ON ASSIMILATION, JOHN COLLIER AND THE ORIGINS OF INDIAN POLICY REFORM 213-94 (1983).

273. The value of a water right is determined by the two factors that have been discussed above—priority and quantity. By according the Pueblos an immemorial priority, and giving each non-Indian a priority only as of the date of the earliest non-Indian appropriation to beneficial use on his land, the court was left with restrictions on the *quantity* of the Pueblo right as its only means of assuring that the non-Indians on private claims acquired under the Pueblo Lands Act would have valuable water rights. *See supra* note 257. It seems at least theoretically plausible that, if guaranteeing the efficacy of the water rights appurtenant to the non-Indian private claims were deemed essential, a result fairer to the Pueblos might be reached by allowing the private claims within the Pueblos to tack onto the Pueblo's immemorial priority (for actually developed rights), and measuring the Pueblo right by the "practicably irrigable acreage" standard recommended by the Special Master. The Pueblos and the non-Indians on private claims within the Pueblo grants would thus have first claim on the available water, and would share it ratably. Persons outside the Pueblo grants would share whatever was left, in accordance with ordinary state law priorities. Such an approach would be consistent with the Ninth Circuit's decision in *Walton*, *see supra* note 258, and likewise would have historical support, in that virtually all the Pueblo lands settled by non-Indians and acquired by them under the Pueblo Lands Act were lands that had long been under Pueblo ditches. It would also simplify management of the ditches, on which Indians and non-Indians are interspersed.

To be sure, it is not at all certain that Congress, in the 1933 Act, *see supra* note 256, mandated such consideration for the water rights of the non-Indians who acquired titles under the Pueblo Lands

wish it had been explained. The water rights issue did not even come plainly to the fore until Congress' consideration of the 1933 Act. Moreover, the legislative history and the language of the Act leave some uncertainty as to how Congress intended the issue to be resolved—if at all.[274] Apart from its apparent decision that Congress, in 1933, determined Pueblo water rights retroactively (or did so silently in 1924), the district court gives no clue as to how or why it resolved the question of Congress' intent as it did. Oddly, but for its immemorial priority, the water right the court found in the Pueblos looks very much like a state law (appropriative) right, measured as it is by actual use, only during the American period. That, too, seems at odds with what the Tenth Circuit had in mind in its 1976 decision.

In modern water rights litigation, Indians who, prior to being herded by the government onto their reservations, never put a seed into the ground, have been adjudicated relatively enormous *Winters* rights regardless whether they are ever developed.[275] It thus seems rather ironic that the Pueblos, whose entire cultural history has been intimately linked to irrigated agriculture, are accorded highly truncated water rights, restricted without regard to their future needs, dependent on actual use and allegedly determined at a time when the Pueblos were unable to irrigate freely.

The Pueblos tried to take an interlocutory appeal from the 1985 decision pursuant to 28 U.S.C. § 1292(b), but the court of appeals did not act on the petition. A second petition for interlocutory review was filed by the Pueblos in November, 1987. Finally on December 1, 1987, the court of appeals denied both petitions. Numerous issues remain to be resolved in the case,[276] and a final decree appealable as of right still seems years away. The Tenth Circuit will eventually have occasion to consider the district court's unusual view of Pueblo water rights, however. It will be interesting to see what it thinks.

IV. JURISDICTION CASES: THE SEARCH FOR "INDIAN COUNTRY," AND OTHER FUZZY CONCEPTS

Questions of jurisdiction have become the most vexing and persistent of all of the knotty problems of Indian law. Whether it be the reach of state authority

Act, or that the Tenth Circuit's 1976 opinion permits any such major infringement of Pueblo rights on the non-Indians' behalf. On its face, indeed, § 9 of the 1933 Act (set forth *supra* note 256) appears to mandate that the Pueblos have prior rights for *all* the irrigable lands remaining in their ownership, whether or not they had previously been irrigated.

274. DUMARS, *supra*, note 233, at 72-80; *see supra* note 257.

275. *See, e.g., In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, State of Wyoming, 750 P.2d 681 (Wyo. 1988) (holding Shoshone and Arapahoe Tribes of the Wind River Reservation entitled to reserved rights totalling approximately 477,000 acre-feet/year).

276. On February 26, 1987, the court issued an opinion rejecting the assertion of immemorial priorities for non-Indians, holding that non-Indian rights would relate back to the earliest acts constituting appropriation to beneficial use on their lands, and ordering that non-Indian priorities would be determined on a tract-by-tract basis, rather than ditch-by-ditch. *Aamodt*, No. 6639 (D.N.M. Feb. 26, 1987) (opinion on priorities for non-Indian rights). On May 1, 1987, the court set a schedule for the parties' submissions on priorities and quantities for the Pueblos' so-called "acquired" and reservation lands. *Aamodt*, No. 6639-M (D.N.M. May 1, 1987) (opinion and order on further proceedings concerning acquired and reservation lands). On January 11, 1988, the parties filed a "Stipulation Regarding Issues," in which they set forth their various views as to the matters remaining to be dealt with by the court. The text of the Stipulation filled 20 pages.

over Indians,[277] the extent of tribal power over non-Indians,[278] the power of states over non-Indians,[279] the jurisdiction of tribal,[280] state,[281] or federal[282] courts, or simply the definition of the fundamental concept, "Indian country,"[283] the jurisdictional issues, and the "rules" fashioned to resolve them, imbue Indian law with all of the clarity and logic of the Tax Reform Act of 1986.[284] At least to some extent, the ever-increasing complexity of this field must be attributed to the Supreme Court's studied refusal to lay down clear rules,[285] and its willingness to modify, sometimes in seemingly arbitrary ways, those few rules that have been established.[286]

277. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373 (1976) (25 U.S.C. § 1323 (1982) [commonly known as "Public Law 280"] did not, as had long been thought, allow certain states to assume full regulatory jurisdiction over Indians in Indian country, but only provided for assumption of state court jurisdiction of crimes and civil causes of action arising in Indian country).

278. *Compare* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (tribes have full power to tax severance of tribal minerals by non-Indians in Indian country) *with* Montana v. United States, 450 U.S. 544, 566 (1981) (tribes' power to regulate non-Indians on fee land within Indian country limited to activities directly affecting "the political integrity, the economic security, or the health and welfare of the tribe").

279. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (state hunting and fishing regulations pre-empted, even as applied to non-Indians, by comprehensive tribal regulatory scheme); Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982) (state gross receipts tax inapplicable to non-Indian contractor's receipts from construction of Indian school, due to pervasive federal interest in Indian education).

280. *See* Williams v. Lee, 358 U.S. 217 (1959) (tribal courts have exclusive jurisdiction over suits by non-Indians against Indians in causes of action arising in Indian country, despite otherwise transitory nature of claim).

281. Three Affiliated Tribes v. Wold Eng'g Co., 467 U.S. 138 (1984), *after remand*, 106 S. Ct. 2305 (1986) (state may not preclude tribe from having access to state court for claim against non-Indian company arising from on-reservation construction project).

282. Iowa Mut. Ins. Co. v. La Plante, 107 S. Ct. 971 (1987) (federal district court may not exercise diversity jurisdiction over suit by out-of-state insurance company against Blackfeet Indian for declaration of non-liability for injuries suffered by defendant in accident on Blackfeet Reservation, until Blackfeet Tribal Court has had opportunity to determine its own jurisdiction of the case).

283. "Indian country" is a fundamental term of art in Indian law that describes the geographical area within which the special jurisdictional rules apply. *See* COHEN, *supra* note 3, at 27-46.

284. Pub. L. 99-514, 100 Stat. 2085.

285. In Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982), for example, the court held that New Mexico gross receipts tax was inapplicable to the receipts of a non-Indian contractor for the construction of the Ramah School on Indian trust land. The ruling was based on a rather involved and somewhat mysterious preemption analysis that led the court to conclude that the government's "comprehensive and pervasive" control over the construction and financing of Indian schools left "no room for the additional burden" of the state's gross receipts taxes. *Id.* at 839-43. *Cf.* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (comprehensive federal control of timber sales on Indian land precluded application of state motor carrier and use fuel taxes to non-Indian logging company doing business on the reservation). The United States had urged the Court, in *Ramah*, to adopt a clear rule that state law is inapplicable to any Indian country activity involving a tribal interest, but the Court declined the invitation, preferring an approach allowing "more flexible consideration of the federal, state and tribal interests at issue," i.e., endless litigation. 458 U.S. at 846.

286. In Williams v. Lee, 358 U.S. 217 (1959), the Court noted that in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), Justice Marshall had declared that within the Cherokee reservation "the laws of Georgia can have no force," but that that clear rule had been modified over the years. *Williams* announced the principle that, at least where the issue is the existence of state court jurisdiction over cases involving Indians, "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. To be sure, until *Williams*, that had *never* been the question in such cases. Thereafter, however, state courts seized on that phrase, and used it to *justify* state jurisdiction unless there was

Several recent New Mexico state court decisions that grapple with Indian law jurisdictional problems give some idea of those complexities, although, with one notable exception, the New Mexico courts seem to have made sincere efforts to follow Supreme Court precedent. Four cases concerning state versus tribal court jurisdiction are examined, after which we look at some important decisions dealing with the "Indian country" concept.

A. Lonewolf v. Lonewolf

Lonewolf v. Lonewolf,[287] was an action for dissolution of the marriage of a non-Indian woman to a member of Santa Clara Pueblo, who happened to be a successful potter. Mrs. Lonewolf had originally filed a petition for a legal separation. Her husband answered, raising questions as to the state court's jurisdiction, but also counterclaimed for divorce.[288] The parties had interests in real property, as well as improvements on the property, within the Santa Clara Reservation, and personal property on and off the reservation.[289] The court entered a decree dissolving the marriage, held it had no jurisdiction over the real property interests, but assumed complete jurisdiction over, and divided, the community personal property, including pottery worth $56,618 that was apparently situated on the reservation.[290] Mr. Lonewolf appealed, challenging the court's jurisdiction to divide the on-reservation personal property.[291]

The Supreme Court agreed that the district court lacked jurisdiction over the real property, but held that Mrs. Lonewolf's interest in the personal property traveled with her. Having properly acquired jurisdiction over Mrs. Lonewolf and her claim, the district court likewise had the power to divide the property.[292]

What unfortunately is missing from the *Lonewolf* opinion is any indication of the residence of the parties, either during the marriage or after the separation. It appears that Mrs. Lonewolf was living off the Reservation when she filed; her husband may have lived at Santa Clara. If so, the court's rulings on jurisdiction

some obvious tribal governmental interest at stake. *See, e.g.*, Chischilly v. GMAC, 96 N.M. 113, 628 P.2d 623 (1981) (refusing to apply Navajo law governing repossession to repossession on Navajo allotment outside reservation; *see* Hughes, *supra* note 2, at 410-41); State *ex rel.* Department of Human Serv. v. Jojola, 99 N.M. 500, 660 P.2d 590, *appeal dismissed, cert. denied*, 464 U.S. 803 (1983) (holding that state court has jurisdiction over paternity action involving on-reservation Indians; *see infra* text accompanying notes 297-310. Those courts have overlooked the fact that in announcing that principle in *Williams*, the Supreme Court was holding that there was no state court jurisdiction over a suit against a Navajo Indian for a grocery debt incurred at an on-reservation trading post. 358 U.S. at 223. In context, the Court plainly was trying to protect the jurisdiction of tribal courts over any claims arising in Indian country that involve Indians. But the fuzzy principle it articulated does anything but make that interest clear.

