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Aboriginal Title: The Trials of Aboriginal Indian Title and Rights--An Overview of Recent Case Law

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NOTES

ABORIGINAL TITLE: THE TRIALS OF ABORIGINAL INDIAN TITLE AND RIGHTS—AN OVERVIEW OF RECENT CASE LAW

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> [T]he rights of the aboriginal Indians were not derived from treaties made with the United States . . . their rights antedated the treaties and continue to exist independently of them; . . . the Indian treaties constituted a surrender of rights or consisted of restrictions placed upon them by the terms thereof; . . . The Indians had an aboriginal right to hunt, [fish, trap, gather] on the land, . . . and, since it has never been surrendered by treaty, it still exists.[1]

This characterization of aboriginal Indian rights is not well developed in legal opinion. Assertion of aboriginal rights has been construed only in the context of the durability of aboriginal, or Indian, title to land. Aboriginal title is the nontreaty possessory right Indians have in lands they have continuously occupied since time immemorial.[2] The occupancy of aboriginal land includes the right to use the land consistent with traditional uses such as hunting and fishing.[3] That aboriginal rights exist separately from aboriginal title to land, just as reserved rights can, is a question that awaits judicial resolution.

This note reviews and analyzes relevant case law on the survivorship of aboriginal rights. The note traces the origin and evolution of aboriginal title and rights. It then discusses treaty-reserved rights as ratifications of aboriginal rights. A third section considers the means by which both aboriginal and treaty-reserved rights can be extinguished, and the next part discusses the issue of severability of aboriginal and treaty-reserved rights from title to land. The final section of the note reviews case law

* Third-place Winner, 1985 *American Indian Law Review* Writing Competition.

1. State v. Quigley, 52 Wash. 2d 234, 324 P.2d 827, 828 (1958).

2. Note, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655, 655-57 (1975). Aboriginal title as a right corresponding to immemorial usage is founded upon the premise that Indians used and occupied vast territories far in advance of encroachment by non-Indian cultures. Indian title claims require exclusive and continuous use and occupancy of the land claims. *See also* Confederated Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184 (1966); Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835).

3. See *infra* note 4 and accompanying text.

which was directly decided upon the concept of preservation of aboriginal rights or aboriginal title.

The Origin of Aboriginal Title

Aboriginal title, also known as original Indian title, is the right of Indians to use and occupy lands they have held for time immemorial. Aboriginal rights include subsistence rights exercised in a manner consistent with ancient custom and practice.[4] The legal doctrine that acknowledges aboriginal title and rights evolved out of the policies of European nations toward Indians. European nations settling in the New World recognized possessory rights in the original Indian inhabitants by imposing their own concepts of property ownership on tribes when negotiating for land to settle upon.[5] It was through this policy that recognition of aboriginal title was achieved.

Europeans, and later the United States government, recognized tribes' aboriginal interests, but were left with defining Indian land ownership in relation to that of discovering nations. The doctrine of discovery, as articulated in *Johnson v. McIntosh*,[6] defines the ownership relationship between the discovered and the discoverers. "[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments which title might be consummated by possession."[7] The United States Supreme Court determined in *McIntosh* that title vested in the discovering government, but in relying on precedent, noted that the occupying Indians retained rights in the land as "the rightful occupants of the soil, with a legal as well as just claim to possession of it."[8] Later, the

4. F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 442-43 (R. Strickland et al. eds. 1982), citing *Mitchel*, 34 U.S. (9 Pet.) at 745:

> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals."

5. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1220-26 (1980). Newton analyzes the development of the doctrine of discovery through the judiciary, citing Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

6. 21 U.S. (8 Wheat.) 543 (1823).

7. *Id.* at 573.

8. *Id.* at 574.

Supreme Court in *Cherokee Nation v. Georgia* laid the foundation for tribes having valid and enforceable rights in their ancestral lands.[9] "[T]he Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy."[10]

Aboriginal title is a legally enforceable right of possession; however, it is subordinate to vested fee title. The Supreme Court in *McIntosh* emphasized that as a result of discovery the Indians' "power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[11] Exclusive title over the land is qualified because it is "subject only to the Indian right of occupancy."[12] Although exclusive title does not vest in the occupying tribe, aboriginal title is a significant right that coexists with title in the United States. In *Cherokee Nation*, the Court called occupancy based upon aboriginal title "as sacred as the fee simple, absolute title of the whites."[13]

The Origin of Treaty-Recognized Title and Reserved Rights

Just as European powers recognized the rights of occupancy and use by the Indians of their native lands, they recognized tribes as separate and sovereign nations. The Europeans, and later the United States, carried on treaty negotiations with tribes, drawing upon principles of international law to guide them. Treaties were made with tribes for a variety of purposes, but to a large degree they were aimed at peaceful relationships and cessions of Indian lands for non-Indian settlers.[14] Treaties are a primary source of recognizing aboriginal title and reserving aboriginal rights.

Treaty-reserved rights and recognized title are aboriginal rights and title preserved through the treaty-making and ratification process. Treaties formally recognized and acknowledged aboriginal title to land. Treaty-reserved rights to use the land can

9. 30 U.S. (5 Pet.) 1 (1831).

