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Self-Government and the Constitution: A Comparative Look at Native Canadians and American Indians

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PHILOSOPHICAL, LEGAL, AND SOCIAL RATIONALES FOR APPROPRIATING THE TRIBAL ESTATE, 1607 TO 1980

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Introduction

During the period of 1492 to 1800, several European nations entered the Western Hemisphere and established dominion over vast territories and native people in North America. At various times Spain, France, Holland, Russia, and Great Britain claimed substantial portions of the territory comprising the present United States. Their tenure endured only as long as each claimant-nation was able to accomplish the sustained occupation and to apply the essential power required to make its claim tenable.

European and Indian tradition and practice regarding land, its tenure and use, were at variance and comprised a source of conflict. "The Indian conceived of earth as mother, and as mother she provided food for her children. The words of the various languages which refer to the land as 'mother' were used only in a sacred or religious sense."[1] The Indians did not regard land as property. Land "was something necessary to the life of the race, and therefore not to be appropriated by any individual or group of individuals to the permanent exclusion of all others." The aboriginal practice was to hold land in common with title vested in the tribe.[2] Europeans, on the other hand, regarded land purely in a material sense, to be individually owned, the potential source of production, profit, and power, a commodity to be bought and sold.

North America on the eve of the European intrusion was sparsely populated, at the rate of less than one person per square mile. Many of the tribes claimed vast territories with fixed village sites and adjacent agricultural lands, the remainder consisting of hunting reserves, all components of what the members of each tribe regarded as their territory. From the Indian viewpoint, this low man-to-land ratio was ideal and essential for consummating the aboriginal lifestyle. However, Europeans, accustomed to more intensive land occupation and utilization, regarded the Indian method of land use wasteful and considered much of each

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1. Fletcher, *Land Tenure*, in 1 HANDBOOK OF AMERICAN INDIANS NORTH OF MEXICO 756 (F. Hodge ed. 1959).

2. *Id.*

tribal estate as vacant territory. The interaction of these conflicting land utilization viewpoints and the concomitant struggle for control of the tribal territories supply the substance for much of the chronicle of American history.

After 1776, a new nation arose in North America to compete with the European claimants for dominion over the land, its resources, and the native peoples. Quite early in its national life the United States developed an ethos of compulsive expansion that committed it to extend American suzerainty to the Pacific shore. Two obstacles intruded momentarily to check the consummation of this national design. One was the presence of several foreign nations in the coveted western territory. By 1850, through purchase, diplomatic agreement, and war of conquest, the United States had removed alien title to all western territory and had integrated the land into the national domain. The other obstacle was the occupation of the western territory by populous and powerful Indian nations, each claiming as tribal estate a substantial portion of what the United States declared to be its national domain. The government of the new nation, pushed by its prodigiously expanding, agrarian-based population, whose obsessive "lust for the land" led John Randolph to characterize American pioneers collectively as "the great land animal," worked assiduously to extinguish Indian title to the land so ardently desired by its citizens. By 1900 the federal government had vested primary title to former tribal territories in itself.

This process of appropriating the Indian estate and transferring land title from the tribes to the public domain for dispensing to American settlers had complex and diverse origins. The intellectual foundation of American rhetoric and policy for tribal land expropriation was derived from Scholastic theology, political theory, international law, a corpus of supportive writings from Sir Thomas More to Theodore Roosevelt, and nearly three hundred years of imperial practice followed by several European nations.

Europeans carried to the New World "attitudes of the Greeks toward the 'barbarians' and the moral assumptions of medieval Christians toward the 'heathen'."[3] Thus, from their ideological viewpoint, the intruders could legitimately dispossess the Indian of his land because they were exercising their duty as Christians to enlighten the "savage." It also was claimed that the Indian

3. W. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW 241 (1971).

was a "wandering hunter with no settled habitations."[4] "This mode of securing their livelihood . . . was too wasteful."[5] Sir Thomas More's *Utopia* (1516) posited a condition where colonists settled adjacent territory "where the inhabitants have much waste and unoccupied" land.[6] The Utopians permitted the natives to dwell "with the Utopians—under Utopian laws."[7] When the natives resisted this "benevolence, they [were] driven off the land; if resistance continues the Utopians have no choice but to make full-scale war against them . . . . This the most just cause of war."[8] More contended that "when any people holdeth a piece of ground void and vacant to no good or profitable use; keeping others from the use and possession of it, which notwithstanding, by law of nature, ought thereof to be nourished and relieved."[9]

Three hundred years later Theodore Roosevelt expressed in *The Winning of the West* the jingoist view that "the settler and pioneer have at bottom had justice on their side; their great continent could not have been kept as nothing but a game preserve for squalid savages."[10] All intruder nations assumed dominion, "based on discovery, without regard for the natives."[11] Administrators of European empires in America "insisted on the right of dominion in its acquired territory and that of granting the soil. . . ."[12] In the process, "the rights of the original inhabitants were in but few instances entirely disregarded."[13]

The presumptively imperialist doctrine of Spain, Holland, and France tinctured United States policy for appropriating the Indian estate, but the primary source of American action was derived from the parent British practice. The government of Great Britain and the governments of the British colonies in North America treated the Indian tribes as nations and conducted relations with tribal governments through the treaty process. The United States government in its relations with the Indian tribes

4. *Id.* at 38.
5. *Id.*
6. *Id.* at 40.
7. *Id.*
8. *Id.*
9. *Id. See also* J. HEXTER, MORE'S UTOPIA: THE BIOGRAPHY OF AN IDEA (1952).
10. 1 T. ROOSEVELT, THE WINNING OF THE WEST 90 (1889).
11. Fletcher, *Government Policy*, in 1 HANDBOOK OF AMERICAN INDIANS NORTH OF MEXICO 500 (F. Hodge ed. 1959).
12. *Id.*
13. *Id.*

under its jurisdiction continued this practice until 1871.[14] Most of the land transfers resulting from extinguishment of tribal claim and shift of title to the United States was accomplished through the treaty process.

The Colonial Period

After a century and a half of English colonial occupation of the Atlantic Seaboard, the local Indian tribes had been drastically reduced in population, the surviving remnants settled on tiny reservations assigned by colonial governments or, in the case of the Shawnees, Delawares, and certain other tribes, had migrated west of the Appalachian Mountains.

Even before the American War of Independence, colonial pioneers from the Seaboard had drifted into eastern Kentucky and Tennessee and established permanent settlements in complete disregard for Indian rights to the land and of the Royal Proclamation of 1763, which forbade settlement west of the mountains.[15] During the 1760s, the British government ambivalently developed plans, on the one hand, to establish a permanent reserve in the trans-Appalachian region for the Indian tribes, and on the other, worked with British and colonial politicians and businessmen to distribute much of the western territory to speculator land companies.

The American War of Independence aborted both schemes. As

14. Indian Appropriations Act of Mar. 3, 1871, 16 Stat. 544, 566 (1871). The Act contained the following clause:

> Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty herein lawfully made and ratified with any such Indian nation or tribe.

After Congress enacted this provision, the federal government conducted relations with Indian tribes by statute, agreements, and executive orders. The Court determined that the contract clause applied to contracts made by the states, and it construed grants of property rights by states as contracts.

The land grant to the Yazoo companies had several ramifications for Indian tribes. One was the establishment of the Mississippi Territory in 1798. Congress established it to provide a government to the settlers moving into the disputed area. Congress also entered into negotiations with Georgia for a final settlement of its western lands. Georgia ceded its western lands in exchange for $1,500,000 and a promise that the United States would extinguish title to all Indian lands in the state.

15. Printed in 1 DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA, 1759-1791, at 163-68 (A. Shortt & A. Doughty eds., 2d & rev. ed. 1918).

a part of its strategy to put down the American rebellion, British officials mobilized the Indian tribes of the trans-Appalachian region against the American frontier settlements, winning the aborigines to the British cause with the warning that the Americans, if victorious, would swarm over the land and eject the resident tribes.

Wide Indian support of the British cause, including participation in British-led campaigns against American settlements in the West, had catastrophic impact, immediate and long-range, on the Indians. A recurring pattern evolved. In most of the major wars of the United States during the nineteenth century, particularly the War of 1812 and the Civil War, Indians consistently opposed the United States. At the conclusion of each war, their role as vanquished people made it easier for the United States to appropriate their lands.

The Revolutionary War initiated the conquest process. A case in point was Cherokee support of the British cause. Warriors from this tribe were among the first to do the British bidding in attacking American settlements in the West. On several occasions between 1776 and 1778, Cherokee bands struck hard at the intruding pioneer communities south of the Ohio River. Massed frontier militia forces broke the Cherokee siege on the settlements, forced the Indians to withdraw, then mounted retaliatory campaigns that desolated the Cherokee towns in western North and South Carolina and eastern Tennessee. These operations crushed Cherokee martial power and thereafter only on isolated occasions were raiding parties from this tribe able to strike the American settlements even on a nuisance-type sortie.[16]

During 1777, American frontier leaders extracted from the Cherokees the Treaty of DeWitt's Corner[17] and the Treaty of Long Island[18] whereby the Cherokees ceded claim to all territory in western South Carolina, that part of their range east of the Blue Ridge Mountains divide in North Carolina, and the land occupied by the Watauga and Nolichucky settlements in eastern Tennessee. This marked the beginning of the compression of the vast Cherokee estate in the southeastern United States, which was completed by the Treaty of New Echota in 1835.[19]

16. *See* G. WOODWARD, THE CHEROKEES (1963).
17. *Id.* at 97.
18. *Id.* at 98.
19. 7 Stat. 478 (1835).