287. 99 N.M. 300, 657 P.2d 627 (1982).

288. *Id.* at 301, 657 P.2d at 628.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* The court also held that Mr. Lonewolf, having counterclaimed for divorce and having signed a stipulation dealing with other property, had waived his jurisdictional objection as to the pottery. *Id.* at 302, 657 P.2d at 629. Besides being unnecessary to the holding, this point seems wrong. The objection went to the court's *subject matter* jurisdiction over the pottery, a defense that cannot be waived. Chavez v. County of Valencia, 86 N.M. 205, 521 P.2d 1154 (1974).

seem correct. (If both resided on the reservation, the state court could have had no jurisdiction over the matter.)[293] If, however, as seems possible, the couple had lived at Santa Clara during happier times, before Mrs. Lonewolf moved away, the question arises as to what her interest would be in the pottery *under Santa Clara Pueblo* law, since that would probably have been the relevant jurisdiction when they acquired the pottery.[294] If, hypothetically, the Pueblo's law (customary or otherwise) gave a potter's spouse no interest in the potter's art, and that law could be proven, the state court should be obliged to apply it in determining the spouse's interest.[295] To be sure, since Santa Clara, like other Pueblos, does not recognize divorce, and has no separate court system[296] it is unclear whether the court could have answered these questions had the parties raised them.

B. State ex rel. Department of Human Servs. v. Jojola

State ex rel. Department of Human Servs. v. Jojola,[297] is not so defensible. An Isleta Pueblo woman, residing at the Pueblo, gave birth out of wedlock, and soon thereafter applied for state public assistance.[298] She identified Jojola, also a member and resident of the Pueblo, as the natural father, and assigned her right to support from him to the State Department of Human Services (DHS) as a condition of receiving assistance.[299] DHS sued Jojola in state court to establish paternity of the child, and for child support.[300] On Jojola's motion, the district court dismissed the suit for lack of jurisdiction. On appeal, the New Mexico Supreme Court reversed. The opinion runs roughshod over the few clear principles that do exist in the Indian law jurisdiction field, and ultimately rests on the slender rationale that it "would be a burden on the aims of the public assistance program" if DHS had to file such suits in tribal courts.[301]

The opinion begins with the proposition that paternity is a transitory action that may be brought wherever the putative father can be found. While true in general, this point overlooks the holding in *Williams v. Lee,*[302] the leading case on questions of state court versus tribal court jurisdiction over matters involving Indians and upon which the *Jojola* court claimed to rely. *Williams* expressly held that a suit for a *grocery debt*—plainly an otherwise transitory action—was exclusively within the jurisdiction of the tribal court, where the debt was incurred

293. Williams v. Lee, 358 U.S. 217 (1958); Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977).

294. *See, e.g.*, Brenholdt v. Brenholdt, 94 N.M. 489, 612 P.2d 1300 (1980) (spousal interest in property determined according to the law of the jurisdiction where it was acquired and situated).

295. Tribal power over the domestic relations of its members on the reservation has consistently been regarded as extensive and exclusive. *See, e.g.*, Fisher v. District Court, 424 U.S. 382 (1976); United States v. Quiver, 241 U.S. 602 (1916). And New Mexico courts are obliged to give full faith and credit to tribal laws and other "public acts". Jim v. CIT Financial Servs. Corp., 87 N.M. 362, 533 P.2d 751 (1975).

296. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 n.22 (1978).

297. 99 N.M. 500, 660 P.2d 590, *appeal dismissed, cert. denied,* 464 U.S. 803 (1983).

298. *Id.* at 501, 660 P.2d at 591.

299. Such assignments are permitted by 42 U.S.C. § 602(a)(26) (1982).

300. 99 N.M. at 501, 660 P.2d at 591.

301. *Id.* at 503, 660 P.2d at 593.

302. 358 U.S. 217 (1958). *See supra* note 286.

by an Indian at an on-reservation store.[303] Under the *Williams* analysis, thus, whether the action is otherwise transitory has no bearing on the issue of tribal court jurisdiction.

The court noted, but ignored, Jojola's plainly correct and properly dispositive assertion that the Pueblo "has *exclusive* jurisdiction to regulate the domestic relations of its members."[304] It then purported to analyze the principles set forth in *Williams*, but discarded them one by one until it came to a passage from an earlier New Mexico case[305] that suggested, as one factor to be considered in applying *Williams*, "the nature of the interest to be protected."[306] The only interest the *Jojola* court could ascertain was that of DHS in administering the state's public assistance program, and it plainly viewed that interest as decisive.

Under a proper analysis of *Williams*, and the cases that establish the exclusivity of tribal jurisdiction in matters affecting the domestic relations of tribal members, this decision is unquestionably wrong. The defendant was a Pueblo member and the cause of action for paternity and support arose on the Pueblo.[307] Those facts alone suffice to bring the case within the exclusive tribal court jurisdiction rule of *Williams*. The facts that the claim involved the domestic relations of members, and affected issues of heirship and, possibly, tribal membership, make the jurisdictional argument overwhelming on legal and policy grounds.[308]

The inconvenience of DHS having to sue in tribal courts, moreover, turned out to be considerably less than the New Mexico court believed. While Jojola's appeal from the state supreme court decision was pending in the United States Supreme Court, DHS simultaneously dismissed its state court case, filed the paternity and support action in Isleta Pueblo Tribal Court, and issued a new regulation specifying that such actions had to be filed in tribal courts in the future, under appropriate circumstances.[309] DHS submitted the state court dismissal, the tribal court petition, and the new regulation to the Supreme Court with its motion to dismiss Jojola's appeal, which the Court granted.[310] Although not reversed, *Jojola* should not be regarded as sound.

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303. 358 U.S. at 223.

304. 99 N.M. at 502, 660 P.2d at 592 (emphasis by the court). *See supra* note 295.

305. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977). In that case, the court held that there was *no* state court jurisdiction over a suit for forcible entry and detainer between two members of the Mescalero Apache Tribe, involving property on the Apache Reservation.

306. 99 N.M. at 503, 660 P.2d at 593.

307. The court asserted that "the cause of action arose outside the reservation when [the mother] filed and obtained public assistance and assigned her support rights to DHS." *Id.* But the suit against Jojola was to establish him as the father of the child and his duty of support. The mother's application for assistance was irrelevant to those claims, except that as part of the transaction she assigned her claims to DHS. The assignment did not create any new claims; it merely transferred the mother's existing claims to DHS.

308. *Jojola* has been criticized previously in Note, *The Subject Matter Jurisdiction of New Mexico District Courts Over Civil Cases Involving Indians*, 15 N.M. L. REV. 75, 88-95 (1985). The author of that note proposes an interesting if somewhat mechanistic approach to questions of court jurisdiction in Indian country, that seeks to rationalize the New Mexico cases. Notably, the author appears to proceed on the premise that each state is free to adopt its own jurisdictional doctrine in this area. That, plainly, is incorrect. These are questions of federal common law; any deviations from the "rules" established by the Supreme Court are in error. *See, e.g.*, Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 846 (1982).

309. *See* Note, *Subject Matter Jurisdiction*, *supra* note 308, at 93 n.125 and accompanying text.

310. 464 U.S. 803 (1983).

C. In re Adoption of Baby Child, Pino v. Natural Mother

In 1978, Congress enacted the Indian Child Welfare Act,[311] an elaborate statute designed to protect the interests of Indian tribes in their member children whose custody or adoption might otherwise be determined by state courts. The Act establishes a firm rule of exclusive tribal court jurisdiction over custody determinations involving Indian children domiciled or residing on the reservation,[312] and a preference for tribal court jurisdiction over such actions involving non-resident, non-domiciliary Indian children.[313] In what may be the first reported New Mexico decision coming within the terms of that Act,[314] *In re Adoption of Baby Child, Pino v. Natural Mother*,[315] the court of appeals threw out a state court adoption decree involving a child born of two Laguna Pueblo members, both residing on the reservation.[316] The court of appeals held, as prescribed by the Act, that Congress had mandated exclusive tribal court jurisdiction for such an adoption.[317] The case had a gnarled procedural history,[318] but the essential facts left no room for argument that under the Indian Child Welfare Act the state court was powerless to decree the child's adoption.

D. Foundation Reserve Ins. Co. v. Garcia

The fourth recent case on state versus tribal court jurisdiction, *Foundation Reserve Ins. Co. v. Garcia*,[319] raises issues that are anything but clear, and that are complicated even more by a nearly simultaneous United States Supreme Court case arising out of a similar fact situation.[320] Foundation Reserve had insured a car belonging to the Garcias, both Indians residing at San Juan Pueblo.[321] The Garcias purchased the policy in Espanola, New Mexico, outside of the San

311. 25 U.S.C. §§ 1901-63 (1982).

312. *Id.* § 1911(a).

313. *Id.* § 1911(b).

314. In *Jojola*, the state supreme court knocked down its own straw man in concluding that, because the Act by its terms did not cover mere paternity and support actions, it did not compel a decision in favor of tribal court jurisdiction in that case. 99 N.M. at 502, 660 P.2d at 592.

315. 102 N.M. 735, 700 P.2d 198 (Ct. App. 1985).

316. *Id.* at 736, 700 P.2d at 199.

317. *Id.* at 737, 700 P.2d at 200.

318. The Pueblo and the natural father had intervened in the district court adoption proceedings, and when the court refused to dismiss the petition, they sought a writ of prohibition in the state supreme court. That court denied the writ. The Pueblo and the father sought review of the denial of the writ in the United States Supreme Court, which set the case for hearing on the merits. Pino v. District Court of the Second Judicial Dist., 471 U.S. 1014 (1985). In the meantime, the district court entered the adoption decree at a hearing at which neither the Pueblo nor the father was represented. They subsequently sought relief under N.M. R. Civ. P. 60(b) (now 1-060(B)), which was denied. They then appealed to the court of appeals, which rendered a decision in their favor, discussed in the text. Following the court of appeals decision, the appeal to the United States Supreme Court was dismissed by the Court. 472 U.S. 1001 (1985).

In the court of appeals, the adoptive parents argued principally that the New Mexico Supreme Court's denial of the writ of prohibition established the law of the case on the jurisdictional issue. The court disagreed, and noted that regardless, objections to subject matter jurisdiction may be raised at any time. 102 N.M. at 737, 700 P.2d at 200.