10. *Id.* at 17.

11. 21 U.S. (8 Wheat.) at 574.

12. *Id. See also* United States v. Alcea Band of Tillamooks, 329 U.S. 40, 47 (1946). The U.S. Supreme Court stated that the right of occupancy based on aboriginal title is "more than a merely moral claim for compensation."

13. 30 U.S. (5 Pet.) at 48.

14. *See* F. COHEN, *supra* note 4, at 62-70. For a discussion of the development of recognized title, see Newton, *supra* note 5, at 1232-41.

be exercised only if there are aboriginal rights upon which they can be recognized.[15] Additional treaty rights, as distinct from reserved rights, can and often did include promises to provide payment, goods, and/or services to tribes.

Formal recognition of aboriginal title need not be accomplished by treaty. Aboriginal title can also be recognized and preserved by executive order or act of Congress. In *Mattz v. Arnett*,[16] a dispute arose that was resolved by recognizing a de facto reservation as Indian country. An executive order of 1855 created the Klamath River Reservation for occupancy by California Indians. The site was the aboriginal home of the Yuroks, who continued to occupy the area even after the reservation had been terminated in 1892 by an act of Congress.[17] The land was later opened for allotment and for settlement by non-Indians. Despite these actions, services continued to be provided to the Indians by the Department of the Interior. The Supreme Court held that the reservation had not been effectively terminated and that its status as Indian country was "reinforced by repeated recognition of the reservation status of the land after 1892 by the Department of the Interior and by Congress."[18] In finding that the reservation continued to exist, the Court cited with approval an earlier Department of Interior opinion on the same issue that held:

> [T]he Indians have lived upon the described tract and made it their home from time immemorial; and it was regularly set apart as such by the constituted authorities, and dedicated to

15. Proof of treaty-reserved rights is accomplished by the same immemorial custom and practice requirements used to show aboriginal title and rights. See *supra* note 5-7 and accompanying text. In United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *app. pending*, the Bay Mills and Sault Ste. Marie tribes sought to enjoin the state of Michigan from interfering by regulation with their treaty-protected fishing rights. The right to fish in the Great Lakes was an aboriginal right that was implicitly reserved and retained in a treaty of cession. In determining the scope of the right to fish, the federal district court required the tribes to document their immemorial use.

> Of course, not every treaty of cession leaves the Indian grantors with reserved fishing rights. In order for the right to exist in the first instance, it must be shown that the Indians were in fact using the resource, i.e., that they exercised this right, subsumed within their larger, aboriginal right to their land and water. Thus, the factual predicate for the reserved fishing right is the documented historic, ethno-historic, anthropologic and archeologic evidence.

Id. at 213.

16. 412 U.S. 481 (1973).

17. *Id.* at 496.

18. *Id.* at 505.

that purpose with all the solemnities known to the law, thus *adding* official sanction *to a right of occupation already in existence.*[19]

Interpreting the scope of treaty-reserved rights requires taking note of aboriginal use. Treaties, and other acts of Congress or the executive, recognize aboriginal title to land and reserve use of the land consistent with its aboriginal use. The existence of a treaty does not, in and of itself, extinguish aboriginal rights; rather, it preserves or modifies them. In *United States v. Winans*,[20] the Supreme Court interpreted a treaty made with the Yakima Indians that protected their right to fish at all "usual and accustomed sites." The Court held that "only a limitation of [aboriginal rights], however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[21]

Extinguishment of Aboriginal or Treaty-Reserved Rights

Aboriginal title and rights reserved by treaty, executive order, or statute are an acknowledgment of rights that have existed since time immemorial. Rights preserved by these means are subject to extinguishment or alteration by tribal or congressional actions specifically intended to terminate those rights. Aboriginal title and rights are extinguishable at the will of the sovereign, but for effective termination of rights of aboriginal origin a clear and express intention on the part of Congress is required just as though the rights were treaty-reserved.

Extinguishing Aboriginal Title or Rights

The means by which extinguishment of aboriginal title can be accomplished were enumerated by the Supreme Court in *United States v. Santa Fe Pacific Railway*,[22] which concluded that extinguishment could occur "by treaty, by the sword, by purchase, by

19. *Id.* at 491-92 (emphasis added), citing Crichton v. Shelton, 33 I.D. 205, 212-13 (1904).

20. 198 U.S. 371 (1905).

21. *Id.* at 381. *See also* Winters v. United States, 207 U.S. 564 (1908) (water rights reserved were based upon aboriginal use with a priority date of time immemorial); United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), *reh. denied* (1984) (reserves water sufficient to maintain hunting and fishing rights with a priority date of time immemorial).

