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That So-Called Warranty Deed: Clouded Land Titles on the White Earth Indian Reservation in Minnesota

Edward Michael Peterson Jr.

THAT SO-CALLED WARRANTY DEED: CLOUDED LAND TITLES ON THE WHITE EARTH INDIAN RESERVATION IN MINNESOTA

EDWARD MICHAEL PETERSON, JR.*

I. INTRODUCTION

During an investigation of allotted[1] land on the White Earth Indian Reservation under 28 U.S.C. § 2415,[2] Minnesota Chippewa Tribe researchers found many clouded titles on trust land that were caused by defective and illegal transfers. The clouded titles stem from an erroneously held impression by certain courts and administrators that the Clapp Amendment of 1906[3]

*B.A., University of North Dakota, 1976; J.D., University of North Dakota, 1979; member of the Minnesota and North Dakota Bars; former land claims researcher for the Minnesota Chippewa Tribe.

1. *See* 18 U.S.C.A. § 1151(c) (West 1966). "The term 'Indian allotment' has a reasonably precise meaning, referring to land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 40 (1982).

2. 28 U.S.C.A. § 2415 (West 1978 & Supp. 1982). At the time of the investigation the statute provided that claims for money damages or trespass that accrued prior to July 18, 1966, are barred if not filed before December 31, 1982. *Id* § 2415(a), (b). The claims must be brought for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status. *Id.* Title claims, however, are not barred by the statute.

3. Act of June 21, 1906, ch. 3504, 34 Stat. 325, 353, *amended by* Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1034. The Act, as amended, is also known as the Clapp Amendment, Clapp Rider of 1906, or Clapp Act. It was a rider to the 1906 Indian Appropriation Act. After a small change in the wording in 1907 it provided:

> That all restrictions as to the sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, heretofore or hereafter held by an adult mixed blood Indian, are hereby removed, and the trust deeds heretofore or

automatically converted trust patents[4] issued to adult mixed blood White Earth Indians into fee patents. Other clouded titles result from more self-evident illegalities such as conveyances by minors or full blood Indians during the heyday of land speculation on White Earth following the passage of the Clapp Amendment. The allotment process of the late 1880s also produced errors affecting title and was the impetus for the eventual loss of the White Earth land base to real estate and timber interests.[5] The researchers examined thousands of allotment files and uncovered more than nine hundred claims involving approximately ninety thousand acres.[6]

This Article first looks at the general legal history of the White Earth Indian Reservation, from the treaties to the allotment acts to the laws allowing sale of the allotments. Next the Article discusses a few of the more complicated but major categories of claims, especially the illegal tax forfeitures and the county court administered probate sales, for which there was lack of jurisdiction. Although the Government will not pursue claims on the basis of a discrepancy in the 1920 Blood Roll,[7] these discrepancies are of increasing concern and will be briefly discussed. Land controversies involving the four townships on White Earth, allegedly ceded to the Government, and questions arising from the condemnation proceedings for the Tamarac National Wildlife Refuge are also important, but in the interest of keeping the scope of this Article to defective titles on individually allotted tracts, will not be discussed.

> hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to the full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application.

Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1034.

4. A trust patent is a patent issued on land. One court explained a trust patent as follows:

> The law required that it declare, and that its legal effect be, that the land be held "in trust for the sole use and benefit of" the Indian to whom such allotment shall have been made, or his heirs for 25 years with no power in the allottee to convey or to contract "touching the same" during that period . . . .

Morrow v. United States, 243 F. 854, 855 (8th Cir. 1917).

5. For a discussion of the destruction of the White Earth Indian Reservation land base, which had the "appearance of a . . . premeditated scheme," see 4 W. FOLWELL, HISTORY OF MINNESOTA 262 (1969).

6. For a brief history of the project, see Pilcher, *Stangeland Introduces Bill to Settle Indian Land Claims,* Minnesota Daily, May 13, 1982, at 10, col. 1.

7. *See* Act of June 30, 1913, ch. 4, § 9, 38 Stat. 77, 88-89, *amended by* Act of March 2, 1917, ch. 146, § 9, 39 Stat. 969, 979. The Act provided that a two member commission should make a roll of the allottees on the White Earth Reservation. The roll "shall show the allotment number or numbers, together with the description of the property allotted, and the name, age, sex, and whether the allottee is of full Indian blood or mixed blood." 39 Stat. at 979.

Identifying and pursuing these land claims is important to the economic and cultural future of the White Earth Band because a partial recovery of the land base would allow more dispersed members to return to the reservation.[8] Indians linked land to survival long before alien concepts of title were imposed upon them.[9] Resolution of the claims is also important to other parties: counties that hold invalid tax titles, private parties who hold unmarketable land titles, and the federal government that must fulfill its trust obligations.[10]

II. LEGAL ESTABLISHMENT OF THE WHITE EARTH INDIAN RESERVATION

A report from a special agent of the United States Government to the Honorable Mr. Taylor, Commissioner of Indian Affairs, dated September 23, 1867, in St. Paul, Minnesota, indicates that in accordance with instructions received from the Acting Commissioner of Indian Affairs, a delegation proceeded to a certain country pursuant to the Treaty of 1867 and examined that country thoroughly.[11] They noted the presence of marshes, small lakes, willow, poplar, pine, and sugar maple groves. The delegation consulted and then designated the boundaries of the White Earth Indian Reservation, destined to become the site of the most infamous land grabbing operations by white men from the Chippewa in Minnesota.[12]

The Treaty of March 19, 1867,[13] established the approximately 800,000 acre reservation.[14] Articles II and VI of the

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8. Vernon Bellecourt, Secretary-Treasurer of the White Earth Reservation Business Committee at the time of a November 1980 land claims meeting with Government lawyers in Minneapolis, noted that there are approximately 4000 members living on the Reservation and 16,000 dispersed members.

9. *See* Lindley, *Why Indians Need Land,* 1957 THE CHRISTIAN CENTURY 1316.

10. *See* Morrow v. United States, 243 F. 854, 859 (8th Cir. 1917) (noting the federal government's trust responsibility "to preserve the land, so that at the end of the trust period it can be passed to the beneficiary 'free of all charge or incumbrance' ").

11. This document can be found in the National Archives, Record Group 75. The delegation designated the Reservation as follows:

> Commencing at the South East corner of Town[ship] (141) one hundred and forty-one Range (37) thirty-seven; thence running North (36) thirty-six miles, thence West (36) thirty-six miles; thence South (36) miles, thence East (36) thirty-six miles to the place of beginning, making a tract (36) thirty-six miles square, containing (36) thirty-six townships. Said reservation is well adapted to the Indians on account of its excellent soil — its abundance of game and fish, rice, sugar maple, water and wood.

Id.

12. *See generally* 4 W. FOLWELL, *supra* note 5, at 261-83.

13. Treaty with the Chippewa Indians, March 19, 1867, United States — Chippewa Indians, 16 Stat. 719.

14. *Id.* The Treaty indicates that the "reservation shall include White Earth Lake and Rice Lake, and contain thirty-six townships of land." *Id.* art. II.