319. 105 N.M. 514, 734 P.2d 754 (1987).

320. Iowa Mut. Ins. Co. v. La Plante, 107 S. Ct. 971 (1987).

321. 105 N.M. at 514, 734 P.2d at 754. Mr. Garcia is a member of San Juan Pueblo. His wife is Cherokee. *Id.*

Juan Pueblo Reservation. The policy excluded any coverage for losses sustained while the vehicle was operated by Mr. Garcia. On March 30, 1985, the Garcias had an accident while in the car, within San Juan Pueblo boundaries.[322]

Foundation filed suit in state court in San Miguel County, seeking a declaration of non-liability under its policy.[323] The Garcias challenged jurisdiction, arguing that since they were Indians, and the accident occurred within the Pueblo's boundaries, the case was one subject to exclusive tribal court jurisdiction.[324] The district court disagreed. It further found that Mr. Garcia had been driving and ruled for Foundation on the merits.[325] The supreme court, through Justice Sosa, affirmed.

The court rejected the Garcias' contention that the cause of action arose from the accident within Indian country, distinguishing *Hartley v. Baca*.[326] Rather, the court said, this case arose from the making of the insurance contract, outside of Indian country.[327] It involved no issue of liability as among the parties to the accident, but rather only Foundation's potential liability on its contract with the Garcias.[328] The court agreed that the tribal court of San Juan Pueblo would have jurisdiction of the case, were it filed there, but held such jurisdiction to be concurrent with, not exclusive of, the state court's jurisdiction.[329]

The court's reasoning seems sound. The interest protected by the *Williams* rule, of extraordinary exclusive tribal court jurisdiction, is that of insuring that the actions of tribal members within the tribe's jurisdiction are judged according to their own laws and standards. Non-Indians who enter Indian country and engage in transactions with or involving Indians there presumably are on notice of that rule. That would dictate that issues relative to the liability of Mr. Garcia vis-a-vis other persons involved in his accident can be determined only in tribal court. The determination of whether an insurer has any liability to its insured as a result of a particular event, however, is primarily a question of contract interpretation. Where the parties enter into a contract outside of Indian country, the insurer arguably has a justifiable expectation that its insurance contract will be interpreted by non-Indian courts.

A contrary argument could be made, however. Because the insurer had reason to know that questions of its liability could arise in connection with occurrences subject to exclusive tribal court jurisdiction, and because the determination of the insurer's duty under the contract may require factual determinations that

322. *Id.* at 515, 734 P.2d at 755.

323. *Id.*

324. *Id.*

325. *Id.* The Garcias had also claimed lack of personal jurisdiction, but the opinion discloses no defect in service on them, and there seems to be no other reason why the state court did not obtain valid personal jurisdiction over them.

326. 97 N.M. 441, 640 P.2d 941 (Ct. App. 1981), *cert. quashed*, 98 N.M. 51, 644 P.2d 1040 (1982). That case, a suit by a non-Indian against a Santa Clara Pueblo member for an accident that occurred within the Santa Clara Reservation, affirmed the district court's dismissal for lack of jurisdiction. Justice Sosa in *Foundation Reserve* acknowledged the correctness of that decision. 105 N.M. at 515, 734 P.2d at 755.

327. *Id.*

328. *Id.*

329. *Id.* at 515-16, 734 P.2d at 755-56.

would foreclose issues otherwise determinable exclusively by the tribal court (e.g., who was driving the Garcias' car), exercise of state court jurisdiction could be both unreasonable and an infringement on the jurisdiction of the tribal courts.

This is a close question, and one made immensely more complicated by a United States Supreme Court decision issued less than a month prior to *Foundation Reserve*, but which the New Mexico Supreme Court did not mention. *Iowa Mut. Ins. Co. v. La Plante*,[330] arose over a one-vehicle accident on the Blackfeet Reservation in Montana, in which La Plante, a Blackfeet Indian employed on a ranch owned by another Blackfeet within the reservation, was severely injured. La Plante sued his employer and the ranch's insurer, Iowa Mutual, in Blackfeet Tribal Court, alleging bad faith refusal to settle on the part of the insurer. Iowa Mutual asserted lack of coverage as a defense, and moved to dismiss for lack of subject matter jurisdiction. The tribal court held that it had jurisdiction to decide La Plante's claim as to both parties, whereupon Iowa Mutual filed suit in federal court, claiming diversity jurisdiction, and asking for a declaration of non-liability under the policy. La Plante moved to dismiss the federal suit for lack of subject matter jurisdiction, a motion the district court granted.[331] The Ninth Circuit affirmed.[332]

The case before the Supreme Court, thus, was Iowa Mutual's suit for a declaration of non-liability, the same type of case brought by Foundation Reserve, and the issue was whether a federal court could entertain that case under its diversity jurisdiction. The Court did not exactly answer that question, except to say that the district court erred in dismissing for lack of subject matter jurisdiction. Rather, the Court said, the district court should simply require Iowa Mutual to

330. 107 S. Ct. 971 (1987). The facts stated in the text are found at 974-75.

331. The district court's analysis followed a line of decisions in the Ninth Circuit. It noted that a federal court's jurisdiction in diversity cases under 28 U.S.C. § 1332 is dependent upon underlying state court jurisdiction, relying on Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949). If no state court would have jurisdiction of a case, then no federal court may entertain the case under § 1332. The Ninth Circuit, in R.J. Williams Co. v. Ft. Belknap Hous. Auth., 719 F.2d 979 (9th Cir. 1983), Hot Oil Serv. Co. v. Hall, 366 F.2d 295 (9th Cir. 1966), and Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966), applying this rule in the context of cases arising in Indian country with Indian defendants, has held that if, under the rule of *Williams v. Lee*, a case is exclusively within the jurisdiction of a tribal court, there can be no federal diversity jurisdiction. That reasoning was applied by the district court in *La Plante*, which held that if the tribal court had jurisdiction over La Plante's case, there could be no federal diversity jurisdiction over Iowa Mutual's suit. The court required Iowa Mutual to allow the Blackfeet courts, including the tribe's court of appeals, to finally determine their jurisdiction, before the case could proceed in federal court. 107 S. Ct. at 975. (To be sure, tribal court jurisdiction over the claim against Iowa Mutual might be only concurrent with, not exclusive of, state court jurisdiction, in which case the rule against diversity jurisdiction might not apply.)

The Supreme Court discussed the district court's rationale in *La Plante*, 107 S. Ct. at 975, but it is unclear what the Court thought of it, although the Court did suggest, 107 S. Ct. at 979 n.13, that because the lack of state court jurisdiction over the case was due to a federal, not state policy, the *Woods v. Interstate Realty* doctrine might not bar diversity jurisdiction here. The holding of the case, however, makes that observation somewhat academic. And in any event, the doctrine of *Williams*, *Hot Oil Service* and *Littell* has probably been vitiated by the 1986 amendment to 28 U.S.C. § 1441, the federal removal statute. Congress added subparagraph (e), which permits a federal court to hear a removed case even if the state court would not have had jurisdiction over it.

332. 774 F.2d 1174 (9th Cir. 1985).

exhaust its remedies in Blackfeet Tribal Court.[333] If the Blackfeet courts hold that they have jurisdiction, *that* determination is subject to review in federal court, under the rule announced in *National Farmers Union Ins. Co. v. Crow Tribe*,[334] but if the final outcome is a decision upholding tribal court jurisdiction, the parties may not relitigate in the federal courts the merits of the tribal court suit.[335]

The Supreme Court's opinion seemed largely swayed by the facts that La Plante's tribal court suit had been filed first and that Iowa Mutual had raised its non-liability defense in that case.[336] Still, the decision's failure to say anything at all about the jurisdictional rules governing whether Iowa Mutual's suit was subject to exclusive tribal court jurisdiction is bothersome. It may be that La Plante's employer's insurance policy was contracted for within the Blackfeet Reservation; if so, the case for exclusive tribal court jurisdiction would be a strong one. If not, then the case is very much like *Foundation Reserve*.

Yet if the exhaustion rule the Supreme Court fashioned in *Iowa Mutual* applies in federal diversity cases, even as a rule of comity, it is hard to understand why it should not apply equally in state court cases (unless the policy being advanced is merely to discourage federal diversity cases). The remarkable thing about the *Iowa Mutual* rule, moreover, is its breadth: it essentially forces into tribal courts every case that *could* be brought there, whether the court's jurisdiction would be exclusive, under *Williams v. Lee*, or merely concurrent with the state court. That is so, because tribal courts will virtually always have jurisdiction to hear suits on transitory causes of action against resident tribal members, regardless where the case arises. By requiring exhaustion of tribal remedies on demand, and forcing exhaustive litigation of the jurisdiction questions before the merits could be heard in other than tribal court, the Court essentially has compelled any party planning to sue a reservation Indian to take his case to tribal court or face the prospect of endless litigation.

To be sure, it is unlikely that many state courts will, on their own, require similar exhaustion of tribal remedies before agreeing to hear the merits of suits against Indians. Some may view *Iowa Mutual* and *National Farmers Union* as exercises of the Supreme Court's supervisory jurisdiction over federal courts, not as rulings of federal common law binding on states under the Supremacy Clause.[337] Whether the Supreme Court will extend this utterly novel rule to state court proceedings remains to be seen. But in the meantime, tribal courts had best gird themselves for an onslaught of new business.

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333. 107 S. Ct. at 978.

334. 471 U.S. 845 (1985). That was a suit by the company to enjoin the Crow Tribal Court from enforcing a default judgment against the company's insured, a local school district, in a personal injury suit brought by a tribal member in tribal court. The Supreme Court held that such a suit, asserting lack of jurisdiction in the tribal court, was a proper exercise of federal question jurisdiction, but only after the tribal forum had been afforded a full opportunity to determine its own jurisdiction.

335. 107 S. Ct. at 978. Of course, if the federal court decided there was *no* jurisdiction in the tribal court to hear the action, it could then consider the merits under its diversity jurisdiction, provided any of the parties were still alive at that point, and not bankrupted by the previous proceedings.

336. *Id.* at 975 n.3, 977.