British use of Indian armies in campaigns against the western settlements during the War of Independence resulted in drastic reduction in the population of great and powerful tribes filling the territorial interstice between the Seaboard and the trans-Appalachian West. The Iroquois Confederacy was reduced to shambles by American armies, never again able to muster its awesome power of colonial times. After tribal leaders ceded much of their eastern territory to the United States, several remnants of this once-grand martial community drifted into the Ohio Valley to escape the settlement pressure of their new imperial master.

From the American viewpoint, those tribes residing on territory claimed by the United States that had raided American settlements as British mercenaries were constructively tainted with treason. Thus retaliatory campaigns against these Indians by western militia armies, consistently ending in defeat of the Indians, were generally concluded by treaties calling for cession of land to the Americans, righteously extracted as reparations for making war on their new master.[20] This became a common resort for opening western lands to American settlers.

British-Tory-Indian armies had carried out brutal, dehumanizing campaigns against American settlements in the trans-Appalachian West. American frontier militia matched its enemy in wanton destruction and general barbarity in their retaliatory strikes. At the close of hostilities, the British and the Tories withdrew, but the Indians remained on the land, now the territory of the United States. The Indian image—a deadly, skulking, bloodthirsty savage—emergent in colonial times, came to full flower in the vicious contest for the West during the American War of Independence, and survived for a century in the minds of

20. The United States government under the Articles of Confederation based its treaties with the Indian tribes on the principle of conquest. The United States government expected the tribes to cede territory because they had sided with the British in the American Revolution. *See, e.g.*, Treaty of Fort Stanwix, 7 Stat. 15 (1784); Treaty of Fort McIntosh, 7 Stat. 16 (1785); Treaties of Hopewell, 7 Stat. 18 (1785), 7 Stat. 21 (1786), 7 Stat. 24 (1786). For a brief discussion of United States policy during this period, see *Report of the Secretary of War, Henry Knox (May 2, 1788), reprinted* in 2 TERRITORIAL PAPERS OF THE UNITED STATES 103 (C. Carter ed. 1934). During the nineteenth century, the United States government continued its practice of extracting reparations in the form of land cessions. See, e.g., text accompanying note 46 *infra* (discussing the Treaty of Fort Jackson). See also text accompanying notes 74-76 *infra* (discussing the Reconstruction treaties).

most Americans. This image colored American relations with the tribes, and in the surge of the settler tide across the West made appropriation of their lands easier.

The Early Federalism Period

The new United States government, functioning under the Articles of Confederation, began its relations with the western Indian tribes in the mid-1780s. From the beginning, it faced jurisdictional problems. For more than a century each of the Seaboard colonies, now states in the American Union, had directed the affairs of local tribes, including appropriation of Indian lands. After 1763, the British government belatedly had developed a royal policy for managing the Indian tribes and their lands. The Articles of Confederation vested in Congress the exclusive power to regulate the affairs of Indians who were not residents of any state.[21] The states with western land claims derived from colonial charters and grants had, beginning in 1781, ceded much of the territory between the Appalachians and the Mississippi River to the national government, and it was over this territory that Congress was to have full jurisdiction.

However, this power was limited by reservations of western lands made by several of the states. Connecticut had retained title to a large northwestern tract to indemnify its citizens for war damages. Virginia had reserved substantial territory in the Northwest to provide military bounties for troops under the command of George Rogers Clark. North Carolina and Georgia had made conditional grants to the national government. North Carolina regularly ceded then reclaimed its western lands, comprising most of Tennessee. And as late as 1802, Georgia retained title to considerable of its western lands, granting much of the territory embracing the future states of Alabama and Mississippi to a group of speculators under the aegis of the Yazoo Land Company, in complete disregard of Indian title rights or pledges to the national government.[22] To further complicate the jurisdictional issue over

21. Art. 9, § 1, 1 Stat. 6 (1778) (Articles of Confederation).

22. In 1794 the Georgia legislature by statute sold 35 million acres to three Yazoo land companies for about one and a half cents an acre. All but one member of the Georgia legislature were stockholders in the Yazoo land companies. When the public learned of the fraud and bribery that led to the land grant, it demanded repeal of the statute. In 1796 a newly elected legislature rescinded the legislation. When the scandal reached the Supreme Court in 1810, the Court in Fletcher v. Peck, 10 U.S. (6 Cranch) 187

Indian tribes and their lands, in 1786 officials in Georgia negotiated a treaty with the Creek Nation for cession of all tribal lands east of the Oconee River.[23]

Despite these jurisdictional complications, the national government persevered in its effort to create an Indian policy for the tribes in the western territory. National leaders proceeded on the assumption that while absolute title to the land resided in the national government, the Indian tribes held possessory and occupancy rights to the territory each occupied. These rights had to be extinguished by established constitutional process before the land could be considered a part of the public domain, open to settlement.

In 1786, Congress adopted a statute providing for the regulation of Indian affairs in which Congress asserted its exclusive power to deal with the Indian tribes.[24] Further regard for native land rights was stated in the Ordinance of 1787—"The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without consent, and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress. . . ."[25] In addition, Congress created a modest bureaucracy to administer Indian affairs, consisting of two departments or divisions, divided on the Ohio River, similar to

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(1810), held that the rescinding statute was unconstitutional. It violated the contracts clause in article 1 of the Constitution, which prohibits the states from enacting any law that will impair "The Obligation of Contracts." The Court determined that the contract clause applied to contracts made by the states, and it construed grants of property rights by states as contracts.

The land grant to the Yazoo companies had several ramifications for Indian tribes. One was the establishment of the Mississippi Territory in 1798. Congress established it to provide a government to the settlers moving into the disputed area. Congress also entered into negotiations with Georgia for a final settlement of its western lands. Georgia ceded its western lands in exchange for $1,500,000 and a promise that the United States would extinguish title to all Indian lands in the state.

23. Letter from Henry Knox to George Washington (July 6, 1789), *reprinted in* AMERICAN STATE PAPERS, 1 INDIAN AFFAIRS 15, 18 (1832). *See also* M. POUND, BENJAMIN HAWKINS—INDIAN AGENT 54 (1951).

24. "An Ordinance for the Regulation of Indian Affairs," 31 J. OF THE CONTINENTAL CONGRESS 491 (1786).

25. 32 J. OF THE CONTINENTAL CONGRESS 340-41 (1787). The Northwest Ordinance of 1787 was reenacted, with minor amendments, in the Act of Aug. 7, 1789, 1 Stat. 50 (1789). Art. 3 of the 1789 Act reiterated the "good faith" language of the Northwest Ordinance as quoted in the text.

the old British system. Each department was headed by a superintendent or commissioner.[26]

Congress also took steps to extend American dominion over Indian nations through a series of councils presided over by American commissioners and attended by leaders of both the northern and the southern tribes. The northern tribes met with American commissioners at Fort Stanwix in 1784. There the remnants of the Iroquois Confederacy accepted American suzerainty and surrendered their claims to territory in the Old Northwest.[27] A second council with the northern tribes was held at Fort McIntosh in the Ohio country during 1785. Ottawa, Delaware, Chippewa, and Wyandot leaders acknowledged American dominion and ceded certain tribal lands in the Old Northwest.[28] A third council was held at Fort Finney in Kentucky in 1786, at which Shawnee leaders acknowledged American dominion and assented to Anglo-American settlement in the Ohio country.[29] By these treaties the American government agreed to keep settlers off Indian lands. The Muskingum River was set as the boundary for settlement. To thwart American trespass on Indian lands west of the river, General Josiah Harmar constructed Fort Harmar at the mouth of the Muskingum.

South of the Ohio River, the Cherokees, Choctaws, Chickasaws, and Creeks inhabited portions of Tennessee, Georgia, Mississippi, and Alabama. The leaders of the Cherokee, Choctaw and Chickasaw nations met with American commissioners at Hopewell in South Carolina in 1785-86 to sign the Treaties of Hopewell whereby they accepted American suzerainty.[30] The Creek Nation did not accede until 1790 by the Treaty of New York.[31]

Determining territorial rights of the Indian tribes and settling jurisdictional issues on national and state prerogative had posed serious problems for the American nation's first government under the Articles of Confederation. These problems survived to vex the new government formed under the Constitution of 1789. Quite early federal leaders attempted to resolve the jurisdictional

26. 31 J. OF THE CONTINENTAL CONGRESS 491 (1786).

27. 7 Stat. 15 (1784) (Treaty of Fort Stanwix).

28. 7 Stat. 16 (1785) (Treaty of Fort McIntosh).

29. 7 Stat. 26 (1786).

30. 7 Stat. 18 (1785) (Treaty with the Cherokee); 7 Stat. 21 (1786) (Treaty with the Choctaw); 7 Stat. 24 (1786) (Treaty with the Chickasaw).