Treaty set apart land for the use of the Chippewas of the Mississippi.[15] The Treaty's purpose was to create a suitable farming region for the Indians.[16] It was also a supposed inducement for the removal and consolidation of the Chippewas of the Mississippi who had been living on six smaller reservations set aside in the Treaty of 1855.[17] By the Treaty of 1864 the Mississippi bands ceded those reservations and moved to a larger reservation, the Leech Lake Reservation.[18] Years later the agricultural land and rich forests fostered hungry land sharks yearning after profitable resources.[19]

III. DESIGN FOR ALLOTMENTS

The assimilationist intent of the General Allotment Act of 1887[20] resulted in the loss of ninety million acres of the American Indian land base. The Act made allotments in severalty as follows: one-fourth of a section to each head of a family, one-eighth of a section to each single person over eighteen years of age, one-eighth of a section to each orphan child under eighteen years of age, and one-sixteenth of a section to each single person under eighteen then living or who might be born prior to the President's order directing allotments.[21] The Act was amended on February 28, 1891, to change each Indian's allotment to one-eighth of a section of land.[22]

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15. *Id.* arts. II, VI.

16. *Id.* art II. As partial payment for the land the Indians ceded to the United States, the Indians received "[f]ive thousand dollars to be expended, with the advice of the chiefs, in the purchase of cattle, horses, and farming utensils, and in making such improvements as are necessary for opening farms upon said reservation." *Id.* art. III.

17. Treaty with the Chippewas, February 22, 1855, United States — Chippewa Indians, 10 Stat. 1165. The reservations are described in article II. *Id.* art. II.

18. Treaty with the Chippewa Indians, March 11, 1863, United States — Chippewa Indians, 12 Stat. 1249. The larger reservation created by this Treaty was reduced in size by the 1867 Treaty. 16 Stat. 719, art. I.

19. *See generally* H.R. EXEC. DOC. No. 247-2747, 51st Cong., 1st Sess. (1889). Executive document number 247-2747 is a report of the commissioners of the United States Chippewa Commission, dated December 26, 1889, chaired by Henry M. Rice. It is known as the "Rice Report." 4 W. FOLWELL, *supra* note 5, at 272 n.35.

20. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (amended 1891). Section 5 of the General Allotment Act provides:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefore in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period.

Id. § 5, at 389.

21. *Id.* § 1.

22. Act of February 28, 1891, ch. 383, 26 Stat. 794.

The purposes of the General Allotment Act were effectuated in Minnesota by enactment of the Nelson Act on January 14, 1889.[23] The Nelson Act created a commission to negotiate with the different bands for the cession of all lands except the White Earth and Red Lake reservations.[24] A permanent interest bearing fund was established for the proceeds from the sale of land not needed for the allotments.[25]

Allotment of land on White Earth eased the way for white ownership; only about six percent of the original acreage remains in Indian control.[26] The Nelson Act directed the Secretary of the Interior to divide the thirty-six townships of land reserved by the Treaty of 1867 and to provide a parcel to each living Indian.[27] Surplus land was sold, with the proceeds credited for the benefit of the Chippewa.[28]

IV. ALLOTMENT PROCESS

After the passage of the Nelson Act individuals or their representatives began to select allotments. Dated applications for selections under the Act were filed in Washington, D.C., and schedules were submitted for the approval of allotments in groups. Claims by the State of Minnesota in certain swamp lands made in lieu allotments necessary in some cases.[29]

23. Nelson Act, ch. 24, 25 Stat. 642 (1889). The Act, entitled "[a]n act for the relief and civilization of the Chippewa Indians in the State of Minnesota," established a commission to negotiate with the tribes for the relinquishment of the reservations in Minnesota. *Id.* § 1, at 642.

24. Allotments were never made on the Red Lake Reservation due to opposition to ownership in severalty. Also, making allotments would have been impractical because much of the land was valuable timber and much of it was swamp. In Chippewa Indians v. United States, 301 U.S. 358 (1937), the United States Supreme Court upheld the determination of the Court of Claims that the Red Lake Band possessed the unceded portion of their reservation independent of all other bands of the Chippewa Indians in Minnesota. The Court also held that the Band held title to a tract of 266,152 acres ceded from the reservation in an agreement embodied in the Act of February 20, 1904. *Id.* at 370.

Mr. Justice Van DeVanter wrote, "No allotments in severalty have as yet been made on this diminished reservation, because the Red Lake Indians have thus far opposed the present making of such allotments and the administrative officers have not as yet considered it practicable to make them." *Id.* at 368.

25. Nelson Act, ch. 24, § 7, 25 Stat. 642, 645 (1889). The Treasury Department was to pay a portion of the interest directly to the Indians over a number of years and fund Indian schools with the remainder. *Id.*

26. "Only 6.7% of the original reservation is now tax-exempt Indian land or United States Government Farm Security Administration (FSA) or resettlement land." U.S. DEPARTMENT OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS AND TRUST AREAS 261 (1974). The land purchased for the Indians' benefit under the Farm Security Administration program is termed "marginal land" and title is held by the United States; however, the Reservation receives income from leasing. LEAGUE OF WOMEN VOTERS OF MINNESOTA, INDIANS IN MINNESOTA 31 (2d ed. 1971).

27. Nelson Act, ch. 24, § 3, 25 Stat. 642, 643 (1889).

28. *Id.* § 7, at 645. The Government was to distribute the money over a period of 50 years. *Id.*

29. *See* United States v. Minnesota, 270 U.S. 181 (1926). In *United States v. Minnesota* the Supreme Court held that the Treaty of March 19, 1867, did not divest the State of Minnesota of its right to lands passing under the Swamp Land Act of March 12, 1860. *Id.* at 214-15 (construing Swamp Land Act of March 12, 1860, ch. 84, 9 Stat. 519 (codified at 43 U.S.C.A. §§ 982-984 (1964))).

The Commissioner of Indian Affairs' 1915 annual report showed that the total number of allotments on the White Earth Indian Reservation to that date was 5,154. They were made as follows: 4,372 in 1901; 505 in 1907; 216 in 1909; 60 in 1913; and 1 in 1914.[30] The Steenerson Act of 1904[31] authorized the President to make additional allotments on White Earth; each Chippewa Indian legally residing thereon would be entitled to 160 acres of land.[32] Thus many allottees who received eighty acres under the Nelson Act later were allotted eighty more acres under the Steenerson Act. Eventually over 12,000 allotments were made. The allotted land on White Earth on February 15, 1934, comprised 673,250.66 acres.[33] The first trust patents issued in 1902.

A few allotments made to non-Indians are clearly invalid. *United States v. La Roque*[34] also held invalid allotments made to deceased Indians except when the applicant had selected an allotment, but died before it was approved, in which case there was an entitlement to the land.[35] The later practice was to issue such trust patents to the heirs of the allottee. Thus the date of the making of the allotment would be the date of the actual selection of a parcel of land.[36]

Another quiet but indicative step toward the disintegration of Indian ownership was made in 1902 when Congress passed a law that allowed the sale of inherited interests if approved by the Secretary of the Interior.[37] *United States v. Park Land Co.*[38] interpreted the 1902 law and held that sales of inherited interests

30. 2 OFFICE OF COMMISSIONER OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ANNUAL REPORTS OF THE DEPARTMENT OF THE INTERIOR 84 (1915).