337. U.S. Const. art. VI, cl. 2.

E. *The "Indian Country" Cases*

Several recent decisions in New Mexico have raised the question whether a particular event occurred in "Indian country". All of the cases discussed but one are criminal cases; in such cases the "Indian country" issue, alone, determines which jurisdiction's laws govern. State criminal laws, like other state laws, generally do not apply to Indians within Indian country absent express congressional authorization;[338] rather, crimes by Indians within Indian country are punished under applicable tribal or federal law,[339] or possibly both.[340]

1. *State v. Begay*

State v. Begay[341] was a prosecution of a Navajo for vehicular homicide, arising out of an automobile accident in which two women and an unborn child, all Indians, were killed. The parties stipulated that the accident occurred on "land purchased by the United States Government and held in trust for the Navajo Tribe", but outside the boundaries of the Navajo Reservation.[342] Begay moved to dismiss the information for lack of subject matter jurisdiction, and took an interlocutory appeal to the court of appeals from the district court's denial of that motion.[343]

The court of appeals noted that the site of the accident fell within none of the three categories of lands which constitute "Indian country" under 18 U.S.C. § 1151.[344] Without further information on the character of the lands in question,

338. COHEN, *supra* note 3, at 349.

339. In Ex parte Crow Dog, 109 U.S. 556 (1883), the Supreme Court expressly recognized the exclusivity of tribal jurisdiction over crimes committed within Indian country by tribal members. Various federal enactments, primarily the Indian Major Crimes Act, 18 U.S.C. §§ 1151-53, 3242 (1982), have brought certain categories of crimes by Indians within federal jurisdiction. The subtleties and daunting complexities of this aspect of Indian country jurisdiction are thoroughly explored in COHEN, *supra* note 3, at 286-304.

340. United States v. Wheeler, 435 U.S. 313 (1978). There, the Supreme Court held that a federal prosecution of an Indian under the Major Crimes Act following a tribal prosecution for a lesser included offense did not offend the Double Jeopardy Clause of the Fifth Amendment to the Constitution, inasmuch as the tribe and the United States were separate sovereigns.

341. 105 N.M. 498, 734 P.2d 278 (Ct. App. 1987).

342. *Id.* at 499, 734 P.2d at 279. That, unfortunately, was the only information in the record as to where the accident occurred.

343. *Id.*

344. That section, part of the Indian Major Crimes Act, *supra* note 339, defines "Indian country", for purposes of Major Crimes Act jurisdiction, as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The Supreme Court, in United States v. John, 437 U.S. 634, 648-49 (1978), observed that that section, enacted by Congress in 1948, was intended as a codification of a line of Supreme Court cases, including United States v. McGowan, 302 U.S. 535 (1938), United States v. Pelican, 232 U.S. 442 (1914), Donally v. United States, 228 U.S. 243 (1913), and United States v. Sandoval, 231 U.S. 28 (1913), in which the Court had gradually expanded the concept of Indian country to include virtually all categories of land set aside for Indian use and occupancy and subject to federal

the court was not prepared to determine the jurisdictional issue.[345] It therefore remanded the case for further fact-finding on the status of the land where the accident occurred, making clear that if the land is found to be Indian country, there would be no state court jurisdiction.[346]

The court of appeals was probably justified in complaining about the lack of detail in the record about the character and status of the land in question. It is nonetheless arguable that the stipulated facts were sufficient to establish that the accident occurred in Indian country, particularly in light of a Tenth Circuit decision the *Begay* court seems to have misinterpreted, *Cheyenne-Arapahoe Tribes v. Oklahoma*.[347] That was a suit by the tribes to enjoin the state from seeking to regulate hunting and fishing by tribal members on trust allotments and lands, like the lands in *Begay*, purchased by the United States and held in trust for the tribes.[348] The Tenth Circuit held that the land was all Indian country, and that the state was without power to regulate.[349] The *Begay* court regarded the *Cheyenne-Arapahoe* decision as not determinative, however, because, it said, the lands involved in that case "were located within the reservation."[350] The court apparently missed the fact that, as the Tenth Circuit noted, the entire Cheyenne-Arapaho Reservation in Oklahoma had been *disestablished* by Congress in 1891.[351] Although the purchased lands were within the former reservation boundaries, that was now irrelevant.

The Tenth Circuit's holding in *Cheyenne-Arapahoe* was, in part at least,

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restrictions on alienation. Although by its terms, the statute only applies to the criminal jurisdiction of federal courts under the Major Crimes Act, the Supreme Court has recently made clear that it views the definition as applicable to questions of civil as well as criminal jurisdiction. California v. Cabezon Band of Mission Indians, 107 S. Ct. 1083, 1087 n.5 (1987); *and see* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

345. 105 N.M. at 501, 734 P.2d at 281.

346. *Id.* at 501, 734 P.2d at 281. On remand, the district court ruled against Begay again. State v. Begay, No. CR-86-6 (McKinley Co. Dist. Ct., August 31, 1987). Interlocutory review was denied, but if convicted, Begay will presumably raise the jurisdictional issue anew on appeal.

347. 618 F.2d 665 (10th Cir. 1980).

348. *Id.* at 667.

349. *Id.* at 669.

350. 105 N.M. at 501, 734 P.2d at 281.

351. 618 F.2d at 667. That was the ruling of an earlier case, Ellis v. Page, 351 F.2d 250 (10th Cir. 1965), to which the Tribes had not been party. But in *Cheyenne-Arapaho* the tribes expressly did not contest that determination. 618 F.2d at 667.

Much more recently, the Tenth Circuit held that lands owned in fee by the Muscogee Creek Nation (*not* the United States) in Oklahoma constitute Indian country for purposes of determining state jurisdiction, wholly irrespective of whether the Creek Reservation had been disestablished (a point argued by the state, but which the court did not decide). Indian Country, U.S.A., Inc., v. State of Oklahoma *ex rel.* Okla. Tax Comm'n, 829 F.2d 967, (10th Cir. 1987), *cert. denied sub nom.* Oklahoma Tax Comm'n v. Muscogee (Creek) Nation, 108 S. Ct. 2870 (1988). The court rejected the assertion that a formal designation of Indian-owned land as a "reservation" was required to make the area Indian country, so long as it could be shown that the United States intended that the area be set aside for Indian use and occupancy, under federal and tribal control. Although this holding seems to go beyond the limits of United States v. McGowan, 302 U.S. 535 (1938) (which held that lands acquired by the United States in fee—not trust—for the Reno Indian colony were Indian country, despite the lack of any formal "reservation" designation), it is a well-reasoned ruling that, though perhaps confined in its effect to the unusual status of Indian lands in Oklahoma, appears to be entirely consistent with the relevant Supreme Court precedents.

influenced by the decision in *United States v. John*,[352] in which the Supreme Court observed that there was "no apparent reason" why lands purchased by the United States for the Mississippi Choctaws "did not become a 'reservation,'" as of the point when Congress declared them to be held in trust for the Choctaws.[353] The *Begay* court was also unpersuaded by that passage from *John*, however. Because the Assistant Secretary of the Interior had formally proclaimed the Choctaw lands to be a "reservation" in 1944,[354] the *Begay* court, probably correctly, regarded the Supreme Court's view of the status of the Choctaw land prior to that time as dictum at best.[355]

It appears that the *Begay* case is destined to return to the court of appeals, with a more fully fleshed-out record on the situs of the accident.[356] Properly seen, *Cheyenne-Arapahoe* should compel a determination that the accident giving rise to the charges against Begay occurred in Indian country, and thus beyond the jurisdiction of the state.

2. *Blatchford v. Gonzales* and *Blatchford v. Winans*

In *Navajo Tribe v. New Mexico*[357] discussed at some length earlier in this article,[358] the Tenth Circuit Court of Appeals held that the Navajo claims of title to the unallotted lands within the area added to the Navajo Reservation by Executive Order 709 were barred.[359] But the court expressly left open the question whether the reservation boundary addition had been legally disestablished, i.e., whether the entire area remained Indian country.[360] The court speculated that the jurisdictional issue might arise in a federal habeas corpus case,[361] the context in which several similar jurisdictional disputes have been litigated in the past.[362]

While the Tenth Circuit speculated, such a case had in fact been underway for some time. In July, 1978, Herbert Blatchford, a Navajo Indian, was convicted in state district court in Gallup, New Mexico, of accessory to criminal sexual penetration and kidnapping of a Navajo child, was sentenced to life imprison-

352. 437 U.S. 634 (1978). The Court held that lands set aside by the United States in the 1940s for the Mississippi Choctaws (who stayed behind when the main body of Choctaws was removed from their homeland in the 1830s to the Indian Territory) was, indeed, Indian country.

353. *Id.* at 649.

354. *Id.* at 646.

355. 105 N.M. at 500, 734 P.2d at 280.

356. *See supra* note 346. The hearing on remand established that the site of the accident, a road south of Gallup, New Mexico, in the west half of Section 28, T. 13 N., R. 18 W., NMPM, was purchased by the United States in 1967, in trust for the Navajo Tribe. State v. Begay, No. CR-86-6 (McKinley Co. Dist. Ct., Findings and Conclusions, August 27, 1987).

357. 809 F.2d 1455 (10th Cir. 1987).

358. *See supra* text accompanying notes 21-226.

359. 809 F.2d at 1470-71.

360. *Id.* at 1474-76.

361. *Id.* at 1475 n.30.

362. *E.g.*, Seymour v. Superintendent, 368 U.S. 351 (1962), where the Court held that the opened portion of the Colville Reservation in Washington remained Indian country; DeCoteau v. District County Court, 420 U.S. 425 (1975) (consolidated with Erickson v. Feather, a federal habeas corpus proceeding), where the Court held that the entire Lake Traverse Reservation in South Dakota had been disestablished; Solem v. Bartlett, 465 U.S. 463 (1984), where the Court held that the opened portion of the Cheyenne River Sioux Reservation in South Dakota remained Indian country.

ment, and was confined to the New Mexico State Hospital in Las Vegas.[363] The crime occurred, for the most part, on privately owned land at Yah-ta-Hey, an unincorporated community of stores and mobile homes that grew up at the junction of U.S. Highway 666 and State Highway 264, about eight miles north of Gallup, New Mexico, and seventeen miles east of Window Rock, Arizona.[364] Although just south of the recognized Navajo Reservation boundary, Yah-ta-Hey is within the E.O. 709 addition, and has a predominately Indian population.[365]

Blatchford's conviction was affirmed on appeal, over arguments based solely on trial errors.[366] Subsequently he filed a state habeas corpus proceeding in district court in San Miguel County, claiming that the crime had occurred in Indian country, and that the state courts thus had no jurisdiction over it.[367] The district judge agreed that the situs of the crime was in Indian country, and ordered him released, but the state supreme court reversed.[368] Although Blatchford's arguments were based on, among others, the continued vitality of E.O. 709,[369] the supreme court never mentioned that order. It discussed only Executive Order No. 2513,[370] a 1917 order by which President Wilson set aside some reacquired railroad lands, that concededly did *not* include Yah-ta-Hey, for the Navajos. The court determined that that order did not affect the status of Yah-ta-Hey, and added—plainly incorrectly, but irrelevantly—that even if E.O. 2513 had encompassed Yah-ta-Hey, the community would nonetheless still not be Indian country because Navajo aboriginal title to the particular section where the crime occurred had been extinguished.[371] The court seemed to view the question whether Yah-ta-Hey could be deemed a "dependent Indian community," within the meaning

363. Blatchford v. Gonzales, 100 N.M. 333, 334, 670 P.2d 944, 945 (1983), *appeal dismissed, cert. denied*, 464 U.S. 1033 (1984).