31. 7 Stat. 35 (1790).

dilemma of dealing with the Indian tribes residing in American territory by taking steps to nationalize Indian policy and reduce complications created by actions of the states. In response to President George Washington's request for a policy statement that might guide the new government in this regard, Secretary of War Henry Knox and Secretary of State Thomas Jefferson articulated the ideal position from which the United States might proceed. Knox stated that:

> It would reflect honor on the new government and be attended with happy effects, were a declarative law to be passed that the Indian tribes possess the right of the soil of all lands within their limits . . . and that they are not to be divested thereof, but in consequence of fair and bona fide purchases, made under the authority, or with the express approbation, of the United States.[32]

Knox added that the different tribes

> ought to be considered as foreign nations, not as the subjects of any particular State. Each individual State, indeed, will retain the right of pre-emption of all lands within its limits, which will not be abridged; but the general sovereignty must possess the right of making all treaties, on the execution or violation of which depend peace or war.[33]

Jefferson supported the Knox position and added the concept of the sovereign's "right of pre-emption" in the land which, he declared, the federal government possessed from European imperial precedents and American colonial practice. Jefferson's doctrine of preemption acknowledged Indian tenure in the land each tribe occupied and asserted the concomitant power of the sovereign government holding dominion over territory occupied by aboriginal peoples to extinguish their claim through purchase.[34]

32. Letter from Henry Knox to George Washington (July 7, 1789), *reprinted in* AMERICAN STATE PAPERS, 1 INDIAN AFFAIRS 53, 54 (1832).

33. *Id.*

34. Notes of a conversation with George Hammond, (June 3, 1792), *reprinted in* 17 THE WRITINGS OF THOMAS JEFFERSON 322, 328-29 (A. Lipscomb & A. Bergh eds. 1904); Letter from Thomas Jefferson to Henry Knox (Aug. 26, 1790), *reprinted in* 4 TERRITORIAL PAPERS OF THE UNITED STATES 34, 35 (C. Carter ed. 1936); Opinion on Georgia Land Grants (May 3, 1790), *reprinted in* 6 THE WORKS OF THOMAS JEFFERSON 55, 56 (P. Ford ed. 1904).

During 1793, Congress incorporated the spirit of the Knox and Jefferson statements in a statute that provided that no transfer of Indian-held land to the public domain of the United States would be valid "unless the same be made by a treaty of convention entered into pursuant to the [C]onstitution."[35] Relations with the Indian tribes, including those pertaining to land transfers, trade, and general administration were to be conducted by the President primarily through treaties subject to ratification by the Senate.

In the halls of government well-intentioned leaders drafted an ideal system for conducting relations with the Indian tribes, but in the wilderness harsh, expropriative reality prevailed. The American population more than doubled each decade. Increasing numbers of settlers poured onto the frontier, pressing for more land. Far removed from the restraints of ordered society, American pioneers did as they pleased, settled where they chose, disregarded boundaries set by treaty, antagonized the Indians, and precipitated incidents that often led to frontier wars. The inevitable result of each frontier extension in both the Northwest and the Southwest was reluctant tribal assent to new treaties ceding the lands coveted by the settlers.

In addition, recurring and accelerating demands for more land forced the federal government to depart from its lofty position of protecting tribal rights to treaty-assigned territory. In simplest terms, political expediency forced this. Settlers going forth into the wilderness to establish farms and towns and territorial and state governments were voters, while the Indians had no franchise. Pioneer voters sent territorial delegates and congressmen to Washington to frame legislation and develop policy that would provide an ever-expanding reservoir of public land, free of tribal encumbrance, for settlement and development. The Indians' presence created a barrier to the satisfaction of these desires and, in the end, they were a pitiable casualty of the American expansion juggernaut.

Until the War of 1812, settler pressure on the tribes of the trans-Appalachian region produced the periodic reduction or compression of tribal lands. Each settler surge into the West resulted in government officials pressing Indian leaders to surrender a portion of the tribal estate. President Thomas Jefferson discussed with Cherokee leaders and spokesmen for other tribes

35. An Act to Regulate Trade and Intercourse with the Indian Tribes, 1 Stat. 329, 330 (1793).

complete removal west of the Mississippi River to the recently acquired Louisiana Territory.[36] After intense federal diplomatic pressure or military conquest, tribal leaders generally responded by surrendering those portions of their eastern domains desired by the settlers, concentrating their people on the steadily reduced tribal lands.

The federal government had created an administrative apparatus to deal directly with the tribes. Responsibility for Indian affairs resided with the War Department. Several officials assisted the Secretary of War, including two appointees—the territorial governor, who also served as the local superintendent of Indian affairs, and the tribal agent. The agent had many duties. He represented the United States in the Indian nation and in the early years was expected to watch for tribal defection from the United States. As the federal government's representative, he had the duty of enforcing federal laws in the Indian country with regard to intruders, traders, contraband traffic, and Indian treaty provisions.[37] It was the intent of the federal government to "civilize" certain of the tribes, particularly the populous southern Indian nations, and the agent was expected to instruct them in those arts that would accomplish this goal.

In President Jefferson's view, the Indian agent's function was to promote peace and acquire more land for the settlers by leading the Indians to agriculture as the tribe's primary industry. "When they shall cultivate small spots of earth, and see how useless their extensive forests are, they will sell from time to time, to help out their personal labor in stocking their farms, and procuring clothes and comforts from our trading houses."[38] Jefferson expected the federally operated trading houses to serve the purpose of Indian land transfer. He directed agents

36. *See, e.g.*, Thomas Jefferson to Chiefs of Upper Cherokees (Jan. 9, 1809), *reprinted in* 16 THE WRITINGS OF THOMAS JEFFERSON 432, 435 (A. Lipscomb & A. Bergh eds. 1904); Thomas Jefferson to Deputies of Cherokees of Upper and Lower Towns (Jan. 9, 1809); *id.* at 458-59; Thomas Jefferson to chiefs of Chickasaw Nation, *id.* at 410-12. As early as 1803, Jefferson entertained the idea of removing Indian tribes west of the Mississippi River. *See, e.g.*, A. ABEL, THE HISTORY OF EVENTS RESULTING IN INDIAN CONSOLIDATION WEST OF THE MISSISSIPPI in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1906, at 241-45 (1906).

37. *See* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 53-57 (1962). *See generally* F. SEYMOUR, INDIAN AGENTS OF THE OLD FRONTIER (1941).

38. Letter from Thomas Jefferson to Andrew Jackson (Feb. 16, 1803), *reprinted in* 10 THE WRITINGS OF THOMAS JEFFERSON 357, 358 (A. Lipscomb & A. Bergh eds. 1903).

> to establish among them a factory or factories for furnishing them with all the necessaries and comforts they may wish (spirituous liquors excepted), encouraging [them] and especially their leading men, to run in debt for these beyond their individual means of paying; and whenever in that situation, they will always cede lands to rid themselves of debt.[39]

During the 1790s, American settler design in the Northwest was accomplished only after federal armies had waged a series of bloody campaigns to dislodge the determined Indians. The Wyandots, Shawnees, Delawares, Miamis, Ottawas, Chippewas, Potawatomis, and Kickapoos were antagonized by intruding survey parties and expanding American settlements. Braced by British agents at Detroit with arms, blankets, provisions, and gifts, warriors from these tribes prepared to ravage the expanding American settlements in southern Ohio. During the 1780s, Joseph Brant, the Iroquois mixed-blood, formed a confederacy among the Northwest tribes. The leaders pledged to cede no more land to the United States and repudiated the treaties of Fort Stanwix, Fort McIntosh, and Fort Finney.[40]

Spokesmen for the aboriginal confederacy met with American officials at Fort Harmar during January, 1789. Arthur St. Clair, governor of the Northwest Territory, would agree to nothing short of the conditions set forth in the three treaties.[41] Settlements in the Ohio country increased, British-armed warriors cut a bloody swath from Chillicothe to the gates of Fort Harmar, and frontier militia companies retaliated in kind with vengeance strikes against the Indian towns on the Maumee.

Beginning in 1790, President Washington ordered troops into the Ohio country to pacify the frontier. On two occasions American armies were trapped and defeated by the massed Indian forces. In 1793, General Anthony Wayne led an American army

39. Hints on The Subject of Indian Boundaries, Suggested For Consideration (Dec. 29, 1802), *reprinted in* 17 THE WRITINGS OF THOMAS JEFFERSON 373, 374 (A. Lipscomb & A. Bergh eds. 1904).

40. *See, e.g.*, Speech of the United Indian Nations (Nov. 28 and Dec. 18, 1786), *reprinted in* AMERICAN STATE PAPERS, 1 INDIAN AFFAIRS 8-9 (1832). *See also id.* at 2 INDIAN AFFAIRS 164, 168, 193. *See also* I. KELSAY, JOSEPH BRANT, 1743-1807, at 344-22 (1984).

41. Treaties of Fort Harmar, 7 Stat. 28, 33 (1789); Letter from Arthur St. Clair to George Washington (May 2, 1789), *reprinted in* AMERICAN STATE PAPERS, 1 INDIAN AFFAIRS 10 (1832).

into the troubled zone and with intensive defensive and offensive activity finally defeated the Indian confederacy forces at the Battle of Fallen Timbers during August of 1794. American officials and tribal leaders met at Greenville the following year and signed the Treaty of Greenville whereby the insurgent tribes conceded most of Ohio to the United States. In return, federal officials distributed $20,000 worth of goods to the signatory tribes and pledged an annuity of $9,500.[42]

The War of 1812 settled the problem of the Indian barrier to American settler advance in the trans-Appalachian region in that this contest destroyed the martial power of the resident tribes. Their weakened postwar state made inevitable their removal to the trans-Mississippi West by the federal government. The western origins of the War of 1812 grew out of the accelerated federal pressure after 1800 on the tribes for additional land cessions. Federal commissioners had achieved spectacular success in reducing the domain of certain tribes in both the Northwest and the Southwest in order to keep an ample supply of land available for the oncoming settler horde. A consummate negotiator was William Henry Harrison, governor of Indiana Territory. By 1809 he had completed fifteen treaties calling for substantial cessions of territory by the Northwest tribes. In 1809 at Fort Wayne he concluded a treaty with Delaware, Potawatomi, and Miami leaders calling for the cession of more than three million acres of tribal land in Indiana to the United States in exchange for trade goods worth about $7,000 and an annuity of $1,750.[43]

After Governor Harrison effectuated the Fort Wayne Treaty, Tecumseh, a Shawnee leader of considerable oratorical and organizational talent, confronted him. Tecumseh had formed a confederation of the Northwest tribes, based on nativistic precepts that included rejection of white contact and culture and a moratorium on the cession of Indian lands. Tecumseh argued that the Great Holy Force Above had provided the land in the beginning for the use of all his children. No single tribe was intended to be the sole proprietor of a given area, and all land was ordained to be held in common. Therefore, no tribe or faction in a tribe could presume to transfer title of land to the United States

42. 7 Stat. 49, 51 (1795).