31. Steenerson Act, ch. 1786, 33 Stat. 539 (1904). The Steenerson Act provided for additional allotments to those legally residing on the reservation. *Id.*

32. *Id.*

33. Minnesota Chippewa Tribe, § 2415 Land Claims Project Summary (n.d.) (Lenee D. Ross, Project Director).

34. 239 U.S. 62 (1915). *La Roque* was an action to cancel a so-called trust patent for a White Earth allotment on the ground it was made inadvertently and not in compliance with the Nelson Act. Vincent La Roque was born in 1883 on the White Earth Reservation. Had he lived he would have been entitled to take an allotment under the Nelson Act. He died in 1889 without an allotment being selected by or for him. However, an application in his name was presented to the allotting officers by La Roque's father and sole heir and a trust patent was issued. United States v. La Roque, 239 U.S. 62, 64 (1915).

35. *Id.* at 66-67. The issue in *La Roque* was "[w]hether the Nelson Act contemplated that allotments should be made on behalf of Indians otherwise entitled thereto but who should die without selecting or receiving them." *Id.* at 64. The Secretary of the Interior and the Eighth Circuit confined the right to select an allotment to living Indians and the Supreme Court agreed: "We think the terms of the general act contemplated only selections on the part of living Indians acting for themselves or through designated representatives." *Id.* at 66.

36. *See id.* at 66. Admittedly, *La Roque* does not contain any clear definition of the point in the allotment process that should be considered the date it was made.

37. Act of May 27, 1902, 32 Stat. 245 (codified at 25 U.S.C.A. § 379 (West 1963)). Section 379 provides in part: "The adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent." 25 U.S.C.A. § 379 (West 1963).

38. 188 F. 383 (D. Minn. 1911).

could not be made before the trust and other patents were issued.[39] The Court previously held that title by patent from the United States was record title and delivery of the trust patent was not essential.[40]

Another significant event in the allotment process was the passage of the Steenerson Act of April 28, 1904,[41] which authorized the President to allot to each Chippewa legally residing on White Earth 160 acres of land. It also removed the restriction on the Chippewa Commission that allowed only the allotment of agricultural lands, reserving the pine lands for the benefit of all the reservation Indians.[42] The Act applied not only to Indians who resided on White Earth, but also to those who might remove to the reservation under the Treaty of 1867.[43]

V. OPENING PANDORA'S BOX: THE CLAPP AMENDMENT AND THE TWO HATS OF COMPETENCY

The strong catalyst to the loss of the Indian land base on White Earth was the passage of the Clapp Amendment in 1906.[44] The law caused many years of administrative and judicial confusion and ultimately resulted in hundreds of defective land titles, many of which have now been searched and prepared as land claims.

Avid monitors, anxious to buy up vast amounts of Indian land, prepared deeds and mortgages to many tracts even before the passage of the Clapp Amendment.[45] They immediately schemed to obtain the allotment owners' signatures. Even when the land transactions were technically legal, often the price was unfair or unconscionable under modern concepts of contract law.[46] The

39. United States v. Park Land Co., 188 F. 383, 386-87 (D. Minn. 1911).

40. United States v.Schurz, 102 U.S. 378, 397 (1880). The Court held that title passed as a matter of record when the patent was issued, sealed, countersigned, and recorded in the General Land Office. *Id.*

41. Steenerson Act, ch. 1786, 33 Stat. 539 (1904).

42. *Id. See also* Fairbanks v. United States, 223 U.S. 215 (1911). In *Fairbanks* the issue was whether the Steenerson Act allowed the allotment of pine lands. *Id.* at 222. Section 4 of the Nelson Act provided for a survey of White Earth lands to ascertain pine lands. Ch. 24, § 4, 25 Stat. 642, 643 (1889). All other lands were termed agricultural lands. 25 Stat. at 644. Only agricultural lands could be allotted. 223 U.S. at 218-19.

After the Steenerson Act, each Chippewa legally residing on White Earth was to receive 160 acres of land. Allottees who had an allotment of less than 160 acres could take an additional allotment. *Id.* at 219. The *Fairbanks* Court found that although the Department first regarded only agricultural lands as allotable, the Steenerson Act modified and changed prior acts. In that Act Congress placed no qualifications on the type of land that could be allotted. *Id.* at 223-24.

43. Steenerson Act, ch. 1786, 33 Stat. 539 (1904).

44. For the text of the Clapp Amendment, see *supra* note 3. *See also* 4 W. FOLWELL, *supra* note 5, at 277-78.

45. 4 W. FOLWELL, *supra* note 5, at 277.

46. For cases that discuss unconscionability, see Scott v. United States, 79 U.S. (12 Wall.) 443, 445 (1870), and Seabrook v. Commuter Housing Co., 72 Misc. 2d 6, 338 N.Y.S.2d 67 (1972). *Scott* and *Seabrook* do not involve Indian law. Also, the Uniform Commercial Code's unconscionability concept was not formulated at the time of the early allotment transfers on White Earth. *See* U.C.C. §

Clapp Amendment removed all restrictions on the sale of land allotted to adult mixed bloods. Additionally, some courts and Government officials inferred from the amendment that the trust patents issued on such allotments vested a fee title in the allottee or his heirs.[47]

The Government brought suit to determine the meaning of the word "mixed blood" in the Clapp Amendment.[48] In *United States v. First National Bank*[49] the Court held that competency under the Clapp Amendment is based on a division of the White Earth Indians into two classes.[50] The class of "full bloods" has no admixture of foreign blood and is restricted from conveying trust land unless proven competent.[51] All others are classified as mixed bloods and hold unrestricted fee title regardless of competency.[52]

Although Congress purportedly recognized that mixed bloods were competent to sell their land, the Government still held them incompetent for other purposes and exercised control over their trust funds.[53] When the Clapp Amendment declared that trust patents "hereafter to be issued" would convey title in fee simple, instead of providing for issuance of fee simple patents directly to subsequent allottees, the intent must have been to avoid a grant of citizenship to incompetent wards.[54]

2-302 (1977) (unconscionable contract or contract clause). In proposing resolution of Indian land claims by a political settlement, however, Congress could look at the moral history of land transactions and consider their unconscionability. The *Seabrook* court found an unenforceable, unconscionable agreement, stating: "It is this Court's view that the Code's prohibition represents a crystallization of the law's view toward all such contracts, whether for the sale of goods or otherwise." 72 Misc. 2d at ____, 338 N.Y.S.2d at 70.

47. *See* Baker v. McCarthy, 145 Minn. 167, 176 N.W. 643 (1920). The *Baker* court considered whether a probate court had jurisdiction to determine the heirs of an adult mixed blood Indian. *Id.* at 168, 176 N.W. at 643. The court relied on a ruling by the Secretary of the Interior that the Interior Department had no jurisdiction to determine heirship. *Id.* at 168-69, 176 N.W. at 644. The court held that the Clapp Amendment converted the trust titles of mixed blood Indians to fee simple titles and remitted Indian allotment issues to the jurisdiction of the state courts. *Id.* at 170, 176 N.W. at 644. *But see* State v. Zay Zah, 259 N.W.2d 580, 588 (Minn. 1977) (trust patents not converted to fee patents), *cert. denied,* 436 U.S. 917 (1978).