364. Blatchford v. Winans, No. 84-0384, slip op. at 18, (D. N.M. April 3, 1987), *appeal docketed*, No. 87-1547 (10th Cir. April 20, 1987).

365. Blatchford v. Gonzales, 100 N.M. at 335, 670 P.2d at 946 ("sixty to seventy percent of the community is Indian"); Blatchford v. Winans, slip op. at 20 ("the area around the crossroads is predominately rural Navajo").

366. State v. Blatchford, No. 12187 (N.M., March 1, 1979).

367. Blatchford v. Gonzales, 100 N.M. at 335, 670 P.2d at 946.

368. Blatchford v. Gonzales, 100 N.M. 333, 670 P.2d 944. Although the opinion primarily addresses the Indian country issue, the court also held that the district court lacked any jurisdiction to grant relief to Blatchford, as he had failed to exhaust his post-conviction remedies under former Rule 57, N.M. R. CRIM. P. (now Rule 5-802). The court's extensive discussion of whether Yah-ta-Hey is Indian country, thus, was merely "to afford guidance in further considerations of this matter should Blatchford pursue other remedies." 100 N.M. at 335, 670 P.2d at 946. In Blatchford's federal habeas case, the district court determined that, despite the New Mexico Supreme Court's holding, Blatchford had in fact properly exhausted his state remedies. Blatchford v. Winans, slip op. at 3-8.

369. *See supra* notes 23, 34-37 and accompanying text. The federal district court expressly found that Blatchford had argued E.O. 709 to the state district and supreme courts. Blatchford v. Winans, slip op. at 5-6.

370. January 15, 1917.

371. 100 N.M. at 336, 670 P.2d at 947. The court was correct in holding Navajo aboriginal title to have been extinguished. Navajo Tribe v. United States, 23 Ind. Cl. Comm. 244, 248 (1970). *See supra* note 27. But as the Tenth Circuit pointedly observed in Navajo Tribe v. New Mexico, 809 F.2d at 1474-76 (and as numerous Supreme Court cases, such as those cited *supra* note 362, make clear), *within* the boundaries of an Indian reservation, *all* land is Indian country, regardless of title. 18 U.S.C. § 1151(a) (1982) codifies that important principle: "all land within the limits of any Indian reservation . . . , notwithstanding the issuance of any patent, . . ."

of 18 U.S.C. § 1151, likewise to depend on whether it was Indian-owned land within a reservation.[372]

Blatchford subsequently filed a federal habeas corpus proceeding, on March 20, 1984, again asserting lack of jurisdiction in the state court.[373] After an eight-day trial to the federal magistrate, the district court issued a decision on April 3, 1987, finding against Blatchford.[374]

Blatchford's arguments in the federal habeas proceeding differ in significant respects from the Navajo Tribe's arguments in *Navajo Tribe v. New Mexico*. Because it was claiming *title* to all of the unallotted lands within the E.O. 709 reservation, the Tribe was forced to contend that the two executive orders that purported to restore the unallotted land to the public domain were invalid.[375] Blatchford made that point also, but it was not central to his case. He relied primarily on the claim that the restoration of unallotted lands to the public domain by E.O. 1000 and E.O. 1284 merely opened those lands to non-Indian settlement; they did not annul the extension of the reservation boundary made by E.O. 709 and confirmed by Congress.[376] Blatchford's principal claim thus threatens no titles in the extension area; it goes only to the question of jurisdiction, and it is thus very much like the five reservation "opening" cases decided by the Supreme Court in the past twenty-five years.[377] Blatchford also argued that Yah-ta-Hey is a "dependent Indian community," within the meaning of 18 U.S.C. § 1151.[378]

The district court concluded that the E.O. 709 addition to the reservation was only temporary, and expired when the unallotted lands were fully restored to the public domain.[379] In reaching that conclusion, however, the court acknowledged that Congress' intent could not be clearly etermined from the history or language of the 1908 ratification of E.O. 709.[380] The court therefore looked to the "contemporaneous understanding" of what had occurred, as reflected in the mass of historical documents placed in the record.[381] There, the court found support for

372. 100 N.M. at 338, 670 P.2d at 949. *See infra* text accompanying notes 383-423.

373. Blatchford v. Winans, slip op. at 2.

374. Blatchford v. Winans, No. 84-0384 HB (D.N.M. April 3, 1987), *appeal docketed*, No. 87-1547 (10th Cir. April 20, 1987).

375. *See supra* text accompanying note 38.

376. Act of May 29, 1908, ch. 216, § 25, 35 Stat. 444, 457. *See supra* text accompanying note 34.

377. Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962). In each case, the issue before the Court was whether an Act of Congress that had designated all or a portion of an Indian reservation for issuance of allotments to tribal members, after which the unallotted lands would be opened to entry and settlement by non-Indians under the public land laws, had disestablished the reservation boundary surrounding the "opened" portion. The Court found the "opened" portion no longer to be within the reservation in *DeCoteau* and *Rosebud*, but found the reservation boundaries were unaffected by the particular Acts in *Seymour*, *Mattz*, and *Solem*. *And see*, Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (*on rehearing en banc*), *cert. denied*, 107 S. Ct. 596 (1986) (holding opened portion of Uintah and Ouray Reservation in Utah to be undiminished).

378. Blatchford v. Winans, slip op. at 2-3.

379. *Id.* at 10-17.

380. *Id.* at 10-13.

381. *Id.* at 13.

the position that the reservation extension was not intended to outlast the land withdrawal.[382]

Turning to the "dependent Indian community" question, the court determined that the relevant community was Yah-ta-Hey "and the surrounding area within a 3 to 5 mile radius of the crossroads".[383] It then considered several factors it gleaned from cases that previously have dealt with the "dependent Indian community" concept.[384] These factors included the nature of the area (in terms of land ownership and character of the population), the relationship of the inhabitants to established Indian tribes and the federal government, the practice of government agencies in dealing with the community, whether the community exhibits cohesiveness, and whether it has been set apart for the use, occupancy or protection of Indians.[385] The court observed that land ownership and population in the Yah-ta-Hey community are predominately Indian, and that the Navajo Tribe provides various services to community residents, but it gave greater weight to the facts that the town simply grew up as a trading post area, had close commercial, social and governmental ties to the town of Gallup, and had no special relationship with the federal government.[386] It thus held that Yah-ta-Hey was not a dependent Indian community within the meaning of 18 U.S.C. § 1151.

Both of these issues are difficult ones, and the significance of the reservation extension issue is potentially so broad that there seems little doubt that the loser in the Tenth Circuit will seek Supreme Court review. Nor can one safely gauge the merits of the competing positions on that issue, as this is another area of Indian law in which the Supreme Court has not seemed able to fashion clear general rules. In the earliest cases to consider similar questions, *Seymour v. Superintendent*[387] and *Mattz v. Arnett*,[388] the Supreme Court had little difficulty concluding that Congress had not disestablished the Colville or Klamath River Reservations, saying in *Mattz* that such a determination to terminate "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."[389] That is consistent with the general rule of construction

382. *Id.* at 13-17.

383. *Id.* at 18.

384. Although the phrase, "dependent Indian community", was first used by the Supreme Court in United States v. Sandoval, 231 U.S. 28, 46 (1913) (in which the Pueblo Indians were held to be subject to federal superintendence and protection, *see supra* note 252), and later in United States v. McGowan, 302 U.S. 535, 538 (1938) (holding that the lands of the Reno Indian Colony were Indian country), since that phrase was codified in 18 U.S.C. § 1151 (1982), *see supra* note 344, the Court has not had occasion to interpret it. The principal decisions interpreting the statutory phrase are United States v. Levesque, 681 F.2d 75 (1st Cir. 1982); United States v. State of South Dakota, 665 F.2d 837 (8th Cir. 1981); Weddell v. Meierheny, 636 F.2d 211 (8th Cir. 1980); United States v. Martine, 442 F.2d 1022 (10th Cir. 1971); City of Sault St. Marie v. Andrus, 532 F. Supp. 157 (D.D.C. 1980); United States v. Mound, 477 F. Supp. 156 (D.S.D. 1979); and Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976).

385. Blatchford v. Winans, slip op. at 19.

386. *Id.* at 20-22.

387. 368 U.S. 351 (1962).

388. 412 U.S. 481 (1973).

389. *Id.* at 505.

that Indian legislation must be interpreted, where possible, favorably to the preservation of Indian rights, including tribal governmental power.[390]

In *DeCoteau v. District County Court*,[391] however, while adhering to the requirement of a "clear" expression of congressional intent to terminate a reservation, the Court found that intent in the broad language by which the Sisseton-Wahpeton Tribe agreed to surrender its entire interest in its unallotted reservation lands.[392] On the strength of the agreement with the Tribe, the Court held that Congress had intended to disestablish totally the Lake Traverse Reservation in South Dakota. Two years later, in *Rosebud Sioux Tribe v. Kneip*,[393] the court found the requisite intent to diminish the Rosebud Sioux Reservation in South Dakota to less than one-third its former size in three acts of Congress passed between 1904 and 1910, despite the Tribe's refusal to concur in the opening legislation and despite similarities between at least two of the acts and the legislation at issue in *Seymour*. Indian fears that *DeCoteau* and *Rosebud* presaged a trend in favor of diminishment were alleviated by the decision in *Solem v. Bartlett*,[394] which held that the opening of a portion of the Cheyenne River Sioux Reservation in South Dakota to non-Indian settlement did not diminish that reservation's boundaries. The Court asserted in *Solem* that its prior decisions "established a fairly clear analytical structure" for deciding which acts diminished boundaries and which did not.[395] The primary elements of the analytical structure were the principles that only Congress can diminish reservation boundaries, that diminishment "will not be lightly inferred", but that absent clear language, the intent to diminish may be inferred from widely held contemporaneous understandings or, to a lesser extent, subsequent treatment of the affected area by Congress and executive agencies.[396]

As the Court suggested in *Solem*, however, Congress, in fashioning reservation-opening legislation in the early 1900's, rarely paid much attention to the effect of particular acts on reservation boundaries.[397] At that time, the notion that tribes might retain jurisdiction over lands no longer in Indian ownership was unfamiliar. In any event, virtually all members of Congress assumed that the reservation system would soon be a thing of the past.[398] To say, thus, that these decisions turn on determination of congressional "intent" requires indulg-

390. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (construing Indian Civil Rights Act, 25 U.S.C. § 1302 (1982), narrowly so as to preclude implication of waiver of tribal sovereignty or creation of federal cause of action); Bryan v. Itasca County, 426 U.S. 373 (1976) (construing Public Law 280 narrowly so as to limit reach of state jurisdiction it permitted within Indian country). *See* COHEN, *supra* note 3, at 221-25.

391. 420 U.S. 425 (1975).

392. *Id.* at 444-47 (agreement by which the Tribes "'hereby cede, sell, relinquish and convey all their claim, right, title and interest . . .'").