22. 314 U.S. 339 (1941).

the exercise of complete dominion adverse to the right of occupancy, or otherwise."[23] In *Santa Fe* the Court was determining the extent of off-reservation hunting and fishing rights. The Hualapai Indians, in the face of increasing encroachment on their aboriginal lands by non-Indians, requested Congress to provide them a reservation for their exclusive use. In reviewing the chain of events leading to the request, the Supreme Court refused to find that previous congressional attempts to relocate the Indians to a distant reservation and forcible military removal unauthorized by congressional mandate had extinguished the tribe's title and rights in their aboriginal lands.[24] Instead, the Court held that the tribe's request for a reservation and acquiescence in encroachment upon their aboriginal lands extinguished their aboriginal title and rights. The tribe was

> in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais [sic] in lands outside the reservation were preserved. . . . Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others.[25]

Later, the Supreme Court again considered extinguishment of aboriginal title and the nature of aboriginal rights. In *Tee-Hit-Ton v. United States*,[26] the Tlingit Indians were suing the United States for compensation under the fifth amendment for an unjust taking of timber located on aboriginal lands withdrawn by the government to create a national forest. The Court held that the tribe's right in their aboriginal land was a permissive right of occupancy and not subject to compensation for takings under the fifth amendment.[27] Had the tribe's aboriginal rights been recognized by Congress as rights of permanent occupation of the land, compensation would have been required.[28]

23. *Id.* at 347, citing Beecher v. Wetherby, 97 U.S. 517 (1877).

24. *Santa Fe*, 314 U.S. at 353.

25. *Id.* at 358.

26. 348 U.S. 272 (1955).

27. *Id.* at 279. *See also* Newton, *supra* note 5, at 1217-20. In analyzing *Tee-Hit-Ton*, Newton interpreted the Supreme Court's finding as having relied upon the view that the act of discovery by the sovereign nation was of itself sufficient to extinguish aboriginal title to land. Compensation under the fifth amendment was available only when Congress recognized a permanent right of occupancy in land.

28. *Tee-Hit-Ton*, 348 U.S. at 288-91.

In *Oneida Indian Nation v. County of Oneida, (Oneida I)*,[29] the Supreme Court discussed the impact of discovery by sovereign nations on aboriginal title and ruled that "[t]hat right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act."[30] The Court noted that Indian title "was extinguishable only by the United States."[31]

Extinguishing Treaty-Recognized Title or Reserved Rights

As with aboriginal title and rights, several methods of extinguishment of treaty-recognized title or reserved rights can be effective. For example, treaty-reserved title can be extinguished by acts such as cession agreements or treaties of cession, and by compensation. Nevertheless, any attempt to extinguish treaty-recognized title or reserved rights must be clearly and expressly intended by Congress.

In *Menominee Tribe v. United States*,[32] the Supreme Court held that the Menominee Indian Termination Act, severing the federal relationship with the tribe, had not extinguished the tribe's hunting and fishing rights on ceded lands. The Court found it "difficult to believe that Congress, *without explicit statement*, would subject the United States to a claim for compensation by destroying property rights conferred by treaty."[33]

29. 414 U.S. 661 (1974).

30. *Id.* at 667.

31. *Id.* The relationship between the United States and Indian tribes has been defined as a relationship of two sovereigns, between which no other can interfere. In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court held that states were preempted from taking actions that affected the U.S./tribal relationships. In *Worcester*, the state of Georgia was barred from extinguishing the property rights and rights of self-government of the Cherokee Tribe. The Court made clear that the relationship between Indians and the U.S. was predominant and ruled that any attempt at extinguishing that relationship could only be valid if done by the United States. *Id.* In deciding County of Oneida v. Oneida Indian Nation (Oneida II), 470 U.S. 226 (1985), the Supreme Court reaffirmed its position that explicit congressional expression was required for extinguishment of aboriginal land rights. In discussing the claims of the Oneidas to land wrongfully held by the state of New York, the Court held that there was no explicit extinguishment of the tribe's rights in Congress' passage of the nonintercourse acts. Further, since the tribes' assertions lie in the federal common law, no federal statute of limitations could bar the claims resulting in an extinguishment through the passage of time. *Id.* at 236-40.

32. 391 U.S. 404 (1968).

33. *Id.* at 413 (emphasis added). *See also* Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979), where the Supreme Court states

The federal district court in *United States v. Felter* ruled on the hunting and fishing rights of mixed-blood Utes with whom the federal relationship had been terminated.[34] Claims in the alternative were raised by the Utes: either their rights were reserved and had not been lost by termination, or they were unextinguished aboriginal rights. In concluding that the rights survived termination and had been preserved statutorily, the Court analyzed the issues of extinguishing both reserved and aboriginal rights. It noted that the source of the rights was not material and that "[t]he standards for determining whether Congress has abrogated Indian property rights are no less stringent as to rights recognized in legislation than they are as to aboriginal rights."[35] The Court clearly ruled that the same mode of extinguishment of either kind of rights can be accomplished only by acts initiated and recognized by the United States Congress.

Use Rights as Independent from Title to Land

Durability of Treaty-Reserved Rights Separate from Title

Treaty-reserved rights include hunting, fishing, gathering, ricing, access to water, and any other attributes of the Indian aboriginal way of life, whether expressly mentioned in a treaty or not.[36] Treaty-reserved rights are severable from ownership of the land; they can be exercised independent of title or occupancy of the land. In some instances treaty-reserved rights continue to exist after termination of an Indian reservation and, in some cases, survive termination of the federally recognized status of a tribe.