43. 7 Stat. 113, 114 (1809). *See also* 7 Stat. 115 (1809) (separate article to treaty, with Miami & Eel River Tribes); 7 Stat. 116 (1809) (convention with Weas); 7 Stat. 117 (1809) (Kickapoos agreeing to Fort Wayne Treaty).

without the common consent of all the Indians. Tecumseh repudiated the Fort Wayne Treaty and warned Harrison to keep surveyors and settlers out of the tract ceded by that agreement.[44] There ensued a two-year impasse.

It became apparent to Harrison that if Tecumseh's will prevailed, there would exist a permanent Indian barrier across the northwestern corner of Indiana that would thwart American settler expansion. Therefore, while Tecumseh was south of the Ohio River during late 1811 attempting to ally the Choctaws, Creeks, Chickasaws, and Cherokees, Governor Harrison collected a sizeable militia army and marched on Prophetstown, the confederated Indian settlement situated near the Wabash River. As a result of the Battle of Tippecanoe, November 7, 1811, Harrison's troops dispersed Tecumseh's followers; this marked the beginning of the War of 1812.

American armies campaigned widely in the Old Northwest and the Old Southwest. Only one operation involving the conquest of an Indian community resulted in land transfer during the period of the war.[45] Most cessions of tribal lands came after the conclusion of hostilities beginning in 1815.

The only Indians south of the Ohio River to take seriously the anti-American teachings of Tecumseh were members of the Red Stick faction of the Creek Nation. These warriors ravaged the frontier settlements of western Georgia and Alabama during 1813-14. General Andrew Jackson, commander of military forces south of the Ohio River, led his army of Tennessee and Kentucky militia and regiments of loyal Creeks, Cherokees, Choctaws, and Chickasaws against the insurgent Creeks. On March 27, 1814, Jackson's army invested the enemy at their fortified town at the Horse Shoe Bend of the Tallapoosa River in central Alabama and administered a punishing defeat. General Jackson convened Creek leaders at Fort Jackson on August 9, 1814. He made it clear that he regarded the entire Creek Nation responsible for the Red Stick outbreak. In the Treaty of Fort Jackson the Creek Nation ceded as reparations 22 million acres of land in southern Georgia and central Alabama.[46]

44. Letter from William Henry Harrison to William Eustis (Aug. 22, 1810), *reprinted in* 1 MESSAGES AND LETTERS OF WILLIAM HENRY HARRISON 459-63 (L. Esarey ed. 1922); *Techumseh's Speeches* (Aug. 20, 21, 1810), *in id.* at 463-69. *See generally* R. EDMUNDS, TECUMSEH AND THE QUEST FOR INDIAN LEADERSHIP (1984).

45. Treaty with the Creeks, 7 Stat. 120 (1814) (Treaty of Fort Jackson).

46. *Id.*

Drastic change occurred in federal policy toward the Indian tribes and their lands following the conclusion of the War of 1812. Until this time the national government, for the most part, in negotiating with tribes for land cessions, had taken portions of the tribal domain, the signatory tribes retreating to diminished territories adjacent to the ceded tracts. By 1816 the national government was ready to change drastically its policy of dealing with the tribes of the Old West. First of all, the tribes of the Northwest were in a most unfavorable position from the American viewpoint in that, as members of tribal communities under United States dominion, they had actively supported the British in the War of 1812, which could be regarded as treasonable conduct. As vanquished peoples they could be expected to suffer some penalty, in the form of land reparations, for making war on the United States. In addition, their collective martial power, which peaked under Tecumseh, had been destroyed by American victories in the Northwest.

The awareness of this very important fact by national government officials was articulated by William Clark, superintendent of Indian affairs at Saint Louis. "[T]he relative condition of the United States on the one side, and the Indian tribes on the other" he concluded, had changed substantially.[47] Before the War of 1812,

> the tribes nearest our settlements were a formidable and terrible enemy; since then, their power has been broken, their warlike spirit subdued, and themselves sunk into objects of pity and commiseration. While strong and hostile, it has been our obvious policy to weaken them; now that they are weak and harmless, and most of their lands fallen into our hands, justice and humanity require us to cherish and befriend them.[48]

Clark recommended that "the tribes now within the limits of the States and Territories should be removed to a country beyond" the Mississippi River "where they could rest in peace."[49] Thus colonizing the tribes from the Old Northwest and Old Southwest to the trans-Mississippi territory became a certain and continuing policy of the national government as a solution to the problem of removing them from the path of American expansion.

47. Letter from William Clark to James Barbour (Mar. 1, 1825), *reprinted in* AMERICAN STATE PAPERS, 2 INDIAN AFFAIRS 653 (1832).

48. *Id.*

49. *Id.*

Removing the Old Northwest tribes did not occur in a single year but was evolutionary, with the rate of evacuation determined largely by the press of the settlement line. Tribal remnants were still being relocated in the trans-Mississippi West as late as the 1840s. Also, some Indian communities fell back to lands so unattractive for settlement use that they completely escaped removal to the West, so that late in the twentieth century residual communities of Potawatomis, Menominees, and certain other tribes remained in isolated portions of the Old Northwest. However, most of the tribes were removed in the decade of 1815 to 1825. The treaties that federal commissioners negotiated with tribal leaders provided for cession of lands in the Northwest in exchange for new reserves in the trans-Mississippi West and relocation of tribal members at government expense.

Federal officials found removing the tribes residing south of the Ohio River much more difficult. These Indian communities were large—the Cherokee Nation numbered about 20,000, the Choctaw Nation about 20,000, the Seminole Nation about 4,000, the Creek Nation about 22,000, and the Chickasaw Nation about 5,000. The Cherokee, Choctaw, Creek, and Chickasaw nations each had a corps of educated bilingual leaders who were worthy adversaries of American commissioners in council. Except for the Red Stick faction in the Creek Nation, these tribes had remained loyal to the United States during the War of 1812, supplying troops for General Jackson's campaigns against the Indian and British enemy. The southern tribes did not carry the stigma of making war on the United States, as was the case for the Northwest tribes. However, these Indians occupied valuable lands in the states of Georgia, Alabama, Mississippi, Tennessee, and Florida and, according to local business and political leaders, held up settlement and development in each state. Moreover, each of the Indian nations maintained a tribal government that had jurisdiction over members and, by treaty with the United States, the tribal citizens and tribal governments were exempt from state law.[50] To state leaders these tribal governments challenged state sovereignty and comprised, in a sense, a state within a state.

Both state and federal officials applied intense pressure on the southern tribes to move west. Tribal leaders responded by continuing the process of surrendering limited portions of their territory

50. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

to satisfy settler demands of the moment, and by concentrating their people on the residue. The Cherokees were the first to succumb to pressure from national officials and to accept a western domain. In 1817, Cherokee leaders negotiated a treaty with General Jackson providing for the surrender of one-third of the Cherokees' eastern lands for a tract of equal size in northwest Arkansas between the White and Arkansas rivers.[51] Emigration was discretionary and by 1835, only about six thousand Cherokees had moved west.

The Choctaws were the next tribe to commit themselves to vacating their eastern lands and migrating west. In 1820, General Jackson and Chief Pushmataha concluded the Treaty of Doak's Stand, providing that in return for surrendering to the United States about one-third of their remaining eastern domain the Choctaws were to receive a vast tract of territory west of the Mississippi, extending from southwestern Arkansas across the Indian country to the western boundary of the United States.[52] The treaty pledged the United States government to supply to each Choctaw warrior who would emigrate a rifle, a bullet mold, a camp kettle, a blanket, and ammunition sufficient for hunting and defense for one year. The treaty also authorized payment for any improvements each emigrant left at his ancestral home. Choctaw leaders insisted that the treaty contain a clause providing that fifty-four sections of Choctaw land ceded in Mississippi be surveyed and sold at auction, the proceeds to go into a special fund to support schools for Choctaw youth on both sides of the Mississippi.[53]

Indian colonists from the Old Northwest settling in Missouri and from the Old Southwest settling in Arkansas found their treaty-assigned lands occupied by American settlers. These pioneers had opened farms, established towns, and organized territorial governments. The frontiersmen demanded that the arriving Indians be located elsewhere.

In 1825, Secretary of War John C. Calhoun determined to end for all time the recurring tribal relocations. He reported to President James Monroe the tragedy of periodic uprooting of the tribes to serve the American settlers' lust for land. Calhoun stated that

51. 7 Stat. 156 (1817).
52. 7 Stat. 210 (1820).
53. *Id.* at 212. *See* A. LEWIS, CHIEF PUSHMATAHA, AMERICAN PATRIOT (1959).