393. 430 U.S. 584 (1977).

394. 465 U.S. 463 (1984).

395. *Id.* at 470.

396. *Id.* at 470-71.

397. *Id.* at 468.

398. *Id.*

ence in a substantial fiction. Actually, the one factor that truly reconciles the decisions in *DeCoteau*, *Rosebud* and *Solem* is the extent of present non-Indian land ownership and population in the opened areas.[399] The Court seemed plainly influenced in *DeCoteau* by the fact that Indians constituted only about nine percent of the population and owned only fifteen percent of the land within the boundaries of the Lake Traverse Reservation.[400] Likewise, in *Rosebud* the land and population in the opened portions of the Rosebud Reservation were less than ten percent Indian.[401] The facts in *Solem*, however, showed that half the population in the opened area remained Indian.[402]

It is difficult to conclude much from those cases as to congressional intent with respect to the E.O. 709 addition to the Navajo Reservation. There are a number of peculiarities in the Navajo case, further, whose possible effect on the outcome is hard to assess. For example, in contrast to all of the cases discussed, the "opened" area of the Navajo Reservation had not previously been part of the reservation; it was added so that allotments could be issued to Navajos living there. On the other hand, there is no explicit congressional act that diminishes the E.O. 709 addition or empowers the President to do so, nor is there precedent for the President having the power to change a reservation boundary confirmed by Congress. Subsequent treatment of the addition, by Congress and the executive branch, shows the same pattern of confusion and inconsistency noted by the Court in *Solem*.[403] There is simply no clear theme.

But if demographic factors are as meaningful as the recent decisions suggest, Blatchford may have a good chance for eventual reversal. The record in *Blatchford v. Winans* shows that fifty-five percent of the land in the E.O. 709 addition is Indian-owned and another twenty-one percent is federal land used and administered by the Navajo Tribe.[404] In addition, 90.1 percent of the population is Indian.[405] The E.O. 709 addition today is, indeed, demographically much more like an Indian reservation than most reservations elsewhere in the country.

The question whether Yah-ta-Hey should be deemed a "dependent Indian community" under 18 U.S.C. § 1151 is similarly vexing, though not because of inconsistent Supreme Court authority. There is *no* Supreme Court decision that has interpreted that phrase in § 1151, although the phrase was derived from the

399. In *Solem*, the Court acknowledged that this "more pragmatic level" of analysis (i.e., how many non-Indians now live in the opened area, and how much of the land they own) "is also relevant to deciding whether a surplus land Act diminished a reservation," *id.* at 471, in effect acknowledging that it had recognized *de facto* diminishment even though the strict standards of *de jure* diminishment might not have been met. Whether such mundane demographic considerations can work *in favor* of a tribe, and not just against it, is a question possibly posed by *Blatchford*.

400. 420 U.S. at 428. Those facts were recited at the very beginning of Part I of the Court's opinion.

401. 430 U.S. at 605.

402. 465 U.S. at 480. As the Court noted, roughly two-thirds of the Cheyenne River Sioux Tribe's members reside on the opened portion, and the seat of tribal government is situated there.

403. *Id.* at 478-79 ("so rife with contradictions and inconsistencies as to be of no help to either side").

404. Appellant's Brief-in-Chief at 4, 5, 48.

405. *Id.* Probably a substantial portion of the non-Indian population, moreover, consists of doctors, teachers, Bureau of Indian Affairs employees and others engaged in providing services to the Navajo population. The record also contains uncontradicted evidence of the extensive services provided throughout the area by the Navajo Tribe and the Bureau of Indian Affairs (which maintains an Agency

Court's decision in *United States v. Sandoval*.[406] There, in holding that the lands of the New Mexico Pueblos are Indian country subject to federal jurisdiction and protection, the Court referred in general terms to the "unbroken current of judicial decisions" under which the United States exercises "a fostering care and protection over all dependent Indian communities within its borders."[407] On its face, it appears the Court meant that phrase to describe broadly all communities of "dependent" Indians, i.e., those still living in a tribal relationship and thus subject to the federal trust responsibility. This broad characterization was necessary to bring within the sweep of federal protection the Pueblos, whose lands are owned by them in fee, not by the United States in trust, and whose treatment by the Court previously had been anomalous.[408] The use of the phrase "dependent Indian community" by the recodifiers of the Indian Major Crimes Act, to identify a category of geographical areas that should be deemed "Indian country," only makes sense if it was intended as a broad catch-all term, as the Court used it in *Sandoval*. The courts have not viewed the language in exactly that way, however. Rather, courts have strained to develop from scratch various criteria for determining whether a particular community should be deemed a "dependent Indian community," without any consistent concept of what the term was intended to describe.

Some of the cases have been easy ones. In *United States v. Levesque*, the First Circuit had little difficulty concluding that the Passamaquoddy Reservation, a state-administered Indian reservation in Maine, was a dependent Indian community, especially since the tribe had finally won federal recognition.[409] *Weddell*

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headquarters at Crownpoint in the addition). By comparison, state services there amount to relatively little. *Id.* at 17-36.

Just prior to publication of this article, another decision from the New Mexico federal district court held that the E.O. 709 reservation was *not* diminished by the subsequent restoration orders. The case, Pittsburgh & Midway Coal Mining Co. v. Saunders, No. 86-1442 M (D.N.M. Aug. 22, 1988), was a challenge by the company to the Navajo Tribe's attempted taxation of certain of the company's mining activities at its South McKinley Mine, which is situated within the E.O. 709 reservation boundaries near Window Rock, Arizona. The Tribe moved to dismiss for failure to exhaust tribal remedies, citing *Iowa Mutual* and *National Farmers Union*, *see supra* notes 330-36 and accompanying text. To decide that motion, the court felt that it had to determine whether the South McKinley Mine was within Indian country (which happened to be the central issue raised by Pittsburgh & Midway's complaint). The hearing on that issue ultimately lasted more than two weeks. *Pittsburgh & Midway*, slip op. at 2.

The court's opinion on the motion to dismiss went carefully through the analytical steps prescribed by *Solem*. It determined that neither the Act of May 29, 1908, ch. 216, § 25, 35 Stat. 444, 457, *see supra* text accompanying note 34, nor Exec. Orders Nos. 1000 or 1284, *see supra* text accompanying notes 35-36, contain any language clearly revealing any intent to disestablish the reservation boundaries. *Pittsburgh & Midway*, slip op. at 4-6. It further found nothing in the events surrounding passage of the 1908 Act indicating any contemporary understanding that the reservation boundaries would shrink, and subsequent treatment of the area by the government, the court said, was "inconclusive." *Id.* at 6-9. As for the demographic issue, the court reviewed the record, which was similar to that made in *Blatchford*, *see supra* notes 404-05 and accompanying text, and found that the E.O. 709 area "has never lost its Navajo character." *Pittsburgh & Midway*, slip op. at 11. It therefore concluded that the E.O. 709 reservation boundaries have never been diminished, and the mine is thus within Indian country. The Tribe's motion to dismiss was granted.

406. 231 U.S. 28 (1913). *See* 18 U.S.C.A. § 1151 Historical and Revision Notes (West 1963).

407. 231 U.S. at 46.

408. *See supra* note 252.

409. 681 F.2d 75 (1st Cir. 1982).

v. Meierhenry,[410] on the other hand, held that the city of Wagner, South Dakota, in which ninety-five percent of the property was owned by non-Indians and nearly eighty-four percent of the population was non-Indian, was not a dependent Indian community.[411]

A somewhat harder case was presented in *United States v. State of South Dakota*,[412] in which the Eighth Circuit held that a federally-funded tribal housing project, on land acquired by the United States in trust for the Sisseton-Wahpeton Tribe, within the city of Sisseton, South Dakota, was a dependent Indian community. The court rejected the state's argument that the city of Sisseton was the relevant community, not the housing project, but only because the state had not raised that argument in the district court.[413] Despite the obvious physical, economic, social and political nexus between the housing project and the town, the court viewed the federal and tribal relationship to the housing project to be determinative.[414]

The earliest reported decision to interpret the "dependent Indian community" language, and still the only Tenth Circuit authority, is *United States v. Martine*.[415] The court noted that there, the trial court received evidence on "the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area", which the Tenth Circuit viewed as "the proper approach."[416] The locale in question was the town of Ramah, New Mexico, a largely Navajo community east and south of the reservation. The accident from which the case arose occurred on land owned by the Tribe, but the opinion appears to consider "the Ramah community" as the relevant community for purposes of the jurisdictional inquiry.[417] Without stating what facts it deemed significant to the decision, the Tenth Circuit was satisfied that Ramah is a dependent Indian community.

These cases suggest that in deciding whether a particular community is a "dependent Indian community" for purposes of 18 U.S.C. § 1151, the courts have first looked at whether the relevant community is predominantly Indian, and have then considered primarily the relative relationships of the community to state versus tribal and federal governments. While land ownership has been addressed in most cases, no decision (other than the New Mexico Supreme Court decision in *Blatchford v. Gonzales*[418]) has held that the presence of non-Indian

410. 636 F.2d 211 (8th Cir. 1980).

411. Though situated within the boundaries of the original Yankton Sioux Reservation, Wagner is in an area opened to non-Indian settlement. The South Dakota Supreme Court had twice held that the opening statute diminished the reservation, and that issue was not contested in *Weddell*. *Id.* at 213 n.2.

412. 665 F.2d 837 (8th Cir. 1981).

413. *Id.* at 841-42. Sisseton is within the former Lake Traverse Indian Reservation, which the Supreme Court in Decoteau v. District County Court, 420 U.S. 425 (1975), held had been disestablished by Congress. *See supra* text accompanying notes 391-92.

414. 665 F.2d at 842.

415. 442 F.2d 1022 (10th Cir. 1972).

416. *Id.* at 1023.

417. *Id.*

418. 100 N.M. 333, 670 P.2d 944 (1983), *appeal dismissed, cert. denied*, 464 U.S. 1033 (1984); *see supra* notes 368-72 and accompanying text.

land precludes a finding that a place is a dependent Indian community.[419]

The district court decision in *Blatchford* was consistent with the foregoing approach. The court ultimately seemed to place the greatest weight, however, on the fact that Yah-ta-Hey had not been established or set aside by the federal government, but merely grew up as a trading and residential area (albeit primarily on Indian land).[420] That focus seems to be in error. Had the community been established or set aside for the use of Navajos, it would have to be deemed an "Indian reservation," and thus Indian country under § 1151(a).[421] Were "dependent Indian communities" subject to the same test, there would be no difference between the two terms, and the second would be reduced to a simple redundancy. The likelihood is that the codifiers included the second category precisely to include those communities, like Yah-ta-Hey (and like the Pueblos), that grow up without federal involvement or encouragement, and outside of established reservation boundaries, but that primarily consist of Indians living in the tribal relationship and subject to federal protection.