In *United States v. Winans*,[37] the Supreme Court interpreted off-reservation treaty rights reserved by the Yakima Indians. The

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that "[a]bsent explicit statutory language, we have been extremely reluctant to find Congressional abrogation of treaty rights." In Lac Courte Oreilles Band v. Voight, 700 F.2d 341 (7th Cir. 1983), the court of appeals recognized and applied Supreme Court declarations that "made clear that abrogation of treaty recognized title requires an explicit statement by Congress." *Id.* at 352.

34. 546 F. Supp. 1002 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985). The court of appeals, in affirming *Felter*, refused to impute congressional intent to abrogate the mixed-blood Utes' right to hunt and fish. Some clear expression to do so must be evident.

35. 546 F. Supp. at 1011.

36. *See generally, Menominee Tribe*, 391 U.S. 404 (1968), which held that use and occupancy of the land was to be in a manner consistent with custom; held as Indian lands are held.

37. 198 U.S. 371 (1905).

tribe had ceded its lands and removed itself to a smaller area by a treaty of cession that reserved to them the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory."[38] The Court found that this language provided for exercise of the tribe's fishing rights independent of aboriginal title or occupancy rights in the land. It held that the "Indians were given a right in the land—the right to occupy it to the extent and for the purpose mentioned."[39]

The court of appeals in *Lower Brule Sioux Tribe v. South Dakota* found that hunting and fishing rights existed separate from the land.[40] The tribe was exercising hunting and fishing rights on new shorelines created by the inundation of aboriginal lands by a dam. The court held that the rights existed despite the loss of occupancy in the land.

Several additional cases have found use rights exist independent of title to land. In *Kimball v. Callahan*,[41] the court of appeals was faced with a situation similar to *Menominee Tribe*, in which treaty rights were asserted after termination of the federal-tribal relationship.[42] Here, however, the court found that the Klamath Termination Act expressly preserved hunting and fishing rights after occupancy in aboriginal land had ceased. In *United States v. Felter*, compensation for lands was held not to be an extinguishment of hunting and fishing rights. An extinguishment of use rights would have to be clearly expressed by Congress.[43] Finally, in *Lac Courte Oreilles Band v. Voight*,[44] a treaty ceding aboriginal lands and providing for removal of the tribe did not extinguish hunting and fishing rights on the ceded lands. The court of appeals held that treaty-reserved rights did not require title to the land.[45]

Durability of Aboriginal Rights Separate from Title

Unlike treaty-reserved rights, the issue of severance of

38. *Id.* at 378.
39. *Id.* at 381.
40. 711 F.2d 809 (8th Cir. 1983).
41. 493 F.2d 564 (9th Cir. 1974).
42. *Menominee Tribe*, 391 U.S. 404 (1968).
43. *Felter*, 546 F. Supp. 1002 (D. Utah 1982).
44. 700 F.2d 341 (7th Cir. 1983). Here, the court of appeals was asked to determine the effect of treaties of cession and removal efforts on the band's right to continue subsistence activities on the ceded land. The court found that the right to use the ceded land was reserved both explicitly and impliedly in treaty language. The court held that the use rights continued in force until Congress expressly extinguished them. *Id.* at 353.
45. *Id.* at 352.

aboriginal rights from title is less frequently addressed and has been examined only in the context of state court proceedings. Analysis of the durability of aboriginal rights separate from title has generally followed, with some modification, the rationale applied to determine the durability of treaty-reserved rights. While a clear expression of congressional intent is required to extinguish aboriginal title, treaty-recognized title, and treaty-reserved rights, there is a curious departure in relation to aboriginal rights.

In *State v. Quigley*,[46] a Chinook Indian asserted an aboriginal right to hunt on his own land purchased in fee from a non-Indian. The land was located within the aboriginal territory of his tribe, and the tribe, having no treaty with the United States, had not ceded any land voluntarily. The hunter claimed that because there had been no treaty, aboriginal rights still existed. The Washington Supreme Court held that extinguishment had occurred and that "[t]he fact that the appellant's predecessor in interest in the land in question was non-Indian, is evidence that aboriginal Indian rights in regard to such land had been extinguished before he acquired it."[47] Calling the situation a "novel theory presented as a case of first instance,"[48] the court applied traditional property law concepts, foregoing any attempt to apply treaty rights analysis, a clear parallel to the situation at hand, to reach its determination. By failing to employ legal concepts applied to analyze the extent of treaty rights, the court avoided the question of severing aboriginal rights from land. Relying on *Johnson v. McIntosh*, the court called aboriginal title a "right of occupancy only"[49] and found any use rights extinguished by virtue of the fact that the property had been acquired from a non-Indian.[50] This rationale ignores the fact that *McIntosh* addressed the issue of the title to land rather than rights to use land.