> one of the greatest evils to which they are subject is that incessant pressure of our population, which forces them from seat to seat . . . . To guard against this evil . . . there ought to be the strongest and the most solemn assurance that the country given them should be theirs, as a permanent home for themselves and their posterity. . . .[54]

Calhoun recommended that the region west of Arkansas Territory and Missouri be set aside as a permanent Indian reserve. There, the federal government could colonize the Indian tribes remaining east of the Mississippi River as well as those tribes residing in Arkansas Territory and Missouri.[55] President Monroe and his successors, with the support of Congress, implemented Calhoun's recommendation. This colonization zone was situated west of Arkansas Territory and Missouri, bounded on the north by the Platte River, on the south by the Red River, and extended to the western boundary of the United States.[56] It was restricted to the colonization of Indian tribes and named variously; early it was called the Indian country, and by 1830 it was commonly referred to as the Indian Territory.

The Removal to the West

In 1825 the Choctaws surrendered their claim to land in southwestern Arkansas and relocated west of the Arkansas Territory boundary. Three years later the Cherokees exchanged their Arkansas domain for a new home in Indian Territory. The Missouri tribes relocated in that portion of the new Indian colonization zone that in 1854 became Kansas Territory.

Indian Territory already was occupied by several tribes, including the Osages, Quapaws, Kansas, Otoes, Missouris, and Ponças. Before federal officials could make land assignments to the eastern Indian colonists, they were required to persuade these

54. Letter from John C. Calhoun to John Monroe (Jan. 24, 1825), *reprinted in* AMERICAN STATE PAPERS 2 INDIAN AFFAIRS 544 (1832).

55. *Id.*

56. Indian country was statutorily defined in the 1834 Indian Trade and Intercourse Act as

> all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and within any state [,] to which the Indian title has not been extinguished. . . .

Act of June 30, 1834, 1, 4 Stat. 729.

local tribes to cede substantial portions of their lands to the United States for reassignment to the emigrating Indians. Through a series of negotiations between 1818 and 1825, the local tribes accepted reduced domains to make room for the emigrating tribesmen.

The southern tribes, for the most part, were relocated during the 1830s. The Georgia,[57] Alabama,[58] and Mississippi[59] legislatures adopted repressive laws that abolished tribal governments and made Indians subject to state law, applying to resident Indians the penalties of the statutes while denying them the protections accorded white citizens.[60] The state of Georgia went so far as to distribute to its citizens—by means of a lottery—the land of the Cherokee Nation.[61] These actions were designed to pressure the Indians to emigrate to Indian Territory. Tribal leaders appealed to federal officials for protection from oppressive state action as guaranteed by treaties with the United States. President Andrew Jackson refused to intercede on behalf of the beleaguered tribesmen, simply advising them to surrender their lands and move west as the only means to escape this torment.[62]

Cherokee leaders attempted to obtain respite through resort to

57. Act of Dec. 20, 1828, ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA (1828), 88-89; Act of Dec. 19, 1829, COMP. OF THE LAWS OF THE STATE OF GEORGIA (1819-1829), 198-99 (Dawson 1831); Act of Dec. 22, 1830, ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA (1830), 114-17.

58. Act of Jan. 27, 1829, DIGEST OF THE LAWS OF THE STATE OF ALABAMA 224 (Aiken 1833); Act of Jan. 16, 1832, *id.* at 224-25.

59. Act of Feb. 4, 1829, CODE OF MISSISSIPPI, BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE WITH TABULAR REFERENCES TO THE LOCAL AND PRIVATE ACTS, FROM 1789 TO 1848 135 (Hutchinson 1848); Act of Jan. 19, 1830, JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISSISSIPPI, AT THEIR 1830 SESSION 86.

60. *See, e.g.*, Act of Dec. 20, 1828, ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA (1828), 88-89. This act added Cherokee lands to five Georgia counties, and declared "all laws, usages, and customs" of the Cherokees "null and void." It also provided that "no Indian . . . residing within Creek and Cherokee nations shall be deemed a competent witness, or a party to any suit, in any court . . . to which a white man may be a party." *See, e.g.*, Act of Dec. 19, 1829, COMP. OF THE LAWS OF THE STATE OF GEORGIA (1819-1829), 198-99 (Dawson 1831), which extended the laws of Georgia over the Cherokee lands. *See also* M. YOUNG, REDSKINS, RUFFLESHIRTS, AND REDNECKS 14-17 (1961).

61. G. WOODWARD, THE CHEROKEES 173-77 (1963).

62. *See* Niles Register, Sept. 18, 1830; F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 235-38, 247 (1962); G. FOREMAN, INDIAN REMOVAL 231-32, 247 (new ed. 1953).

action in federal court. In *Worcester v. Georgia*, Chief Justice John Marshall ruled that the Georgia laws pertaining to the Cherokees were null and void because federal jurisdiction over the Cherokees was exclusive.[63] Nonenforcement of the decision destroyed the will to resist among many Cherokees, and several tribal leaders prepared for removal.[64]

In 1830, Congress passed the Indian Removal Act that formalized the colonization process and reiterated federal intent as to Indian land rights in the East.[65] Between 1830 and 1837, each of the southern tribes signed comprehensive removal treaties ceding their eastern lands to the United States and accepting new domains in Indian Territory.

In the case of the Creeks and Choctaws, government commissioners permitted the removal treaties to contain provisions for allotment. Tribal members who preferred to remain in the East were assigned allotments within the ceded territory, and the allottees thereby became subject to state law.[66] The treaties differed in sums paid to the tribes and government services provided in relocation.

By the terms of the controversial Treaty of New Echota,[67] the Cherokee Nation surrendered to the United States a domain of about eight million acres for $5,000,000. The eastern Cherokees were confirmed in joint ownership with the western Cherokees in their Indian Territory lands and this domain was patented to the Cherokee Nation in fee simple. They were obligated to remove within two years after ratification of the treaty, and the federal government was to pay the cost of removal and to provide subsistence for the immigrants for one year after arrival in the West.

The Chickasaws ceded their eastern lands by the Treaty of Pontotoc (1832) and the amendatory treaties of 1832 and 1834.[68] Federal agents were required to survey the Chickasaw Nation and assign each Indian family a homestead as a temporary residence until the western home was decided upon. Then the Indians were permitted to sell their homesteads to white settlers. The re-

63. 31 U.S. (6 Pet.) 515 (1832).

64. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 83 nn.173-174, and accompanying text (R. Strickland et al., eds. 1982).

65. 4 Stat. 411 (1830).

66. Treaty with the Choctaw (Treaty of Dancing Rabbit Creek), 7 Stat. 333 (1830); Treaty with the Creeks (Second Treaty of Washington), 7 Stat. 366 (1832).

67. 7 Stat. 478 (1835).

68. 7 Stat. 381 (1832); 7 Stat. 388 (1832); 7 Stat. 450 (1834).

mainder of the Chickasaw territory was to be sold at public auction, the proceeds to go to the Chickasaw general fund. The Chickasaws were to pay for the cost of their relocation.

The Seminoles were the last of the southern tribes to experience forced removal to Indian Territory. In 1832, Seminole chiefs signed the Treaty of Payne's Landing.[69] By its terms, the Seminole Tribe relinquished all claim to its lands in Florida Territory to the United States and agreed to relocate on Creek lands in Indian Territory within three years. The United States government agreed to pay the cost of removal, to provide subsistence for one year after arrival in the West, and to pay $15,400, plus an annuity of $3,000 a year for fifteen years. In the Treaty of Fort Gibson (1833) the Seminoles agreed to settle on a particular tract of Creek lands west of Fort Gibson.[70]

Osceola and other patriot leaders refused to be bound by the removal treaties. As a result of their opposition, a faction of the Seminoles became embroiled in a costly war with the United States that lasted until 1842. During the protracted struggle, the federal government forcibly removed most of the Seminoles from Florida Territory. In 1842 the United States abandoned its war effort and allowed a small group of Seminoles to remain permanently in the Florida Everglades.[71]

In 1855 the land of the Choctaw and Chickasaw nations in the Indian Territory was reduced by a treaty with the federal government whereby the latter leased the tribal lands situated between the 98th and the 100th meridians, flanked by the Canadian and Red rivers, and designated it the Leased District.[72] Subsequently federal officials assigned this area as a reservation for collecting a collage of Texas tribes—Waco, Tonkawa, Anadarko, Tawakoni, Caddo, and some Comanche bands—numbering at the time of their removal only about 1,500. For several years these tribes had resided on the Brazos Reserve in northwest Texas. Demands by Texan settlers for the reserve lands led federal officials in 1859 to relocate these tribes in the Leased District. Following removal, they were attached to the Wichita Agency, situated in the Leased District.[73]

69. 7 Stat. 368 (1832).

70. 7 Stat. 423 (1833).

71. A. GIBSON, THE AMERICAN INDIAN 328-29 (1980).

72. Treaty with the Choctaw and Chicasaw, 11 Stat. 611 (1855).

73. ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1859), at 1, 5-6, 19, 220-33.