48. United States v. First Nat'l Bank, 234 U.S. 245 (1914). In *First Nat'l Bank* the Court consolidated three cases in which the defendants claimed that adult mixed blood Indians could transfer title without Government supervision. *Id.* at 248.

49. 234 U.S. 245 (1914). In a letter to the Solicitor General by the attorney who wrote the *First Nat'l Bank* brief, the attorney commented, "I believe that we ought to win these cases and that we will do so if the court sees the real questions involved and appreciates the gross injustice that has been done the Indians." Letter from Attorney in charge of White Earth matters to Solicitor General, Washington, D.C. (March 11, 1914).

50. 234 U.S. at 258.

51. *Id.*

52. *Id.* The Government contended that "mixed-blood" meant those of half white or more than half white blood, while the appellees and the court of appeals insisted the term meant all those who had an identifiable mixture of white blood. Applying the general rule of construction that words are to be given their usual and ordinary meaning, the Court upheld the appellees construction. *Id.* at 262.

53. *See* F. COHEN, *supra* note 1, at 143 (noting restrictions on contracting). *See also* Bacher v. Patenacio, 232 F. Supp. 939 (S.D. Cal. 1964).

54. *See* F. COHEN, *supra* note 1, at 142. One commentator observes:

> The General Allotment Act of 1887 provided an important method for acquiring

The Indian office soon learned of scores of fraudulent transfers under the Clapp Amendment.[55] The office launched an investigation and appointed a special assistant to the Attorney General. Two investigating authorities, the Linnen and Moorehead enrollment investigation and the Hinton investigation on blood status, recommended bringing lawsuits.[56] The first federal lawsuits were filed in 1910.[57] Approximately 1600 cases eventually were brought in equity, either to recover land, for timber trespass, or to clear titles encumbered by mortgages or taxation.[58] Most of the suits were settled by 1918, but appeals continued for several years.[59] The lawsuits covered 142,000 acres of illegally purchased land.[60] Although the land involved was worth over $2,000,000 and the timber an additional $1,755,000, the lumber companies paid only a little over $70,000 in settlements.[61] The Government charged individuals, banking, and timber interests with a conspiracy to defraud the Government, but obtained no convictions.[62]

The Government's brief in *United States v. Waller*[63] argued that many of the mixed blood Indians were incompetent regarding land transactions and, therefore, were grossly defrauded by defendant Waller.[64] Many of the Indians could not read or write and did not

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citizenship. Citizenship was conferred upon two classes of Indians born within the limits of the United States: (1) those to whom allotments were made by law or treaty; and (2) those who voluntarily lived away from their tribes and adopted the habits of civilized life. Unlike many of the earlier statutes and treaties citizenship under the General Allotment Act did not alter the new citizen's tribal property interest. The Burke Act of 1906 amended the General Allotment Act, delaying citizenship until the trust period ended and a patent in fee was issued, rather than after the trust patent was issued.

Id. (footnotes omitted).

55. 4 W. FOLWELL, *supra* note 5, at 283.

56. 4 W. FOLWELL, *supra* note 5, at 284-85.

57. 4 W. FOLWELL, *supra* note 5, at 284.

58. 4 W. FOLWELL, *supra* note 5, at 294.

59. 4 W. FOLWELL, *supra* note 5, at 293.

60. 4 W. FOLWELL, *supra* note 5, at 284.

61. 4 W. FOLWELL, *supra* note 5, at 284-85, 295.

62. 4 W. FOLWELL, *supra* note 5, at 290. The criminal prosecutions were barred by the statute of limitations. *Id.* The Chippewa Tribe researchers' investigation found many cases of apparent impropriety involving full bloods. Affidavits of old Indian witnesses showed full bloods who signed by their thumb marks were able to sell land. Some land buyers obtained deeds to allotments from Indian children in school. Some would go to an elderly Indian woman's home at night, get her out of bed, tell her she had a small interest in a piece of very bad land, obtain her signature on a deed in which the grantee was not listed, then go back to the dealer's office where the grantee blank was later filled in and the signature "witnessed and acknowledged." The next day the allottee often learned she had sold her whole tract. "Arrangers" sometimes worked as interpreters in such deals, getting up to one dollar per acre for each deal put through. Other land fraud scenarios involved representing deeds as mortgages and telling an allottee that he or she was only "borrowing" a few dollars on the land. *See* United States v. Waller, 243 U.S. 452 (1917) (United States alleged that the defendant falsely and fraudulently induced Indians who could not read or write to affix their thumbprints to deeds). *See also* 4 W. FOLWELL, *supra* note 5, at 278 (land fraud scenarios).

63. 243 U.S. 452 (1917).

64. Brief for the United States at 27, United States v. Waller, 243 U.S. 452 (1917). The Government contended that the United States could sue for protection of its Indian wards in every

know the difference between a warranty deed and a simple receipt. Many relied on false explanations of documents they did not understand. Thus little more than a hundred dollars secured allotments worth several thousand dollars.[65] The Government argued that it had the capacity to sue for the allottees to redress the wrongs, but the Court disagreed.[66]

It is difficult to understand the widely held impression that the Clapp Amendment transformed trust patents, which on their face conveyed a restricted and conditional title, into fee patents. As the Minnesota Supreme Court pointed out in *Geray v. Mahnomen Land Co.*,[67] an imperfect title that can be perfected only by a judicial decree founded upon parol evidence of extrinsic facts is not clear title.[68] In *Geray* the defendant argued that he had deeds from mixed blood Indians on White Earth who had received trust patents and that he, therefore, held fee title by virtue of the Clapp Amendment. At the time of the transaction no judicial proceeding had established the character of the allottee's blood status.[69] The trial court, therefore, correctly excluded the proffered evidence that the conveyors were mixed bloods.[70]

As a general rule decrees were entered in favor of the United States in the equity cases involving full bloods. In other cases title was secured in the defendants upon payment of the difference between the real value of the land and the consideration paid the owner. The Government further helped make the purchasers' titles good by issuing fee patents, approving deeds, and then obtaining a decree dismissing the action. The Government's attorney became convinced that "settlements out of court were much to be desired."[71]

VI. CLAPP AMENDMENT AND HEIRS ON OTHER RESERVATIONS

Unallotted heirs of the White Earth allottees, such as members

justiciable case of wrong suffered by them. 243 U.S. at 455.

65. Brief for the United States at 27-28, *Waller*.

66. 243 U.S. at 464. The *Waller* Court concluded that the Clapp Act "evidences a legislative judgment that adult mixed blood Indians are . . . capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands." *Id.* at 462. Thus, the Court held that "the United States was without capacity to bring the action for the benefit of the Indians named." *Id.* at 464.

67. 143 Minn. 383, 173 N.W. 871 (1919).

68. Geray v.Mahnomen Land Co., 143 Minn. 383, 386, 173 N.W. 871, 872 (1919).

69. *Id.* at 385, 173 N.W. at 872. The transaction occurred prior to the approval of the Blood Roll of 1920.