In *State v. Keezer*,[51] the Chippewa Indians asserted aboriginal rights to fish and gather rice on unceded land within the aboriginal territory of several tribes who were signatories to a treaty that recognized their right to use and occupy land in the Northwest Territory, an area without definite boundaries. The Chippewas asserted that the treaty raised their aboriginal rights

46. 52 Wash. 2d 234, 324 P.2d 827 (1958).
47. *Id.*, 324 P.2d at 829.
48. *Id.*, 324 P.2d at 828.
49. *Id.*, 324 P.2d at 829.
50. *Id.*
51. 292 N.W.2d 714 (Minn. 1980).

into treaty rights. The Minnesota Supreme Court ruled otherwise, saying that the treaty merely acknowledged a right of occupancy and that upon relinquishment of land to the United States all use rights were extinguished. Because of the difficulty of labeling the rights in question as either aboriginal rights or treaty rights, the court posed its decision in the alternative. If the rights were aboriginal rights, extinguishment of aboriginal title resulted in extinguishment of any use rights.[52] The court reasoned that if the rights were treaty rights, lack of an express reservation of them in the treaty of cession resulted in their loss.[53] Finally, if any of these means of extinguishment were inadequate, the court found that an executive order revoking all rights to the land effectively resulted in extinguishment.[54] By virtue of the court's failure to decisively label the rights at issue as aboriginal or treaty-reserved, it is difficult to assess the impact of *Keezer*. No analysis of loss of aboriginal rights as an incident of loss of title was offered. The majority of the opinion is devoted to extinguishment of those rights through clearly expressed congressional actions.

In *In re Wilson*,[55] the California Supreme Court issued an opinion that demonstrates a decided disregard for well-founded principles of Indian law and an extraordinary ability to selectively, and erroneously, interpret long-standing judicial opinion. The court sets the mood by beginning its opinion with a rhetorical question:

> May an exception to the law, which otherwise applies equally to every Californian, be carved out for a special class of individuals so that a person may violate, with impunity, a criminal statute which prohibits hunting out of season on public or private land simply because he belongs to an Indian tribe which once occupied the land.[56]

No one can doubt that the answer was in the negative. A Pit

52. *Id.* at 721. For this interpretation, the court relies on United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom.* Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905. In *Red Lake Band*, the Court ruled that aboriginal rights are "mere incidents of Indian title, not rights separate from Indian title, and consequently if Indian title is extinguished so also would these aboriginal rights be extinguished." *Id.* at 1385. See also text accompanying note 60 *infra*.

53. *Keezer*, 292 N.W.2d at 720-21.

54. *Id.*

55. 30 Cal. 3d 21, 634 P.2d 363, 177 Cal. Rptr. 336 (1983).

56. *Id.*, 634 P.2d at 364, 177 Cal. Rtpr. at 337.

River Indian was asserting aboriginal hunting rights on aboriginal lands. Earlier, in *United States v. Gemmill*,[57] the court of appeals found that the Pit River Tribe's aboriginal title had been extinguished by actions of the federal government. In reliance on that finding, the California court concluded that all aboriginal hunting and fishing rights had also been extinguished. The court based its finding on state court opinions that only indirectly address the issue[58] and federal opinions dealing with treaty rights.[59] Despite its reliance on treaty rights cases, the court ignored the legal severance of rights from title in treaty cases.

Red Lake Band of Chippewa Indians v. Minnesota is the only federal case that discusses the issue of the aboriginal rights as severable from aboriginal title.[60] *Red Lake Band* is, however, an adjudication of treaty-reserved rights. The Red Lake Band had agreed to cede lands by treaty but was orally promised the right to hunt, fish, and trap on the ceded land. The court of appeals strictly interpreted the language of the treaty in which the band agreed to relinquish and convey to the United States "'all our right, title and interest in and to' all ceded land," to find that there were no retained rights.[61] In discussing aboriginal rights, the court said that use rights were "mere incidents of Indian title, . . . and consequently if Indian title is extinguished so also would these aboriginal rights be extinguished."[62]

Recent Assertions of Aboriginal Rights

No case directly addressing the issue has held that aboriginal rights are extinguished solely because there is a loss of aboriginal title. Extinguishment has been demonstrated in other ways, such as by treaty or Indian Claims Commission compensation.

In *State v. Coffee*,[63] an Idaho Kootenai Indian asserted her

57. 535 F.2d 1145 (9th Cir. 1976).

58. *Wilson*, 634 P.2d at 368-69. The court cites State v. Keezer, 292 N.W.2d 714 (Minn. 1980) and State v. Coffee, 97 Idaho 905, 556 P.2d 1185 (1976). These cases, as with the other state court opinions, scarcely address the issue of severance of rights from title.

59. *Wilson*, 634 P.2d at 368-70. The court relies heavily on *Menominee Tribe*, 391 U.S. 404 (1968). For example, the *Wilson* court cites *Menominee* as evidence for its argument against severance of rights and title when *Menominee* discusses the scope of rights available to the tribe in pursuit of its livelihood outside of title to land.

60. 614 F.2d 1161.

61. 466 F. Supp. at 1384.

62. *Id.* at 1385.