White Settler Expansionism

Well before the Civil War, the Indian Territory's status as a permanent Indian colonization zone, off-limits to white settlement, was challenged by the renewed expansion of American settlements into the West. By the 1850s, settlers were agitating for the opening of the entire Indian Territory. Their demands were articulated in a number of bills introduced in Congress that provided for the extinguishment of tribal title and the opening of Indian Territory to settlement. The tribes of the northern half of Indian Territory were the first casualties of the renewed American expansion into the West. The Kansas-Nebraska Act, 1854, excised from Indian Territory the region north of 37° and created Kansas and Nebraska territories.[74]

In 1854 and 1855, Commissioner of Indian Affairs George W. Manypenny concluded agreements with local tribal leaders abrogating treaties containing solemn pledges that forbade the creation of any organized territory within this Indian colonization zone.[75] The commissioner reported that the Omahas, Otoes, Missouris, Sac and Fox, Kickapoos, Delawares, Shawnees, Kaskaskias, Peorias, Piankeshaws, Weas, Miamis, and other resident tribes reluctantly signed new treaties and accepted reduced reservations or allotments.[76] The federal government sold the ceded lands to settlers.

The American expansionist surge of the 1840s that carried United States dominion to the Pacific shore produced in the new territory a momentum of expansion, settlement, and development that did not requite until the close of the century. The discovery of gold in California and the concomitant sweep of the mining frontier across the newly acquired territory into the Pacific Northwest, Great Basin, Rocky Mountain region, and into the Southwest, with recurring gold and silver bonanza strikes, rapidly populated portions of the West. This drastically increased activity disturbed the local Indian peoples who then valiantly defended their homelands. The inevitable retaliatory military action led to successive Indian defeats and reductions in tribal territory,

74. 10 Stat. 277 (1854).

75. *See, e.g.*, Treaty of 1831 with the Senecas and Shawnees, 7 Stat. 349, 353. For a discussion of treaties with similar clauses, see CONG. GLOBE, 32d Cong., 2d Sess., 556-58 (1854).

76. INDIAN AFFAIRS, LAWS AND TREATIES, 2 TREATIES 608-46, 677-81 (C. Kappler ed. 1904); ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1854), at 3, 10.

ultimately culminating in assignment of the conquered tribes to drastically reduced reservations out of the Anglo-American stream of expansion and development.

Pre-Civil War Phase

The military conquest of western tribes and the compression of tribal territory, which began in 1845, can be divided into three periods. The first period or phase of the conquest and compression process, 1845 to 1861, conducted largely by regular troops, was particularly successful in California, Oregon, and Washington where, except for scattered pockets of resistance, the Indians after 1861 were no longer a factor to be reckoned with. The Treaty of Fort Laramie (1851) began the compression process for several tribes of the Central and Northern Plains including the Mandans, Gros Ventres, Assiniboines, Crows, Blackfeet, Cheyennes, and Arapahoes.[77] By this pact the signatory tribes accepted reduced hunting ranges that ultimately became restricted reservations. This first phase substantially reduced the Indian threat to American expansion and opened vast areas of Indian land to settlement and development.

The Civil War Phase

The second phase of the conquest of the western Indians and compression of tribal lands occurred during the American Civil War, 1861 to 1865. This episode in national history produced the comprehensive militarization of the West. Volunteer infantry and cavalry regiments raised in the region's new territories and states were kept in combat readiness for service in the East against Confederate armies by campaigning against Indians. Their actions further reduced Indian military power and compressed tribal territories. Volunteer troops pacified the Shoshonis, Bannocks, Utes, and other tribes residing near the Oregon-California roads, and their campaigns against the Cheyennes and other tribes of Colorado, Nevada, and Utah territories scattered the Indians and reduced their domains. In New Mexico and Arizona, General Henry H. Carleton's conquest and containment policy at Bosque Redondo emasculated the Mescalero Apaches and the Navajos' will to resist. His troops also campaigned eastward onto the Great Plains against the Kiowas and Comanches. However, Union regiments were never able to deal decisively with the western Apaches.

77. INDIAN AFFAIRS, LAWS AND TREATIES, 2 TREATIES 594 (C. Kappler ed. 1904).

During the Civil War, the tribes of Indian Territory—the Choctaws, Creeks, Chickasaws, Cherokees, and Seminoles—signed treaties of alliance with the Confederate States of America.[78] Indian armies fought under the Confederate flag in the contest between Union and Confederate armies for control of Indian Territory. At the close of the war the five tribes, through their Reconstruction treaties, were required to surrender the western half of Indian Territory to the national government as a penalty for the Confederate alliances and as reparations of war, receiving only minimal compensation for the territory ceded.[79] The Seminoles were pressed by federal officials to cede their entire domain to the United States, for which they received an average of fifteen cents an acre.[80] Subsequently the Seminoles purchased a small homeland within the Creeks' reduced territory for which they paid fifty cents an acre.[81] The intent of federal officials in appropriating the western half of Indian Territory was to use the land as a colonization zone for concentrating tribes from other portions of the West.

This was compatible with recommendations of a congressional committee, which, during the Civil War, had studied extensively the Indian problem in the West and concluded that it was "no longer feasible" to indulge the western tribes in a free, roving existence.[82] To "remove the causes of Indian wars" and to establish peace in the West, the committee concluded that the Indians would have to give up the nomadic life and accept limited reservations and "walk the white man's road."[83] Fulfillment of this policy in the postwar period provides the substance for the third and final phase of the conquest of the western tribes and compression of their lands.

The Reservation Phase

During the period of 1866 to 1886 the federal government assigned tribes to fixed, limited reservations. Those western tribes who remained largely unconquered, the Sioux, Northern

78. *See* A. ABEL, THE AMERICAN INDIAN AS PARTICIPANT IN THE CIVIL WAR (1919).

79. Treaty with the Seminoles, 14 Stat. 755 (1866); Treaty with the Choctaws and Chickasaws, 14 Stat. 769 (1866); Treaty with the Creeks, 14 Stat. 785 (1866); Treaty with the Cherokees, 14 Stat. 799 (1866).

80. 14 Stat. 755, 756 (1866).

81. *Id.*

82. S. REP. NO. 156, 39th Cong., 2d Sess., 7 (1867).

83. *Id.*

Cheyenne, Kiowa, Comanche, Southern Cheyenne and Arapaho and western Apache, did not submit quietly to the new policy. Federal troops campaigned continuously against them until the last tribal holdout, Geronimo's Apache band, capitulated in 1886.

The continuing settlement and development of the West during the postwar period, and the concomitant reduction of Indian lands, is illustrated in the case of the Kiowas, Comanches, Cheyennes, and Arapahoes. In 1865 at the Council of the Little Arkansas, leaders of these tribes signed treaties with American commissioners.[84] These tribes ceded to the United States their claim to all territory north of the Arkansas River and accepted diminished territories south of that stream. Thereupon federal officials assigned the Cheyennes and Arapahoes a domain between the Arkansas and Cimarron rivers in southwestern Kansas and northwestern Indian Territory. The Kiowas and Comanches were assigned a reservation between the Cimarron and Red rivers, extending across western Indian Territory and the Texas Panhandle from the 98th to the 103rd meridians.

Notwithstanding the Little Arkansas treaties, the soil of the new Kiowa, Comanche, Cheyenne, and Arapaho domains was soon bloodied by contests between Indians and Anglo-American intruders. Land-hungry settlers pressed onto the eastern margins of the treaty-assigned lands. The flow of traffic along the rivers and the old trails across these tribals ranges increased. American hunters slaughtered the buffalo, so essential for the survival of the Plains tribes, for the hides. Because federal officials on the western border refused to protect tribal territorial rights guaranteed by the Little Arkansas treaties, the tribes assumed this function themselves. Settler appeals for protection brought the tribes into bloody contests with the United States army.

In 1867 federal commissioners called these tribes into council again at Medicine Lodge Creek. The Treaties of Medicine Lodge, 1867, further reduced the lands of these tribes.[85] The Kiowas and Comanches were assigned a reservation in the Leased District,

84. Treaty with the Cheyenne and Arapaho, 14 Stat. 703 (1865); Treaty with the Apache, Cheyenne, and Arapaho, 14 Stat. 713 (1865); Treaty with the Comanche and Kiowa, 14 Stat. 717 (1865).

85. Treaty with the Kiowa and Comanche, 15 Stat. 581 (1867); Treaty with the Kiowa, Comanche, and Apache, 15 Stat. 589 (1867); Treaty with the Cheyenne and Arapaho, 15 Stat. 593 (1867). *See generally* D. JONES, THE TREATY OF MEDICINE LODGE (1966).

situated between the 98th and the 100th meridians, bounded roughly on the north by the Washita River and on the south by the Red River. The Cheyennes and Arapahoes were assigned a reservation in the Cherokee Outlet, bounded by the Cimarron and Arkansas rivers. These tribesmen actually settled south of the reservation on the North Canadian River. An executive order in 1869 established a new Cheyenne-Arapaho Reservation in the Leased District, situated between the 98th and the 100th meridians, extending to the Kiowa-Comanche line on the Washita.[86]

Extensive military action was required to keep the Indians on their reservations. After considerable combat, all bands had capitulated by late 1875. Military officials at Fort Sill and Fort Reno disarmed the warriors, confiscated the Indians' horses, and arrested their leaders and sent them off to military prison at Fort Marion, Saint Augustine, Florida. Finally leaderless, disarmed, and afoot, the warriors of the fierce southern Plains tribes were thoroughly pacified. They settled down to the dull routines of reservation life, most of them demoralized by the drastic changes in life confronting them, but studiously thwarting the attempts of agents to lead them along the "white man's road."[87]

Failed Government Policies

By 1887 it was evident that the national government was not accomplishing its cultural transformation goals. Critics claimed that the reservation system was a curse for the Indian and America's shame. These "institutionalized slums" were the subject of Helen Hunt Jackson's *Century of Dishonor* (1881), which stirred the public conscience.