Martine lends strong support to that view. The town of Ramah was not established or set aside by the federal government for Indians. It was settled by Mormons in the 1870s, as a ranching and farming community, near the homes of a band of Navajos who had stopped there on their way back from the Bosque Redondo.[422] Stores and schools established by the Mormons undoubtedly began to attract more Navajos over time, and the Ramah area today is a major community of about 2,000.[423] But in terms of the factors deemed relevant to the "dependent Indian community" inquiry, it differs hardly at all from Yah-ta-Hey. If the Tenth Circuit finds itself unwilling to accept the continued vitality of the E.O. 709 addition as an Indian reservation, it should have an interesting time deciding whether Yah-ta-Hey (and by extension, a whole array of Navajo communities throughout this region, with names like Torreon, Lake Valley, Pueblo Pintado, Churchrock, White Horse Lake, Borrego Pass, and many others) is a

419. COHEN, *supra* note 3, at 39, explains that the phrase refers to "residential Indian communities under Federal protection, not to types of land ownership or reservation boundaries." Because § 1151 was intended to reduce checkerboard jurisdictional situations, "patented parcels and rights-of-way within dependent Indian communities should also be within Indian country." *Id.*

420. Blatchford v. Winans, slip op. at 20, 21-22. The record showed that 83% of the land within three miles of the junction of U.S. Highway 666 and State Highway 264 is Indian-owned. Appellant's Brief-in-Chief at 55.

421. *See* United States v. John, 437 U.S. 634, 648-49 (1978), where the Court noted that the concept of "Indian reservation" in the revised version of § 1151 was based in part on the decision in United States v. McGowan, 302 U.S. 535 (1938), where the Court had held that the Reno Indian Colony constituted Indian country. The test applied in that case, in turn, the Court explained in *John*, was drawn from United States v. Pelican, 232 U.S. 442 (1914), and was "whether the land in question 'had been validly set apart for the use of the Indians as such, under the superintendence of the Government,'" 437 U.S. at 645 (quoting *Pelican*, 232 U.S. at 449), *and see McGowan*, 302 U.S. at 539. (*Pelican* actually was concerned with whether an *allotment* within the opened—and diminished—portion of the Colville Reservation in Washington remained Indian country, but the passage quoted above was the Court's explanation of why the original reservation constituted Indian country. In the Court's view, the allotments were of the same character, and thus retained the same jurisdictional status.)

422. M.E. JENKINS AND A.H. SCHROEDER, A Brief History of New Mexico 70 (1974). *See supra* text accompanying notes 25-29.

423. *See* Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 834 (1982).

dependent Indian community under 18 U.S.C. § 1151. Indeed, one could fashion a persuasive argument that the entire E.O. 709 area, if not still a "reservation," is nonetheless a "dependent Indian community."

It might be noted that there is yet another case now pending in which the jurisdictional issue posed by E.O. 709 is raised, though in quite a different context. In 1984, the State of New Mexico filed suit in the United States District Court for the District of Columbia, challenging final regulations issued by the Secretary of the Interior concerning regulation of surface coal mining on Indian lands, under the Surface Mining Control and Reclamation Act.[424] The Navajo Tribe intervened in the case opposing New Mexico, and counterclaimed for a declaratory judgment that the E.O. 709 addition (which contains, among other things, enormous coal reserves) constitutes "Indian lands" within the terms of the Act, that are thus beyond New Mexico's regulatory jurisdiction.[425] After the state settled its claim against the Secretary, the district court dismissed the Tribe's counterclaim.[426] On appeal, the court of appeals vacated the dismissal, but ordered the district court to transfer that counterclaim to the District Court for the District of New Mexico.[427] The case currently is pending there.[428]

3. *State v. Ortiz*

A final "Indian country" case that may turn out to have significant consequences is *State v. Ortiz*,[429] decided by the court of appeals at the end of 1986. Ortiz, an Indian (although his tribal affiliation is not stated in the opinion), was arrested for burglary and larceny, on private land or a public roadway in Espanola, New Mexico, within the boundaries of San Juan Pueblo.[430] His motion to dismiss the charges for lack of jurisdiction was denied.[431] On appeal, the court of appeals, through Judge Minzner, reversed, holding that the crime occurred within Indian country and was thus subject to tribal or federal jurisdiction.[432]

The court's opinion proceeded through a careful analysis of 18 U.S.C. § 1151 and the case law under it, and arrived at the conclusion that Pueblo grants ought

424. 30 U.S.C. §§ 1201-1328 (1982). For purposes of the Act, "Indian lands" are defined as "all lands . . . within the boundaries of any Federal Indian Reservation . . . and all lands including mineral interests held in trust for or supervised by an Indian tribe," 30 U.S.C. § 1291(9). Under § 1300, regulatory jurisdiction over Indian lands was to be determined only after a study by the Secretary of the Interior. Interior published final regulations governing Indian lands on September 28, 1984, 30 C.F.R. Part 750 (1987). New Mexico's challenge was directed at the provision at § 750.6 (a)(1) that gave the federal Office of Surface Mining exclusive regulatory authority over Indian lands. New Mexico had previously been regulating two large mines on the Navajo Reservation, the Navajo Mine near the Four Corners Powerplant, and the Pittsburgh & Midway Mine east of Window Rock, Arizona.

425. New Mexico *ex rel.* Energy & Minerals Dep't v. United States Dep't of the Interior, 820 F.2d 441, 443 (D.C. Cir. 1987).

426. *Id.*

427. *Id.* at 447.

428. No. 87-1108 JB (D.N.M., *docketed* August 28, 1987).

429. 105 N.M. 308, 731 P.2d 1352 (Ct. App. 1986).

430. *Id.* at 309, 731 P.2d at 1353.

431. *Id.*

432. *Id.* at 312, 731 P.2d at 1356.

to be viewed as Indian Reservations under that section, and thus Indian country "notwithstanding the issuance of any patent."[433]

Ortiz appears to be the first reported decision, state or federal, dealing directly with the jurisdictional status of private lands within Pueblo grants. Although the origin of these private titles (which the *Ortiz* court did not discuss) is quite different from that of the private lands in "opened" reservations, such as those at issue in *Solem v. Bartlett*, the history of the Pueblo lands makes an even stronger argument for continued tribal jurisdiction. Those private titles all derive from the Pueblo Lands Act,[434] which was enacted by Congress in 1924 to provide a solution to the problem of non-Indian settlement on Pueblo lands in New Mexico. That problem had arisen in the late nineteenth and early twentieth centuries, when many people in New Mexico assumed that Pueblo lands were not protected by federal law like other Indian lands, and thus could be freely bought and sold or simply acquired by adverse possession.[435] The Supreme Court indirectly abetted such beliefs with its holding in *United States v. Joseph*[436] that the Pueblos were not Indian tribes within the meaning of federal laws restricting alienation of tribal lands. Congress, however, continued to treat the Pueblos as Indians, and in 1913, in *United States v. Sandoval*,[437] the Court acknowledged that the view it had espoused in *Joseph* was ill-informed, and that the Pueblos were entitled to federal protection.

By the time of the *Sandoval* decision, there were an estimated 12,000 non-Indians who had settled on Pueblo lands, most under color of title, some as mere squatters.[438] *Sandoval* cast a dark cloud over their occupancy, and shortly after that decision the United States Attorney for New Mexico began filing ejectment actions against them.[439] The resulting furor quickly reached Congress, and for two years that body wrestled with the problem of reaching an equitable solution to the situation, in the midst of what became a major national issue. Indian advocacy groups from coast to coast became passionately involved in the debate, as did Mabel Dodge Lujan and her coterie of artists and writers in Taos, Santa Fe and New York.[440]

The scheme Congress crafted in the Pueblo Lands Act provided that those non-Indians who met certain criteria—adverse possession since 1902 with color of title, or since 1889 without color of title, plus (in either case) payment of taxes—would be given valid titles to the lands they occupied.[441] The Pueblos

433. 18 U.S.C. § 1151(a); 105 N.M. at 312, 731 P.2d at 1356.

434. Act of June 7, 1924, ch. 331, 43 Stat. 636. *See supra* note 257.

435. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 240 (1985).

436. 94 U.S. 614 (1877).

437. 231 U.S. 28 (1913).

438. *Mountain States*, 472 U.S. at 243 n.14.

439. *Id.* at 243-44 n.15.

440. *See generally*, L. KELLY, *supra* note 272, at 213-93. The controversy over the Pueblo Lands Act was what drew John Collier, then a New York social worker, into the Indian affairs arena. He went on to become Commissioner of Indian Affairs under Franklin D. Roosevelt, from which position he engineered several major pieces of progressive Indian legislation and helped foster a dramatic swing in the pendulum of federal Indian policy in favor of tribal self-government. *Id.*; COHEN, *supra* note 3, at 146-52.

441. *Mountain States*, 472 U.S. at 244.

would receive compensation for the lands they lost.[442] All non-Indian grant overlaps with Pueblo grants were to be confirmed to the Pueblos.[443] Congress created the Pueblo Lands Board as an investigative body to review the settlers' claims and make the initial determinations as to those that satisfied the criteria.[444] Claims rejected by the Board would then be dealt with in quiet title suits filed by the United States in federal court.[445]

The Pueblos lost more than 41,000 acres under the Act, much of it prime irrigated farmland.[446] There is no reason to believe Congress intended they lose more, however. The Pueblo Lands Act was an "act of grace" to the non-Indian settlers, and as such must be strictly construed.[447] It was not, like the various reservation "opening" statutes, seen as the first step in the gradual termination of the reservation system; indeed, in § 17 of the Act, Congress declared firmly that no "right title or interest" in any Pueblo lands, title to which had not been extinguished in accordance with the provisions of the Act, could thereafter be acquired by any person without the express authority of Congress.

This brief summary suggests that, as the *Ortiz* case concluded, the lands patented to non-Indians under the terms of the Pueblo Lands Act should be considered to be within the boundaries of Pueblo "Indian country," and thus fully subject to applicable tribal and federal laws. *Ortiz* is an important, and long overdue, jurisdictional ruling.

V. RELIGION CASES: OF EAGLES AND PEYOTE

Two recent cases decided by the United States District Court for the District of New Mexico upheld claims of Indians that they were entitled, on the ground of sincere religious belief, to engage in activities otherwise proscribed by law.

A. Toledo v. Nobel-Sysco, Inc.

Toledo v. Nobel-Sysco, Inc.,[448] was a claim by a Navajo Indian, Wilbur Toledo, that Nobel-Sysco had unlawfully discriminated against him on the basis of his religion when it refused to consider his application for employment as a truck driver because of his membership in the Native American Church, the peyote church. Peyote, a small cactus that grows in southern Texas and northern Mexico, and one of whose principal components is the psychoactive alkaloid, mescaline, has been used by southwestern Indians in ritualized settings since before the arrival of the Spaniards.[449] Although now a so-called "Schedule I", or controlled,

442. *Id.* at 245.