63. 97 Idaho 905, 556 P.2d 1185 (1976).

aboriginal right to hunt free from state regulation on lands, then privately owned, within the tribe's aboriginal territory. The tribe had no treaty or reservation. The Idaho Supreme Court found extinguishment of both aboriginal title and rights by various means. A treaty had ceded the land in question to the United States. Although the Idaho Kootenai were not signatories to the treaty, the court found that inclusion of the land in the treaty signified the intent of Congress to extinguish Indian title.[64] A subsequent Indian Claims Commission ruling sealed extinguishment by compensating the Idaho Kootenai for loss of the land.[65] The issue of retention of aboriginal rights separate from title was addressed, and the court's analysis evidences that it considered aboriginal title and rights as severable interests. The court held that "aboriginal title includes the right to hunt and fish and *where those rights have not been passed* to the United States, by treaty or otherwise, *the rights continue to adhere to the current members of the tribe* which held them aboriginally."[66] However, the court found that the treaty had "expressed [an] intent to terminate the Indian title to the land . . . and equally expressed [an] intent to leave certain rights untouched."[67] The assertion of the aboriginal right to hunt was found to be extinguished because the right was no longer aboriginal but was treaty-reserved and had been exercised on private land not included in the meaning of "open and unclaimed."[68] Nevertheless, *Coffee* allows for the possibility of retaining aboriginal rights separate from title.

The Ninth Circuit Court of Appeals in *United States v. Gemmill* also addressed the question of aboriginal title.[69] The case consolidated two appeals from offenses arising on national forest land, the aboriginal territory of the Pit River Indian Tribe. Some members of the tribe appealed convictions for illegally cutting Christmas trees, and others appealed convictions for trespass, in an attempt to halt logging operations on sacred lands. Both appeals centered on the issue of whether the tribe still possessed aboriginal title to the land. The court examined the scope of aboriginal title and concluded that such title was a permissive right of occupancy and extinguishable by the United States upon

64. *Id.*, 556 P.2d at 1187.
65. *Id.*, 556 P.2d at 1188.
66. *Id.*, 556 P.2d at 1189 (emphasis added).
67. *Id.*, 556 P.2d at 1192.
68. *Id.*
69. 535 F.2d 1145 (9th Cir. 1976), *cert. denied*, 429 U.S. 982 (1976).

some clear expression of intent.[70] Loss of title was found in a series of events which, combined, evidenced congressional intent to extinguish. The opinion first cites the California Land Claims Act of 1851 as revoking rights to land if homestead claims had not been perfected by patent within a specified period of time.[71] Because some ambiguity in the intent to extinguish was noted, the court enumerated further actions resulting in loss of title. These actions included forcible and permanent removal, withdrawal of the land as a managed forest reserve and later as a national forest, and an Indian Claims Commission compensation to the tribe for the land.[72] The court failed to address directly the issue of retained-use rights. By leaving this question unanswered, it must be inferred that the tribe lost all its interests in the area by these enumerated acts.

In failing to identify the single act signifying congressional intent to extinguish aboriginal title, the court stated that "[a]ny one of these actions, examined in isolation, may not provide an unequivocal answer to the question of extinguishment."[73] The Land Claims Act and the withdrawal of the area for forestry purposes are not conclusive evidence of congressional intent to terminate Indian occupancy.[74] The Court of Claims settlement and military removal were the only acts that directly addressed the Indian occupants.

In *Wahkiakum Band of Chinook Indians v. Bateman*, the Wahkiakum argued that they retained aboriginal rights to fish at their usual and accustomed sites.[75] The Wahkiakum are signatories to an unratified treaty.[76] The band is able to exercise

70. 535 F.2d at 1147. The Court cites *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) and *Tee-Hit-Ton*, 348 U.S. 272 (1955), as authority for calling Indian title a permissive right of occupancy granted by the federal government to aboriginal possessors of the land. This premise contains a basic fallacy from the outset as aboriginal possession is not a grant from the federal government. *McIntosh* specifically recognized prior possessory rights in the original inhabitants and described that right as being as sacred as the fee of the whites. *Tee-Hit-Ton* stands not for the proposition that Indian title is merely possessory but that the possessory right is not subject to compensation for takings under the fifth amendment.

71. *Gemmill*, 535 F.2d at 1148, citing Act of Mar. 3, 1851, ch. 41, 9 Stat. 631.

72. *Id.* at 1148.

73. *Id.* at 1149.

74. *See* United States v. Dann, 706 F.2d 919 (9th Cir. 1983), *rev'd and remanded*, 470 U.S. 39 (1985), for a discussion of the various uses to which land may be put while retaining aboriginal title.

75. 655 F.2d 176 (9th Cir. 1981).

76. *Id.* at 180 n.11.

treaty rights by affiliation with treaty tribes. In disposing of the claim to aboriginal fishing rights, the court of appeals ruled that those rights had been extinguished by an act of Congress that provided payment to the Wahkiakum for all claims they had against the United States.[77] When the court considered if this payment pertained to rights other than title, its analysis of the act proved that Congress believed those rights had been extinguished by the unratified treaty.[78] The band had attempted reservation of some rights for which government compensation was urged but never forthcoming. In finding that the Wahkiakums' fishing rights had been extinguished by unratified congressional expression, the court went on to say that it did "not necessarily agree that there can be any aboriginal fishing rights in the context of a tribe which no longer holds title to any lands and is not a signatory to any ratified treaty."[79] This language can be interpreted to leave open the possibility that aboriginal rights can survive where they have not been expressly extinguished.