70. *Id.* at 386, 173 N.W. at 872. The Minnesota Supreme Court noted, however, "If the Indians were in fact mixed bloods, the title was complete and free from fault." *Id.*

71. 4 W. FOLWELL, *supra* note 5, at 290.

of the Red Lake or other reservations, occasionally transferred White Earth land under the Clapp Amendment. Because they were not classified on the White Earth Blood Roll and because a legal determination of mixed blood status was necessary for alienation, it would be logical to assume that such attempted transfers were invalid. In *United States v. Knauf*,[72] however, the court held that a mixed blood heir from the Red Lake Reservation made a legal conveyance of a White Earth allotment.[73]

In *Knauf* Minnie C. Warren, a resident of the White Earth Reservation, received a trust patent seven years after she died. Josette Howe, an adult mixed blood member of the Red Lake Reservation, was Warren's sole heir. The court found that since the allotment came within the purview of the Clapp Amendment, Josette Howe acquired title in fee simple to the land and that she later legally conveyed that title.[74] Thereafter it was thought that an adult mixed blood Chippewa of any reservation could make a legal conveyance of any land or interest that he held on the White Earth Reservation.

VII. BLOOD ROLL OF 1920

Although a blood classification known as the Hinton Roll was made in 1910 for White Earth,[75] a commission appointed pursuant to the Act of June 30, 1913, prepared a new roll.[76] Judge Page Morris, Senior Judge of the United States District Court for the District of Minnesota, approved the roll and placed it on file with the Clerk of Court in Fergus Falls, Minnesota.[77]

Soon thereafter, the Minnesota federal district court commented on this blood roll: "Aside from the language of the statute, there are persuasive practical reasons why this formal document, prepared with great care, should be final."[78] The Hinton Roll, completed in December 1910, was made because of a Department of Justice investigation into frauds perpetrated upon full bloods on White Earth. The 1920 Blood Roll, known as the Powell Roll, differed from the 1910 roll. Many full bloods on the 1910 roll were reclassified as mixed bloods on the 1920 roll.

72. No. 219 Eq. (D. Minn. Dec. 28, 1927).
73. United States v. Knauf, No. 219 Eq., slip op. at 2 (D. Minn. Dec. 28, 1927).
74. *Id.*
75. *See* 4 W. FOLWELL, *supra* note 5, at 209-10.
76. Act of June 30, 1913, ch. 4, 38 Stat. 77, 88 (amended 1917).
77. 4 W. FOLWELL, *supra* note 5, at 293.
78. Bisek v. Bellanger, 5 F.2d 994, 995 (D. Minn. 1925). In *Bisek* the court concluded that the sole heir of an Indian classified as a mixed blood in the 1920 Roll could freely convey the allotted land. *Id.*

Although the 1920 roll only determined who could sell under the Clapp Amendment without supervision of the United States, the Department of the Interior is still bound by the federal court's approval of the roll. Correction of the discrepancies between the rolls will have to be pursued by tribal and individual efforts unless the Government changes its position.[79]

VIII. FORCED FEE PATENTS

On January 13, 1920, the Secretary of the Interior received a list of the adult White Earth mixed blood allottees shown on the roll approved by Judge Morris.[80] In 1920 the Government advised the supervisor in charge of the White Earth Agency that he could issue fee simple patents to all living adult mixed blood Indians.[81] These forced fee patents issued under the authority of an order from the Assistant Secretary of the Interior to the Commissioner of the General Land Office.[82] Apparently the plan for expediting the issuance of patents without requiring an application from the allottees was influenced at least in part by the high percentage of White Earth land that had been sold after the Clapp Amendment but before 1919.[83] Purchasers were unable to obtain loans from the Farm Loan Bank unless the Government issued a fee patent.

It is now clear that the unrequested fee patents did not and could not remove allotments from trust status.[84] Challenging the validity of a forced patent, however, would have affected previous decisions that took the validity of the patent for granted. For example, in *Smith v. Kurtzenacker*[85] the issue was whether the plaintiff could rescind a contract for the sale of certain real property because the allottee's mixed blood status had not been determined at the time of the contract.[86] The allotte, Nah-guan-way-we-dung, died a minor on December 31, 1900. His sole heir was his father, Jacob Smith, who was issued a fee patent on June 24, 1919. The trial court found that because the fee patent vested a "perfect and complete" title in defendant Jacob Smith by the time of performance, a fee simple title could be transferred upon payment

79. 4 W. FOLWELL, *supra* note 5, at 291.
80. *See* Act of June 30, 1913, ch. 4, 38 Stat. 77, 88.
81. Letter from the White Earth Agency supervisor to A.H. Macs, a Minneapolis attorney (Oct. 18, 1920) (Mr. Macs informed that the fee simple patents would issue).
82. Letter from E. B. Merritt, Assistant Commissioner, General Land Office, to the Secretary of the Interior (approved by the Secretary April 14, 1919).
83. 4 W. FOLWELL, *supra* note 5, at 277-83.
84. *E.g.*, Bacher v. Patencio, 232 F. Supp. 939, 944 (S.D. Cal. 1964) (fee patent could not be issued against will of Indian allottee), *aff'd per curiam*, 368 F.2d 1010 (9th Cir. 1966).
85. 147 Minn. 398, 180 N.W. 243 (1920).
86. Smith v. Kurtzenacker, 147 Minn. 398, 399, 180 N.W. 243, 243 (1920).

of the purchase price.[87] The court thus affirmed the judgment for the defendant.[88]

The Burke Act of 1906 authorized the issuance of forced fee patents on many allotments.[89] The Government issued these patents arbitrarily, without the consent of the individuals affected, to allottees of one-half or less Indian blood until the policy was halted by the Cancellation Acts.[90] Courts held such "policy" patents valid only when issued upon application of the allottee or with the consent of the allottee.[91] The legislative history of the Burke Act indicates that actual competency was the test to be applied when issuing fee patents.[92]

Courts differed when defining the consent of the allottee and have held that mortgaging or conveying after the issuance of a forced fee patent constitutes either consent[93] or only some evidence of consent.[94] One court determined there was no consent even though the allottee signed a receipt for a patent and negotiated two mineral leases.[95] While prior application most strongly evidences consent, prior denial evidences that the allottee was not competent, did not sign, or did not know he was signing an application. The United States Supreme Court has not yet considered a case concerning forced fee patents.

Solicitors for the Bureau of Indian Affairs maintain open files on many forced fee cases. The cases include trust allotments for which fee patents were issued without application or consent. In most cases of this nature, after the forced fee was issued title was

87. *Id.* at 401, 180 N.W. at 244.

88. *Id.* at 402, 180 N.W. at 244.

89. Ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C.A. § 349 (West 1963)). The Act provides in part:

> That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent . . . .

34 Stat. at 183.

90. *See* Act of Feb. 26, 1927, 44 Stat. 1247 (codified as amended at 25 U.S.C.A. § 352(a), (b) (West 1963)). The Act allows the cancellation of "any patent in fee simple issued to an Indian allottee or to his heirs . . . where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs." 44 Stat. 1247.

91. *See, e.g.*, United States v. Benewa County, Idaho, 290 F. 628 (9th Cir. 1923). The court in *Benewa County* distinguished *Schurz* and held that fee patents could issue only after application or consent. *Id.* at 630. The court also held that void fee patents do not pass title to the grantee. *Id.*

92. *See* 40 CONG. REC. 3599 (1906) (statement of Senator Burke).