443. Act of June 7, 1924, ch. 331, § 14, 43 Stat. 636, 641.

444. *Mountain States* at 244-45.

445. *Id.* at 245.

446. Survey of Condition of Indians in the United States: Hearings Before a Subcomm. of the Comm. on Indian Affairs, U.S. Senate, 71st Cong., 3d Sess., at 10914-10915 (1931). Nearly half of the total was the entirety of the grant to the defunct Pueblo of Pecos, amounting to 18,814 acres. *Id.*

447. Garcia v. United States, 43 F.2d 873, 878 (10th Cir. 1930).

448. 13 Ind. L. Rep. 3114 (D.N.M. April 2, 1986).

449. *Id.* at 3115.

substance, peyote's use for religious purposes by the Native American Church has been upheld by some courts.[450]

Nobel-Sysco, while not contesting the legality of Toledo's use of peyote, claimed that the risk of his driving under the influence of the drug after a ceremony justified its refusal to offer him a job.[451] The court rejected that contention, on the grounds that Toledo claimed he only attended two to four ceremonies a year, and that, as shown by expert testimony, one could safely drive approximately twenty-four hours after ingestion of normal amounts of peyote.[452] Nobel-Sysco could therefore accommodate Toledo's religious beliefs, the court held, by allowing him to take one day off following a ceremony, a burden on the company the court viewed as *de minimis*.[453]

B. United States v. Abeyta

The second decision was a federal criminal prosecution of an Isleta Pueblo man for possession of a golden eagle carcass, under the Bald and Golden Eagle Protection Act.[454] In *United States v. Abeyta*,[455] the district court dismissed the charges, on the ground that the Act did not apply to a taking of an eagle within Pueblo lands, solely for religious purposes.

The opinion carefully documents the religious beliefs and practices of Isleta to which the use of eagle feathers, from eagles taken in a particular manner within Isleta aboriginal lands, is central.[456] It was undisputed that Abeyta's sole

450. *See, e.g.*, People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964). The official listing of Schedule I substances, at 21 U.S.C. § 812(c) (1982), and 21 C.F.R. § 1308.11 (1987), specifically exempts "the nondrug use of peyote in *bona fide* religious ceremonies of the Native American Church", 21 C.F.R. § 1307.31 (1987). In Employment Div., Dep't of Human Resources v. Smith, 108 S. Ct. 1444 (1988), two Indian members of the Native American Church contended that their religious beliefs were unconstitutionally burdened when they were denied unemployment compensation after they had been discharged from their jobs as drug and alcohol counselors because they had taken peyote at an NAC meeting. The Oregon Supreme Court agreed, but the United States Supreme Court vacated the Oregon court's decision. The Court reasoned that if the religious use of peyote was protected under Oregon state law (which otherwise made possession of peyote a crime), the wrongfulness of the denial of benefits could be determined without reaching the federal constitutional issue concerning peyote use, but that the Oregon court's decision had not clearly addressed the legality of the use under Oregon law. The case was thus remanded to the Oregon court for clarification of the state law issue. The Court indicated that if Oregon law did not afford protection for religious use of peyote, the Court might have to determine whether such protection could be found in the First Amendment, before it could decide whether the denial of benefits was wrongful. The Court's premise is that conduct otherwise defined as criminal is not necessarily protected just because it is claimed to be part of a religious ritual. In New Mexico, however, the religious use of peyote has statutory protection. N.M. Stat. Ann. § 30-31-6(D) (1978).

451. 13 Ind. L. Rep. at 3116-17.

452. *Id.* at 3115.

453. *Id.* at 3116-17. Nobel-Sysco had offered to settle Toledo's claim prior to suit by proposing that he give one week's notice of ceremonies, and that he take off the day after a ceremony. The company also offered $500.00 in back pay. The court viewed that as a reasonable offer of accommodation, and thus denied Toledo's claim for damages.

454. 16 U.S.C. § 668 (1982). The Act prohibits taking, possessing, selling, offering to sell, or transporting any live or dead bald or golden eagle, or parts thereof.

455. 632 F. Supp. 1301 (D.N.M. 1986).

456. *Id.* at 1303.

purpose in taking the eagle was to use the feathers in the prescribed religious ceremonies.

The Department of the Interior has established a means by which Indians wishing to obtain eagle parts and carcasses for religious purposes may apply to receive them from a federal depository in Boise, Idaho.[457] Although Abeyta had not tried to take advantage of that procedure,[458] the court found that "it would have not been fruitful for him to have done so," as, according to the evidence heard by the court, the depository takes eighteen months to two years to fill requests, and the application procedure is "unnecessarily intrusive and hostile to religious privacy."[459] The court also found, on the basis of uncontradicted testimony, that the golden eagle is not endangered, nor is its New Mexico population in decline. A state Game and Fish biologist testified that some eagles could be harvested in the state without an adverse impact on the population.[460]

On those facts, the court held the Act to be inapplicable to Abeyta on two separate grounds: first, that article IX of the Treaty of Guadalupe Hidalgo[461] guaranteed that the Pueblo Indians (and others residing within the Mexican Cession) would be "secured in the free exercise of their religion without restriction," and that there was no indication Congress intended to encroach upon that treaty provision by enacting the Bald and Golden Eagle Protection Act;[462] and second, that Abeyta's conduct was protected under the Free Exercise Clause of the First Amendment, and the government had not established that its interest in protecting the birds was sufficiently compelling to justify the Act's burden on protected religious rights, or that no less burdensome means to achieve its ends was available.[463] The court ended its opinion with the caution that it "in no way declares an open season" on golden eagles, but merely holds that on the record before it, Abeyta's taking of an eagle on Isleta land for religious purposes enjoyed treaty and constitutional protection.[464] The United States noticed an appeal, but dismissed it prior to briefing.

These two decisions, especially *Abeyta*, reflect an unusual sensitivity to Indian religious practices, and a willingness to accord them the same degree of protection enjoyed by more conventional American religions, even where the Indian practices are of a type that might otherwise be frowned on by large segments of

457. *See* 50 C.F.R. Pt. 22 (1987). The regulations also authorize the Secretary to issue permits to Indians to take eagles themselves for religious purposes. *Id.* § 33.33. The *Abeyta* court noted, however, that although the Fish and Wildlife Service continues to issue permits to ranchers to take depredating golden eagles, it has "never issued a permit to kill a golden eagle for Indian religious purposes in New Mexico or anywhere else." 632 F. Supp. at 1304.

458. The court found that Isleta religious belief required that the feathers used in certain ceremonies be from eagles taken on Isleta tribal land. *Id.* at 1303.

459. *Id.* at 1303-04. The applicant is required to identify the names of religious leaders and groups and the ceremonies involved, among other things. *Id. See* 50 C.F.R. § 22.22.

460. 632 F. Supp. at 1304.

461. 9 Stat. 922, 930 (1848). *See supra* note 250.

462. 632 F. Supp. at 1304-07.

463. *Id.* at 1307. The court noted in particular the evidence that golden eagles are not endangered, and that the government was willing to permit killing of eagles by ranchers, for non-religious purposes.

464. *Id.* at 1307-1308.

society. Indian religious practices have not generally fared so well in the courts.[465] *Toledo* and *Abeyta* suggest that they will be taken seriously in the federal courts in New Mexico.[466]

VI. CONCLUSION

Nothing ever seems routine in Indian cases. And as the foregoing suggests, cases arising in New Mexico continue to be as non-routine, as significant, and as interesting in their complexity, as those in any other American jurisdiction.

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465. Although the religious use of peyote has been upheld, *see supra* note 450, as has taking of moose out of season for religious purposes, Frank v. Alaska, 604 P.2d 1068 (Alaska 1979), the courts have gone to unusual lengths to frustrate Indian claims of Free Exercise rights of access to and use of particular *sites*. *See, e.g.*, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) (holding that Forest Service approval of major ski area expansion on San Francisco Peaks did not give rise to impairment of religious practices of Navajos and Hopis, to whose religions peaks were concededly indispensable, of constitutional dimension); Crow v. Gullett, 541 F.Supp. 785, (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983) (rejecting Sioux claim that state development of tourist facilities at acknowledged sacred butte violated Sioux Free Exercise rights); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980) (holding that ancestral sacred sites not sufficiently "central" to traditional Cherokee religion to justify protection from flooding by Tellico Dam); Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (rejecting claim of Navajo medicine men that government should manage Rainbow Bridge, a national monument, in such a way as to protect Navajo religious practices there, on ground that to do so would violate Establishment Clause); *cf.* Dedman v. Hawaii Bd. of Land & Natural Resources, 740 P.2d 28 (Haw. 1987), *cert. denied*, 108 S. Ct. 1573 (1988) (holding that worship of volcano goddess Pele not impaired by proposed geothermal power project). Recently, after a district court and the Ninth Circuit Court of Appeals held that a proposed road and timber sale would impermissibly violate the Free Exercise rights of Yurok Indians for whom the affected mountain area had critical religious importance, the Supreme Court accepted review—the first time it has taken such a case—and reversed. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd*, 764 F.2d 581 (9th Cir. 1985), *on rehearing*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988). In a 5-3 decision, the Court held, in effect, that government land management actions that do not actually prevent worshipers from having access to religious sites or that do not otherwise coerce or penalize religious beliefs can never violate the Free Exercise Clause, even if their effect were to "'virtually destroy the Indians' ability to practice their religion.'" *Id.* at 1321 (quoting 795 F.2d at 693). This sweeping, and stunning, pronouncement may serve to put an end to any further cases such as *Badoni*, *Crow*, *Sequoyah*, and *Wilson*, unless Congress enacts legislation that would give sincere religious practices and beliefs the same protections from the acts of government land managers as are enjoyed by, for example, endangered species of plants and animals. *See*, 16 U.S.C. § 1533 (1982).

466. In United States v. Dion, 106 S. Ct. 2216 (1986), the Supreme Court held that the Bald and Golden Eagle Protection Act *did* abrogate Indian treaty rights to hunt eagles. The case concerned eagle killings that were plainly for commercial, not religious, purposes. At the close of his opinion, moreover, Justice Marshall carefully noted that the decision did not address the question whether the Act invades religious freedom, citing *Abeyta*. *Id.* at 2224.

The District Court for Nevada declined to follow *Abeyta* in United States v. Thirty-Eight Golden Eagles, 649 F. Supp. 269 (D.Nev. 1986), *aff'd*, 829 F.2d 41 (9th Cir. 1987), and held, apparently on a much different record than was made in *Abeyta*, that to exempt Indians from the Act's requirements would unreasonably impair the government's interest in protecting this "rare and endangered species." *Id.* at 277. Although the opinion proceeds on the premise that religious beliefs underlay the killing of the eagles sought to be forfeited in this proceeding, there appeared to be evidence that the claimant was actually selling the birds commercially. The Ninth Circuit affirmed without opinion.