Federal officials blamed the failure of the detribalization process on the Indian land system. The Indians held their reservation lands in common with title vested in the tribe. This nourished a continuing tribal government which, although suppressed, persisted in functioning. Federal officials concluded that the way to break resistive tribal force and communal strength would be to abolish reservations and assign each Indian an allotment of land in fee simple. They believed that private ownership of land, allotment in severalty, would accomplish what twenty years of reser-

86. Executive Orders Relating to Indian Reservations 138 (rep. ed. 1975).

87. *See generally* W. LECKIE, THE MILITARY CONQUEST OF THE SOUTHERN PLAINS (1963); Gibson, *The St. Augustine Prisoners*, 3 RED RIVER VALLEY HIST. REV. 259-70 (1978). 259-70 (1978).

vation life had not. Officials failed to acknowledge what was a compelling force in the movement behind the liquidation of Indian reservations—that considerable land embraced by Indian reservations held agricultural promise and thereby was coveted by homesteaders. By the 1880s settlers had filed upon most of the arable land in the West under the Homestead Act and other federal land-dispensing statutes. Indian reservation lands then, in a sense, comprised the agrarians' last frontier.

Congress passed the General Allotment Act in 1887. The Act provided for the assignment to each Indian of an allotment of land averaging 160 acres of reservation land, to be held in trust by the federal government for twenty-five years.[88] It applied to virtually all reservation lands with promise for agricultural development. Thus, those reservations in the desert and mountain regions which, at the time, were not coveted by Anglo-American settlers for farming and stockraising or desired by corporate interests for timber and mineral exploitation, escaped the allotment process. In Indian Territory all the reservations were liquidated under the terms of the General Allotment Act as amended or under similar statutes.[89] Each member of each tribe was assigned an allotment. The surplus lands in the West after allotment, amounting to over 60 million acres, were opened to homesteaders.[90] Allotment cruelly cast the Indian adrift into the dominant white society. Of the acreage assigned to Indians between 1887 and 1934, 27 million acres, or two-thirds of the land allotted, had passed from Indian to non-Indian ownership.[91]

In 1934, by the terms of the Indian Reorganization Act (Wheeler-Howard Act),[92] a historic process—compression of the Indian estate—ended. This statute terminated allotment in severalty, restored to tribal ownership surplus Indian lands available for non-Indian purchase, and provided for the acquisition of additional land for the tribes in order to maintain "tribal land bases." During the period of 1934 to 1950, the Indian tribal estate actually increased.

A resurgence of old practices occurred during the decade of the

88. General Allotment Act of 1887, 25 U.S.C. § 331-334, 339, 341-42, 348-49, 354, 381 (1982).

89. *See* FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 64, at 784-85.

90. *Id.* at 138.

91. *Id.*

92. 48 Stat. 984 (1934) (codified as amended at 25 U.S.C.A. §§ 461-479 (1982).

1950s under the rhetoric of "termination," a federally sponsored program to conclude national trusteeship for the American Indian. Termination produced a resumption of transfer of Indian land to non-Indian owners. During the period from 1953 to 1957, 1.8 million acres of Indian land passed from Indian tenure.[93] Termination slowed during the 1960s and was repudiated by the federal government in 1970.[94] However, threats to Indian land tenure persist, a primary one being the increasing resort to eminent domain by the Corps of Engineers and other federal agencies to obtain Indian land for construction of dams and reservoirs as power and flood-control projects, highway right-of-way, and other public purposes.[95]

Restitution through Money or Land

Indian leaders have worked to counter these threats to their surviving tribal estates and have achieved modest success in some instances. They have gained cash awards in settlements of certain claims that alleged unlawful sequestration of tribal lands by state and federal authorities. In other instances the result has been restitution of former tribal land or purchase of other land for tribal use.

This countermovement in restitution by money or land is the result, largely, of a gradual change in Native American stance from activism to advocacy, from stridency in the streets to persuasive, rational quests for remedies in Congress, state legislatures, and federal courts. The agencies responsible for the change in Native American strategy are reactivated tribal governments supporting leaders capable of fashioning appeals to improve Native American life, including restitution of the tribal estate. Tribal leaders, fused into pan-Indian councils and committees, increase the force of the Native American effort to achieve justice and restitution. Their resort to courts to accomplish these goals has been strengthened by the formation of several Native American legal action groups, including the Native American Rights Funds founded in 1970 with a Ford Foundation

93. *Chairman of the Senate Comm. on Interior & Insular Affairs, 85th Cong., 2d Sess., Memorandum: Indian Land Transactions* xviii (1958).

94. *See Special Message to the Congress on Indian Affairs*, PUB. PAPERS 564 (July 8, 1970) (Richard M. Nixon).

95. *See* OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA (E. Cahn & D. Hearne eds. 1969). *See also* Watson, *State Acquisition of Interests In Indian Land: An Overview*, 10 AM. INDIAN L. REV. 219 (1984).

grant, which is made up largely of Indians educated as lawyers. As of 1979, NARF attorneys had filed a reported 1,900 lawsuits, including many land-recovery actions.[96]

Indian action groups began some restitution work in 1946 when Congress enacted the Indian Claims Commission Act.[97] The Indian Claims Commission considered and settled claims filed by Indian tribes before August 13, 1951, that had accrued prior to the enactment of the Act.[98] The Commission had jurisdiction over five categories of tribal claims against the United States.[99] Surviving Indian communities, if successful in their suits, were awarded monetary compensation for appropriated lands. Damages were based on rates determined by expert witnesses to be the fair value of the land at the time it was appropriated by the federal government. These awards ameliorated some of the harshness of the "doctrine of pre-emption."

Congress extended the life of the Indian Claims Commission five times to settle the claims before it. The last extension expired on September 30, 1978.[100] On its dissolution, all claims not adjudicated by the Commission were transferred to the United States Court of Claims.[101]

96. Parade, June 17, 1979.

97. 60 Stat. 1049 (codified as amended at 25 U.S.C. §§ 70 to 70 v-3 (1982)).

98. The United States Court of Claims was given jurisdiction of Indian claims against the United States arising after the enactment of the Indian Claims Commission Act on August 13, 1946. The Indian claims that the Court of Claims could consider were more limited than those adjudicated by the Indian Claims Commission. The Court of Claims only had jurisdiction of claims arising "under the Constitution, laws or treaties of the United States, or Executive orders of the President, or which otherwise would be cognizable in the Claims Court if the claimant were not an Indian tribe, band or group." 60 Stat. 1050, 1055 (codified at 28 U.S.C § 1505).

99. The five categories of claims were: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims that would result if the treaties, contracts, and agreements between the claimant and the United States were reviewed on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. 60 Stat. 1049, 1050 (codified at 25 U.S.C. § 70a).

100. 70 Stat. 624 (1956); 75 Stat. 92 (1961); 81 Stat. 11 (1967); 86 Stat. 114 (1972); 90 Stat. 1990 (1976) (codified at 25 U.S.C. § 70v).

101. 90 Stat. 1990 (1976).

Some tribes have preferred land restitution to monetary compensation. During the 1970s a number of tribes regained possession of former tribal lands. In 1970 the return of 48,000 acres to the Taos Pueblo culminated a sixty-four-year effort by Taos leaders to regain possession of Blue Lake and its watershed area.[102] In 1975, Congress returned 185,000 acres in the Grand Canyon to the Havasupai Tribe in Arizona.[103] Havasupai attempts to regain some of their ancestral lands dated to the early twentieth century.

Other tribes in the 1970s also succeeded in their efforts to restore former lands to their land base. The Confederated Tribes of the Warm Springs Reservation in Oregon received approximately 61,000 acres.[104] The Paiute and Shoshone tribes of Fallon Reservation in Nevada regained about 2,700 acres.[105] The Santa Ana and Zia Pueblos in New Mexico recovered 16,000 acres and 4,850 acres, respectively.[106] The Yakima Tribe in Washington secured possession of Mount Adams and 21,000 acres.[107] The above tribes represent only a few of the tribes who recovered possession of former lands.[108]

Since the 1970s some tribes have obtained restitution in the form of monetary awards and land. In 1971, Congress enacted the Alaska Native Claims Settlement Act.[109] It represented the largest amount of land ever received by American Indians for the extinguishment of aboriginal title. The Alaska natives recovered more than forty million acres, were awarded $462.5 million, and were awarded future mineral royalties not to exceed $500 million.

102. Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437.

103. Act of Jan. 3, 1975, Pub. L. No. 93-620, 88 Stat. 2089, 2091.

104. Act of Sept. 21, 1972, Pub. L. No. 92-427, 86 Stat. 719.

105. Act of Aug. 4, 1978, Pub. L. No. 95-337, 92 Stat. 455.

106. Act of Oct. 21, 1978, Pub. L. No. 95-499, 92 Stat. 1679; Act of Oct. 21, 1978, Pub. L. No. 95-496, 92 Stat. 1672.

107. Exec. Order No. 11,670, 37 Fed. Reg. 10,431 (1972).

108. Many tribes have recovered small tracts of land. *See, e.g.*, Act of Oct. 18, 1974, Pub. L. No. 93-451, 88 Stat. 1368 (40 acres to Bridgeport Indian Colony); Act of Oct. 18, 1974, Pub. L. No. 93-458, 88 Stat. 1383 (12.5 acres to Kootenai); Act of Oct. 26, 1974, Pub. L. No. 93-489, 88 Stat. 1465 (90.24 acres to Sisseton-Wahpeton Sioux). In 1975 Congress enacted legislation authorizing the Secretary of the Interior to restore surplus lands to tribal trust status, Act of Jan. 2, 1975, Pub. L. No. 93-599, 88 Stat. 1954 (1975). A number of tribes have recovered land under the authority of the 1975 Act. *See, e.g.*, 50 Fed. Reg. 3679 (1985) (4.67 acres to Turtle Mountain Band of Chippewa). Some tribes have received land as a part of their restoration to federal status. *See, e.g.*, Act of Sept. 4, 1980, Pub. L. No. 96-340, 94 Stat. 1072 (3,630 acres of timberland to the Siletz Tribe of Oregon).

109. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1628).

Fee simple patents were to be issued to village and regional corporations established by the Act. The settlement culminated several decades of efforts by Alaska native groups to obtain title to their aboriginal lands.

Tribal remnants—Penobscots, Passamaquoddys, and Maliseets in Maine, Wampanoags in Massachusetts, Narragansetts in Rhode Island, Pequots in Connecticut, Mohawks, Oneidas, and Cayugas in New York, Catawbas in South Carolina—casualties of colonial and early state and national territorial sequestration also sought restitution in the form of monetary compensation and land. Each tribal claim has been based on the Indian Trade and Intercourse Act of 1790, which required Congress to ratify all land transactions with tribes. Claimant tribes alleged that the requirements of this law were never met. Most of these tribes have filed lawsuits against state or local governments or private parties presently owning the claimed lands.[110] In some instances, the

110. See *infra* notes 111-118. The eastern land claims lawsuits may have been partly precipitated by the tribes' concern that their claims would be barred by the statute of limitations enacted by Congress in 1966. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 64, at 200. The statute of limitations, however, only applied to money damage suits brought by the United States on behalf of tribes. The Act also did not apply to actions involving claims to title or possession of real property. Claims that had accrued prior to the enactment of the statute were deemed to have accrued on the date of enactment. The legislation established a six-year and a 90-day special limitation period. Congress extended the statute of limitation period four times. 28 U.S.C.A. § 2415. The last extension was in 1982 when Congress enacted the Indian Claims Limitation Act of 1982. This Act expanded the coverage of the statute of limitations. It applied to damage claims brought by tribes and individual Indians as well as to suits brought by the United States on their behalf.

Congressional intent behind the 1982 Act was to bring an end to all damage claims arising in tort or contract. The Act provided that within 90 days after its enactment the Secretary of the Interior must publish in the *Federal Register* a list of all pre-1966 claims covered by the Act. Tribes and individual Indians were given 180 days after the publication of the list to submit any additional claims. Within 30 days after the expiration of that period, the Secretary was required to publish in the *Federal Register* a list of all claims submitted during the 180-day period. Claims that did not appear on either list were barred at the end of the 60-day period following the publication of the supplemental list. For claims contained on either list, the statute of limitations does not begin to run until the Secretary of the Interior takes certain actions. Any claim rejected by the Secretary is barred unless the tribe or individual files a complaint within one year after a notice of rejection is published in the *Federal Register*.

If the Secretary determines that a claim should be settled legislatively, he may submit a legislative proposal or report to Congress. After the Secretary submits a legislative proposal or report, the claim is barred if a complaint is not filed within three years. The Indian Claims Limitation Act of 1982 is printed in a note following 28 U.S.C.A. § 2415. The claims lists are found in 48 Fed. Reg. 13,698 (1983), 49 Fed. Reg. 51,204 (1983), and

tribes have negotiated settlements to their land claims and Congress has implemented these agreements by enacting Indian claims settlement acts.

The first tribe to win a settlement of its claims was the Narragansett. In 1978, Congress enacted the Rhode Island Indian Claims Settlement Act[111] implementing the negotiated settlement agreement between the Narragansetts and the state of Rhode Island and other parties to the pending lawsuits. The Settlement Act provided for the restoration of 1,800 acres of former tribal land in Rhode Island, one-half of the land to be donated by the state, the other half to be purchased from private owners with federal funds. Congress authorized the appropriation of $3.5 million to purchase the private lands. The land was to be transferred to a state-chartered and Indian-controlled corporation. In return the Narragansetts agreed to the extinguishment of their land claims and to the extinguishment of their aboriginal title.

In 1980, Congress enacted a settlement of the Penobscot, Passamaquoddy, and Houlton Band of Maliseet claims. These tribes claimed aboriginal title to 12 million acres in Maine. Congress authorized the appropriation of $54 million to purchase for these tribes more than 300,000 acres of land from private owners, largely lumber and pulp companies. The Maine Indian Claims Settlement Act also created a $27 million trust fund to be invested by the Penobscot and Passamaquoddy tribes. In return the tribes agreed to the extinguishment of their aboriginal title and land claims.[112]

The Western Pequots alleged that 800 acres of tribal land in Connecticut had been transferred to private owners in violation of the Trade and Intercourse Act of 1790. In 1983, Congress enacted the Mashantucket Pequot Indian Claims Settlement

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49 Fed. Reg. 518 (1984). For a brief discussion of the statute of limitation legislation, see County of Oneida v. Oneida Indian Nation, 53 U.S.L.W. 4225, 4229-30 (U.S. Mar. 5, 1985).

111. Pub. L. No. 95-395, 92 Stat. 813 (codified at 25 U.S.C. §§ 1701-1712. *See also* Narragansett Tribe v. Southern Rhode Island Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976).

112. Maine Indian Claims Settlement Act, Pub. L. No. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. §§ 1721-1735); Norman Transcript, Dec. 8, 1977; and Daily Oklahoman, Mar. 14, 1980. For case law concerning the Passamaquoddy claims, *see* Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); State v. Dana, 404 A.2d 551 (Me. 1979).

Act.[113] It authorized the appropriation of $900,000 to purchase about 800 acres from private landowners. The Act provided that some of the settlement funds could be used by the tribe to promote its economic development.

The Catawbas claim 144,000 acres in South Carolina. Officials in the Department of the Interior recommended that the tribe be awarded most of the claimed lands.[114] The Catawba claim is presently in litigation. In 1984 the United States Court of Appeals for the Fourth Circuit reversed the federal district court's summary judgment in favor of the state of South Carolina and 76 other defendants, and remanded the case to the district court for further proceedings on the merits of the claim.[115] Whether a negotiated settlement will be obtained remains uncertain. Since the mid-1970s tribal leaders and state officials have discussed several settlement plans, and Congress has also considered settlement legislation.[116]

The Mohawk, Oneida, and Cayuga tribes have claimed aboriginal title to more than 300,000 acres in New York. In March, 1985, the United States Supreme Court adjudicated a portion of these claims and ruled that the Oneidas are entitled to receive additional compensation for land sold by the tribe to New York in 1795. The Court held that the Oneidas had a common law right to sue for violation of their possessory rights and that the action was not barred by any statute of limitations. The settlement involved 872 acres, only a fraction of the original claim.[117]

Some eastern tribes have not been successful in their efforts to recover former tribal lands or to obtain monetary compensation for the land taken from them in violation of the Trade and Intercourse Act of 1790. In 1978 the Wampanoag claim to 16,000 acres on Cape Cod was denied by the federal district court in Boston on the grounds that the Wampanoags did not comprise a

113. Pub. L. No. 98-134, 97 Stat. 851 (codified at 25 U.S.C. §§ 1751-1760).

114. Norman Transcript, Aug. 19, 1979.

115. 718 F.2d 1291 (4th Cir.); *aff'd on reh. per curiam*, 740 F.2d 305 (1984) (en banc).

116. *Settlement of the Catawba Indian Land Claims: Hearings on H.R. 3274 Before the House Comm. on Interior & Insular Affairs*, 96th Cong., 1st Sess. (1979).

117. County of Oneida v. Oneida Indian Nation, 105 S.Ct. 1245 (1985). For prior history of the Oneida case, see 70-CV-35 (N.D.N.Y. Nov. 9, 1971), *aff'd*, 464 F.2d 916 (2d Cir. 1972), *rev'd and remanded*, 441 U.S. 661 (1974); 434 F. Supp. 517 (N.D.N.Y. 1977); *aff'd* 719 F.2d 525 (2d Cir. 1983).

tribe in a federal sense and therefore was not entitled to pursue their claim.[118] The district court ruling not only made the Wampanoag ineligible for filing suits as a tribe, but also excluded them from the benefits of federal wardship generally—health, housing, education—and required them to rely on state relief and support.

Conclusion

An extended action taken by several tribal leaders to draw attention and support for their "quest for justice," and focusing more than anything else on dispossession of the tribal estates, has been to reach beyond increasingly responsive agencies in the United States to international agencies. Thus they have presented moving revelations of past wrongs to the United Nations. Also, in 1980 several Indian spokesmen, including Iroquois leaders from New York, testified before the Fourth Bertrand Russell Tribunal in Rotterdam, the Netherlands, on "alleged crimes against Indians" of North America. They charged that the "greatest of crimes against Indians" has been the callous appropriation of their land, the "mother," which they believe to be "necessary to the life of the race."[119] The renascence of Native American vitality—population increase, heightened spirit, and commitment to positive action—is perhaps due in part to their contemporary success, albeit limited, in recovering fragments of their territorial heritage.

118. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979).

119. Oklahoman & Times, May 29, 1980.