93. *E.g.*, United States v. Glacier County, 74 F. Supp. 745, 748 (D. Mont. 1947) (conveyance of land constitutes evidence of consent).

94. *E.g.*, United States v. Frisbee, 165 F. Supp. 883, 891 (D. Mont. 1958) (conveyance of land constitutes some evidence of consent).

95. Caddo County v. United States, 87 F.2d 55, 57 (10th Cir. 1936). The court also stated, "Payment of taxes wrongfully assessed against land of an Indian which is immune . . . does not deny the right of the United States to maintain an action for the recovery of the amount." *Id.*

soon lost through tax forfeiture proceedings or involuntary alienation.

IX. PROBATES VOID FOR LACK OF JURISDICTION

In 1915 a Department of the Interior Solicitor was asked whether the Department had jurisdiction to determine the heirs of adult mixed blood White Earth allottees after the Clapp Amendment.[96] The Act of June 25, 1910,[97] provided that the Secretary of the Interior should ascertain legal heirs when an Indian died with an allotment in trust, but did not specifically address the White Earth issue.[98] The Solicitor assumed that title passed in fee by virtue of the Clapp Amendment and that the Secretary had no jurisdiction to determine the heirs of the adult mixed blood White Earth Indians.[99]

In 1978 the Department of the Interior reconsidered the Solicitor's opinion[100] in light of court decisions holding that the Clapp Amendment did not terminate the trust or create a fee simple title.[101] The 1915 Solicitor's opinion has been repealed; it is now evident that the United States continued to have jurisdiction to determine the descent of the allotted lands when no fee patent was properly issued.[102] Thus, it appears that many probates were void for lack of jurisdiction. Many problems may arise in determining the correct heirs of the original Indian allottees of trust lands.

Some of the early decisions in both federal and state courts also failed to recognize the proper jurisdiction for probate. In *United States v. Park Land Co.*[103] Judge Morris held that because the

96. Solicitor's Opinion No. D-29636, Department of the Interior, Office of the Solicitor (Aug. 2, 1915).

97. Ch. 431, 36 Stat. 855. The Act provides as follows:

> That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior . . . shall ascertain the legal heirs of such decedent. . . . If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold . . . .

Id. § 1.

98. *See id.* The Act refers to "any Indian." *Id.*

99. Solicitor's Opinion No. D-29636, *supra* note 96.

100. Memorandum from Field Solicitor, Twin Cities, Minnesota to Associate Solicitor, Indian Affairs, Washington, D.C. (Oct. 6, 1978).

101. Morrow v. United States, 243 F. 854, 858 (8th Cir. 1917) (Clapp Amendment did not alter trust status against Indian's will); State v. Zay Zah, 259 N.W.2d 580, 589 (Minn. 1977) (following *Morrow* rationale and holding), *cert. denied,* 436 U.S. 917 (1978).

102. Memorandum from the Office of the Solicitor, Department of the Interior to the Assistant Secretary, Indian Affairs (May 9, 1979).

103. 188 F. 383 (D. Minn. 1911).

General Allotment Act provided that the state or territory's law of descent and partition should apply to the allotment after patents were delivered, "the only way I know of that we can ascertain who his heirs are and what portion of the allotment those heirs are respectively entitled to would be by proceedings in the probate court."[104]

Similarly, another federal case[105] from the early part of the century reasoned that because the Act of May 8, 1906,[106] provided that all Indian allottees with patents in fee were subject "to the laws, both civil and criminal, of the State or Territory in which they may reside,"[107] this included the probate of their estates.[108] Like *Park Land,* the court erroneously believed that the Clapp Amendment bestowed on the mixed bloods "automatic" fee title: "These amendments gave adult mixed-blood Indians title in fee to their allotted lands, with power to sell and convey the same."[109]

Another Minnesota Supreme Court case dealt with the heirship of a minor Indian.[110] The court held that state probate courts had jurisdiction over probate matters,[111] however, the court relied on an attorney general's opinion, which stated that when title passed to an adult mixed blood Indian, all questions of title by inheritance were vested in the proper state courts.[112]

The older cases are no longer indicative of the law, but show how the mistaken interpretation compounded itself until more recent cases settled the question of responsibility for the probates. Thus, title clouds resulted when an allottee's estate was admitted to probate in a county court having no requisite jurisdiction. Often a county court appointed administrator authorized to sell land or an heir's undivided fractional interest in land illegally sold such land without the approval of the United States Government. Also invalid were the appointments of guardians of mixed blood minor heirs without the Government's approval.

X. TRUST PATENT EXTENSIONS

104. United States v. Park Land Co., 188 F. 383, 384 (D. Minn. 1911). The court therefore applied Minnesota law and determined that the estate was inheritable. *Id.* at 385.

105. Bisek v. Bellanger, 5 F.2d 994 (D. Minn. 1925) (Clapp Amendment allowed the sole heir of an adult mixed blood Indian to convey allotted land).

106. Act of May 8, 1906, ch. 2348, 34 Stat. 182.

107. *Id.*

108. 5 F.2d at 995.

109. *Id.*

110. Baker v. McCarthy, 145 Minn. 167, 176 N.W. 643 (1920) (Clapp Amendment vested jurisdiction in state probate courts).

111. *Id.* at 170, 176 N.W. at 644.

112. *Id.* at 168-69, 176 N.W. at 643-44. The attorney general's opinion was the basis of a similar ruling by the Secretary of the Interior. *Id.*

An understanding of the reason many allotments were lost through illegal tax forfeiture proceedings first requires a look at the history of Presidential extensions of certain trust periods. An Executive Order signed in 1927 extended for ten years all trust periods on White Earth allotments.[113] With the passage of the Indian Reorganization Act in 1934 all existing trust periods were indefinitely extended and made tax exempt.[114]

The issue in *United States v. Spaeth*[115] was whether the Executive Order of December 7, 1920, issued by President Wilson, extended the trust patents for an additional twenty-five year period for those adult mixed blood Indians who took a fee patent under the Clapp Amendment.[116] The court misconstrued the nature of forced fee patents:

> That the Government recognized the plain intendment of the Clapp Amendment is reflected by the action of the Department in issuing fee patents to the adult mixed-blood White Earth Indians. While in no instance was a fee title patent requested by these Indians, it may be noted that, in all of the allotments referred to in the stipulation, fee title patents have been issued by the Government after the passage of the Clapp Amendment to all allottees but two. It is not probable that the issuance of these fee patents were considered essential in order to give the Indians unrestricted fee title, but they were issued because it was apparently believed that fee title now existed and that a fee title patent would be more convenient for the Indian and his vendees.[117]

The court also found that since the Clapp Amendment removed the restrictions on alienation, the Executive Order could not have intended to extend the trust periods because they did not exist.[118]

In *State v. Zay Zah*[119] the court discussed *United States v. Spaeth*[120]

113. Exec. Order of May 5, 1927, *reprinted in* 4 C. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 1024-25 (1929). The trust patents indicated that the President reserved the authority to extend the trust period. *See* General Allotment Act, ch. 119, 24 Stat. 388 (1887) (amended 1891).

114. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C.A. § 462 (West 1963)). The Act is commonly known as the Wheeler-Howard Act of 1934. *See* State v. Zay Zah, 259 N.W.2d 580, 583 (Minn. 1977), *cert. denied*, 436 U.S. 917 (1978).