United States v. Dann (Dann II) arose out of trespass charges in which individual Western Shoshone Indians asserted grazing rights on lands within the tribe's aboriginal territory.[80] In *Dann I*,[81] the government contended that an Indian Claims Commission ruling and recommended settlement agreement constituted extinguishment of the tribe's aboriginal title. The Ninth Circuit Court of Appeals in *Dann II* ruled that the Commission proceeding and award were insufficient to extinguish aboriginal title on two grounds. First, the Commission did not have jurisdictional authority to extinguish aboriginal title because extinguishment could only occur by congressional action evidencing that intent.[82] Second, since final payment by the Commission had not been made to the tribe, and in fact was actively resisted by the tribe, extinguishment by acceptance of compensation cannot be inferred.[83] On review, the Supreme Court, never addressing the issue of extinguishment of aboriginal title, restricted itself to the

77. *Id.* at 180-81.

78. *Id.*

79. *Id.* at 180 n.12.

80. 706 F.2d 919 (9th Cir. 1983).

81. 572 F.2d 227 (9th Cir. 1978).

82. *Dann II*, 706 F.2d 919, 928 (9th Cir. 1983). The court ruled that the Indian Claims Commission has only the power to award compensation for claims of taking of aboriginal title or other action of the United States affecting Indian land or rights. The Commission does not have authority to extinguish Indian title.

83. *Id.*

narrow question of whether payment had been achieved by certification of the Commission award and subsequent appropriation by Congress. In reversing the court of appeals on that issue, the Supreme Court ruled that payment occurs "when funds are placed by the United States into an account in the Treasury of the United States for the Tribe."[84] The Court determined that Congress had delegated authority to the Commission to dispose of Indian claims to payment for land and that such payment constituted a "full discharge of the United States of all claims and demands touching any other matters involved in the controversy."[85] In other words, the Commission was responsible for certifying payment of valid claims, and once payment was requested by a tribe and authorized by the Commission no further claims regarding the land would be heard. This approach assumed that tribes were requesting payment in lieu of title to land.

By its silence, the Supreme Court left intact the court of appeals' analysis of several actions raised in *Dann II* by the government as evidence of extinguishment: application of public land laws, including homestead laws, creation of an executive order reservation for the tribe, and management of the lands in question under the Taylor Grazing Act.[86] All of these claims failed for lack of express congressional intent to extinguish aboriginal title. In addition, the Danns claimed that only Congress exercises exclusive control over extinguishment of title and that executive action, such as creation of a reservation, is insufficient. The court of appeals responded: "We agree that executive action wholly unauthorized by Congress could not effect an extinguishment."[87] The court further held that "Congress must make clear its intent to permit extinguishment as a result of any given piece of legislation."[88] The government's claim that public lands acts and homestead laws extinguished aboriginal title failed because the court of appeals did "not find . . . the clear expression of intent that would be required . . . to hold that the homestead laws alone extinguish aboriginal Indian title in every state and territory where they were generally applicable."[89] Establishment of a re-

84. *Dann II*, 470 U.S. at 44-45.

85. *Id.*, citing Indian Claims Comm'n Act, 25 U.S.C. § 22(a) (1976).

86. *Dann II*, 706 F.2d 919.

87. *Id.*, citing Cramer v. United States, 261 U.S. 219, 234 (1923).

88. *Dann II*, 706 F.2d at 929. The Supreme Court's action in the case reaffirms this proposition by finding that the legislation creating the Indian Claims Commission delegated the authority to resolve Indian claims with finality. *See* 470 U.S. at 45.

89. 706 F.2d at 929.

servation for the tribe also failed as an expression of intent to extinguish aboriginal title.[90] As a basis for its decision, the court of appeals relied on the rationale applied in *Santa Fe*.[91] There, as will be recalled, the tribe was considered to have abandoned its aboriginal territory by requesting removal to a reservation. Since the same circumstances did not exist in *Dann II*, the court of appeals found that establishment of the reservation alone had not resulted in extinguishment of aboriginal title.

The court of appeals disposed of the government's final contention, that the Taylor Grazing Act extinguished aboriginal title, by concluding that there was no congressional intent to extinguish title in the legislation.

The court of appeals in *Dann II* addressed the prior opinion in *United States v. Gemmill*,[92] which held, in relevant part, that establishment of a national forest was evidence of intent to extinguish aboriginal title. It clarified its ruling in *Gemmill* saying that forcible military removal and the acceptance of the final payment of the Commission settlement were deciding factors in finding extinguishment, and that inclusion in a national forest could not alone extinguish aboriginal title.[93]

The *Dann II* opinion is helpful in identifying means that are successful or unsuccessful in extinguishing aboriginal title. It also reaffirms the principle that extinguishment can only be effective if Congress expressly approves it. Despite reversal by the Supreme Court on the issue of effective payment, the opinion retains alternatives for asserting aboriginal title and rights. The Supreme Court expressly declined ruling on the issue of whether the Danns retained individual aboriginal title, recognizing that the issue had not been addressed by the lower courts and should first be discussed there.[94] Neither the court of appeals nor the Supreme Court discuss whether aboriginal rights can exist separately from title, however, leaving the question unanswered.