115. 24 F. Supp. 465 (D.C. Minn. 1938).

116. United States v. Spaeth, 24 F. Supp. 465, 468 (D.C. Minn. 1938). The court concluded that because the Clapp Amendment granted title in fee, "[t]he lands are not only free from any restriction of alienation, but they must now bear their fair share of the taxable burden." *Id.* at 469.

117. *Id.*

118. *Id.* The court determined that the effect of the Executive Order "must be limited to the full bloods, because the Clapp Amendment divested the United States of any title to lands of the adult mixed bloods." *Id.*

119. 259 N.W.2d 580 (Minn. 1977), *cert. denied*, 436 U.S. 917 (1978).

120. 24 F. Supp. 465 (D.C. Minn. 1938).

in deciding whether the expiration of an original trust patent subjected land to tax forfeiture.[121] The *Zay Zah* court rejected the *Spaeth* court's reasoning, contending that if fee title resulted upon passage of the Clapp Amendment, the land would be subject to immediate taxation.[122] This was not possible because the immunity from taxation was a vested interest.[123] The *Zay Zah* court concluded that the Clapp Amendment did not automatically terminate the tax exempt status of the land and that the extension of the trust patents left the equitable title in the heir of the allottee.[124]

XI. ILLEGAL TAX FORFEITURES

A significant category of title claims on White Earth is land forfeited to the counties for nonpayment of taxes. Often the land was later sold by the counties to private parties, even though the land was never legally fee patented or sold by the allottee or his heirs. Included within this category are claims involving the sale of fractional interests by heirs and the subsequent claim by the county of all the land for delinquent taxes.

The United States Supreme Court discussed an allegation of illegal tax collection in *County of Mahnomen v. United States.*[125] The county collected taxes from the allottee, Isabelle Garden, for the years 1911 to 1927 inclusive. The county claimed she paid the taxes voluntarily and that she could do so after passage of the Clapp Amendment.[126] The allottee, an adult, made the first controverted tax payment in 1911. The test for whether a tax illegally collected from an Indian could be kept was thought to be whether the tax was paid voluntarily.[127] The allottee had the burden of establishing an involuntary payment.[128]

The Court found that the 1911 through 1921 taxes evidently were paid without protest and that the 1922 through 1927 taxes were paid in a compromise arrangement with the state in 1936.[129]

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121. State v. Zay Zah, 259 N.W.2d 580, 583 (Minn. 1977), *cert. denied,* 436 U.S. 917 (1978). The case was a quiet title action involving land that had been sold by the state after a tax forfeiture. 259 N.W.2d at 582.

122. 259 N.W.2d at 589.

123. *Id.* at 585.

124. *Id.* at 589. The court decided that the holding in *Spaeth* could not be harmonized with the holding in *Morrow*; the Clapp Act could not, without an Indian's consent, convert trust patents into fee patents and at the same time "maintain the tax-exempt status of the land." *Id.*

125. 319 U.S. 474 (1943).

126. County of Mahnomen v. United States, 319 U.S. 474, 475 (1943). The trust patent issued in 1902 and would normally have been exempt from all state taxation. *See* United States v. Rickert, 188 U.S. 432 (1903) (trust land is exempt from taxation).

127. 319 U.S. at 477.

128. *Id.*

129. *Id.* at 478. The compromise involved delinquent taxes and a sale of the land to the state. *Id.*

Under the compromise agreement Garden paid less for the entire period from 1922 through 1934 than the amount assessed for 1928 through 1934 for which there was no claim of exemption. The Court held that neither Minnesota law nor federal law required that the county refund the taxes that the "emancipated Indian" had "voluntarily" paid the county.[130] The Court thus reversed in favor of the county.

Justice Murphy dissented and indicated that the Court was taking too narrow a view of the legal obligations toward Indian citizens.[131] The 1902 trust patent issued pursuant to the Nelson Act provided exemption from state and local taxation for a period of twenty-five years. This tax exemption was a vested right,[132] and the Clapp Amendment did not disturb this vested tax exemption.

Justice Murphy found strong policy reasons for placing the burden on the county to establish voluntary payment, rather than on the Indian claimant to establish involuntary payment. Justice Murphy based his conclusion on the United States' duty to enforce its guarantee of tax immunity for the allottee's benefit.[133] The Court's decision indirectly deprived Garden of her vested tax immunity because the county illegally placed her property on the tax rolls and assessed it. Justice Murphy would have remanded because there were no findings on whether she paid the taxes of her own free will with full knowledge of her legal rights.[134] Finally, he noted that Isabelle Garden probably would have been able to compromise the 1928 through 1934 taxes more advantageously had the county not asserted unwarranted claims for the 1922 through 1925 taxes.[135]

The Department of Justice could seek to quiet title in the United States in all cases involving forfeited land. Alternatively, legislative resolution might be accomplished. The following section addresses a major case concerning a tax forfeiture prompted by the Clapp Amendment.

XII. THE ZAY ZAH CASE

The Minnesota Supreme Court held in *State v. Zay Zah*[136] that

130. *Id.* at 479-80.

131. *Id.* at 480 (Murphy, J., dissenting).

132. *Id.* at 481. The allottee could be deprived of this right only with her consent. *See* Morrow v. United States, 243 F. 854 (8th Cir. 1917).

133. 319 U.S. at 481 (Murphy, J., dissenting).

134. *Id.* at 482. Because the allottee ran the risk of losing the land unless she paid the taxes, Justice Murphy concluded that "if we are to decide the case here by indulging in presumptions, I think the only tenable assumption is that the payments were made under compulsion." *Id.*

135. *Id.* at 484.

136. 259 N.W.2d 580 (Minn. 1977), *cert. denied,* 436 U.S. 917 (1978).

the Clapp Amendment did not terminate the trust relationship during the trust period provided in the trust patents.[137] The court found that the county had no right to impose real property taxes on the allotment involved and, therefore, the allotment had been illegally forfeited.[138] The court made clear that although the Clapp Amendment permitted certain Indians to convert their trust patents into fee simple patents, the trust patents could not be converted after issuance without the consent or action of the patentee or his heirs.[139]

The court discussed *Baker v. McCarthy,*[140] another case that held that issuance of a forced fee patent operated "to emancipate mixed-blood Indians from federal guardianship and jurisdiction."[141] The *Zay Zah* court found that the duty of federal trusteeship expounded in *Warren v. Mahnomen County*[142] and *Morrow v. United States*[143] could not be squared with the automatic fee simple theory of *Baker.*[144] It concluded that the district court had not erred in concluding that *Warren* "overruled *Baker,* at least by implication."[145]

The *Zay Zah* case was a quiet title action. On March 1, 1976, the trial court entered an order for judgment in favor of defendant George Aubid Sr., who was the sole heir of Zay Zah, an adult mixed blood.[146] Plaintiffs, the Stevens, along with the State of Minnesota and the County of Clearwater, appealed to the Supreme Court of Minnesota. The parties stipulated that the land was within the White Earth Indian Reservation and that Zay Zah did not apply for a fee simple patent for the land.[147]

Zay Zah, also known as Charles Aubid, was an adult mixed blood as of 1920 who died on May 28, 1969. He never applied for a fee patent for his allotted trust land. On September 11, 1940, the auditor for Clearwater County issued a tax certificate for 1931 taxes that vested title in the State of Minnesota, but the certificate was cancelled on January 30, 1947.[148] The County of Clearwater

137. 259 N.W.2d at 589. The trust period included the indefinite extension of the Indian Reorganization Act. *Id.*

138. *Id.* at 581.

139. *Id.* at 586.

140. 145 Minn. 167, 176 N.W. 643 (1920) (Clapp Act permits the sale of forced fee patents).

141. Baker v. McCarthy, 145 Minn. 167, 170, 176 N.W. 643, 644 (1920).

142. 192 Minn. 464, 257 N.W. 77 (1934). The *Warren* court held that the federal trusteeship prevented the property from being subject to the taxing power of the state. Warren v. Mahnomen County, 192 Minn. 464, 465, 257 N.W. 77, 78 (1934).

143. 243 F. 854 (8th Cir. 1917). The *Morrow* court held that the Clapp Act did not allow the alteration of an allottee's trust status without the allottee's consent. Morrow v. United States, 243 F. 854, 858 (8th Cir. 1917).

144. 259 N.W.2d at 588.

145. *Id.*

146. *Id.* at 583. Zay Zah was listed on the 1920 Blood Roll as a mixed blood. *Id.*

147. *Id.* at 582-83.

148. *Id.* at 582. The parties agreed that the property was not subject to taxation during the

assessed real estate taxes on the property for 1954 and obtained a real estate tax judgment on March 27, 1956. In 1961 another tax certificate of forfeiture was issued. The Commissioner of Taxation conveyed the lands to the Stevens on May 4, 1973.

The trust patent was dated September 6, 1927. Appellants argued that the Clapp Amendment eliminated the trust aspect of the patent.[149] The respondents argued that the trust status was constitutionally protected even after the twenty-five year trust period because of the indefinite extension of the trust status by the Indian Reorganization Act of 1934.[150]

The Supreme Court of Minnesota agreed with the trial judge. The court reasoned that because the allottee took no action to convert the trust patent into a fee simple patent under the provisions of the Clapp Amendment or to alienate or encumber the land in any way, equitable title remained in the Indian patentee and passed to his sole heir.[151] Thus, the court concluded that literal application of the Clapp Amendment was erroneous — the Clapp Amendment did not turn the trust patents into automatic fee patents. Therefore, the right to be free from taxation was a vested right relating to the land.[152]

The court concluded that both the tax forfeiture and the deed from the state to the Stevens were null and void.[153] The court also concluded that the trust period will continue until an act of Congress or the acceptance of a fee patent, and the state and county cannot levy taxes against the land. At the time of the *Zay Zah* case there was no accurate estimate of the number of titles and amount of land affected.

After *Zay Zah* it is clear that the language of the Clapp Amendment cannot be taken on its face. This interpretation is consistent with decisions such as *Morrow* and *Warren*. Together the cases show that the General Allotment Act and the issuance of trust patents created vested property rights that Congress cannot abrogate without consent. This includes the right to continue the trust relationship subsequent to the Clapp Amendment and the right to immunity from taxation for the original twenty-five year trust period plus applicable extensions. The only exception to the

original 25 year trust period. *Id.* at 583.

149. *Id.* at 583. Appellants relied on United States v. Rickert, 188 U.S. 432 (1903). 259 N.W.2d, at 583.

150. 259 N.W.2d at 583. *See* Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C.A. § 462 (West 1963)).

151. 259 N.W.2d at 589.

152. *Id.* The court concluded that "the tax-exempt status of this land, derived as it was from the trust agreement, did not terminate in 1952, and hence the land did not become subject to forfeiture for nonpayment of taxes." *Id.*

153. *Id.*

tax immunity is some affirmative action by the adult mixed blood or his heirs that evidences a desire to terminate the trust relationship protecting the land. It is also evident that because the trust relationship continued, the Department of the Interior, not the state courts, has the jurisdiction and responsibility to determine the heirs of deceased White Earth Chippewas and to distribute their trust estates.

XIII. SUMMARY OF TYPES OF CLOUDED TITLES

The following list indicates the types of clouded land titles on the White Earth Indian Reservation:

1. If a minor, full or mixed blood, sold land without the approval of the United States Government, a claim appears. A minor is a person under the age of eighteen. Many of the allottees' birth dates appear on the 1920 Blood Roll.
2. Forced fee patents were issued in the 1920s pursuant to the Clapp Amendment. Secretarial authorizations were dated April 14, 1919, and December 8, 1919. The patents issued before the trust periods expired and without the application or consent of the allottees or their heirs are recorded in the serial record of the patents. The land was often lost through tax forfeiture or involuntary alienation, thus leading to clouded titles.
3. If an allottee or all his heirs did not convey, did not convey in a valid manner, or did not consent to fee status, a claim may exist on all or an undivided partial interest in an allotment. In many cases a county later took the property in invalid tax forfeiture proceedings. Fraud and forgery may also be involved.
4. Sometimes errors were made in the allotment process, for example when non-Indians received an allotment, when Indians received dual allotments, or when persons received an allotment without selecting one.
5. When the allottee's estate was admitted to probate in a county court having no requisite jurisdiction, when a court appointed administrator was authorized to and did sell land, or when an heir died and an undivided fractional interest was sold by a county

court appointed administrator, a clouded title appears if not all the rightful heirs were determined.

6. Unapproved sales by full blooded heirs or non-White Earth heirs unclassified at the time of the sale result in a potential claim.
7. Other types of potential claims, although not pursued by the Government, may indicate a legal problem with the title that could be asserted by individuals, the Tribe, or the White Earth Band. Claims against the Government or discrepancies in the 1920 Blood Roll are examples.
8. Further research will reveal other types of claims, especially under treaty provisions relating to certain land grants and allotments made in the treaties.

These types of claims were found in an extensive land records investigation by the Minnesota Chippewa Tribe to identify, by December 31, 1982,[154] claims for trespass and money damages prior to July 18, 1966. Although there is a statute of limitations for making claims, the statute does not limit the time for the United States or an individual to bring an action to establish title or to establish the right to possession of real or personal property.

XIV. CONCLUSION

The complexity of the title problems revealed by the White Earth land investigation admit no simple solutions. Present landowners cannot clear their titles by merely alleging they purchased in good faith: innocent purchasers in fact are not innocent purchasers at law. Also, it would be difficult to claim ignorance of the Indian origin of the title considering the White Earth Indian Reservation contains almost 800,000 acres of land. Placing responsibility on the federal government for allowing so many illegal sales would be a deserved result considering its role in helping landbuyers take up Indian land under the provisions of the Clapp Amendment and other laws easing the sale of allotments in severalty. However, the same federal government must, because of its trust responsibility, pursue claims on behalf of the Indian heirs who lost their land illegally. The Tribe and Band have a right to a meaningful input into any resolution of the title problems to protect

154. Minnesota Chippewa Tribe, § 2415 Land Claims Project Summary (n.d.) (Lenee D. Ross, Project Director).

the future of their people. Whatever happens to White Earth in the nature of a settlement or litigation will almost certainly have an impact on future transactions between the United States Government and the Indian tribes.