Recently, in *United States v. Pend Oreille County Public Utilities District No. 1*,[95] survivorship of aboriginal title was fur-

90. *Id.* at 931.

91. *Santa Fe*, 314 U.S. at 353-54. The Supreme Court held that it could "find no indication that Congress by creating a reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for its Indian wards," cited in *Dann II*, 706 F.2d at 931.

92. 706 F.2d at 932, citing *Gemmill*, 535 F.2d 1145 (9th Cir. 1976).

93. 706 F.2d at 932.

94. 470 U.S. at 50.

95. 585 F. Supp. 606 (E.D. Wash. 1984). Proceedings in this matter are pending:

ther strengthened by ruling that the equal footing doctrine did not extinguish aboriginal title to the Pend Oreille River bed and banks. Asserting that the equal footing doctrine vested title to stream beds and banks in the state, the Public Utilities District and state of Washington sought summary judgment against the Kalispel Indian Tribe, which claimed aboriginal title to the Pend Oreille River bed and banks. The court ruled that the Kalispel Indian Tribe could retain aboriginal title to that portion of the river because under the equal footing doctrine, "States obtained only that title which the United States actually held before Statehood, and in the case of Indian lands that was the bare fee."[96] The Court concluded that the United States would not have absolute title for the purpose of conveyance until aboriginal title was extinguished. In ruling that "[o]nly Congress has authority to extinguish aboriginal title,"[97] the Court found that creation of an executive order reservation unauthorized by Congress and an Indian Claims Commission settlement were ineffective means of extinguishment of aboriginal title.[98] The issue of severable use rights was never addressed.

Conclusion

Aboriginal title has been recognized by the federal government and the judiciary as a significant and legally enforceable occupancy right. The right of occupancy includes the right to use the land and carry on a way of life in its traditional manner. The question of whether aboriginal rights can exist independent of aboriginal title, however, is one that remains unanswered. Although several cases have struggled with survival of aboriginal title, few have dealt with severance of aboriginal rights from title. Some state court cases have ruled that loss of aboriginal title extinguishes any use rights; however, these courts supported their findings by showing extinguishment on other, more express, grounds. In addition, these opinions fail to recognize the parallel that can easily be made between aboriginal and treaty rights.

Treaty-reserved rights find their origin in aboriginal rights and

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motion for summary judgment was denied. The tribe is asserting aboriginal title claims to the bed and banks of the Pend Oreille River, setting forth proof of aboriginal occupancy and use. Telephone interview with Robert D. Dellwo, Attorney for the Kalispel Tribe (Jan. 23, 1985).

96. *Id.* at 609.

97. *Id.* at 610.

98. *Id.*

can be extinguished only by express congressional action. The same standard applies to aboriginal title and rights. The primary difference in extinguishment of these two types of rights is made clear by the Court in *Tee-Hit-Ton*. Treaty-reserved rights are compensable upon extinguishment whereas aboriginal rights are not. Whether a right is compensable and whether a right has been extinguished are separate and distinct questions. A right can be extinguished by compensation, but the fact that a right is non-compensable does not automatically mean it is nonexistent. The veracity of this argument is illustrated in the 1983 ruling in *Dann II*, which found aboriginal title continued in lands that had been the object of homestead laws, public land laws, and management under the Taylor Grazing Act. The deciding factor of whether a right, either aboriginal or treaty-reserved, can be extinguished is a clear and express congressional intent to do so.

Another parallel that can be drawn between aboriginal and treaty-reserved rights is that treaty-reserved rights can exist after occupancy of the land is extinguished. The original purpose behind recognition of use rights was one of practical necessity. The Indians had to be able to exercise customary usage in order to survive. At the same time, there was recognition of preservation of the Indian way of life. A way of life is a cultural, rather than a property concept, and therefore does not cease when title to land ceases.

Although recent decisions directly addressing the issue of aboriginal title have not favorably addressed survival of such rights, they are distinguishable and do not foreclose the possibility of asserting aboriginal rights separate from title. Some cases also contain encouraging language. The United States Court of Appeals in *Wahkiakum Band* does not totally bar the possibility of aboriginal rights existing in nontreaty tribes possessing no title to land. The *United States v. Felter* ruling declares that extinguishment of aboriginal or treaty-reserved rights must follow the same requirements regardless of their origin. Additionally, the Idaho Supreme Court in *Coffee* stated that where aboriginal rights have not passed to the United States by some express means, they continue to exist.

Finally, the more recent Supreme Court ruling in *Dann II* enunciates that participation in an Indian Claims Commission settlement resulting in certification and appropriation of payment forecloses the possibility of asserting aboriginal title and rights to the land at issue. The Supreme Court's silence on all but the issue of payment preserves the opportunity of asserting aboriginal

rights despite a history of land-use policies that could have proved mutually exclusive to retention of such rights. Instead, the *Dann II* opinion reaffirms that express congressional intent to extinguish aboriginal title and rights is required.