Native American Estate

The Struggle over Indian and Hawaiian Lands

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RESTORATION OF LAND BASE

Both Native Hawaiians and American Indians have endeavored to rebuild their land base during the twentieth century. They began making such attempts earlier in the century but achieved only limited success. American Indians accomplished more in this sphere than Native Hawaiians; the former have made significant progress in the 1970s and the 1980s in regaining former lands.

Restoration of the Indian Land Base

Under provisions of the Indian Reorganization Act, unallotted surplus lands have been restored to tribal trust status. Some tribes purchased land with loan funds authorized by the act for that purpose. However, Congress failed to appropriate sufficient funds to adequately support the program. Some Indians deeded their allotments to their tribe. Tribes acquired four million acres by 1950. In the 1970s and 1980s the secretary of the interior approved the addition of land to existing reservations or established new reservations under the authority of the Indian Reorganization Act. Tribes also purchased land in fee simple with their own funds, later transferring the land to trust status.[15]

In 1977, under provisions of the Indian Reorganization Act, the Bureau of Indian Affairs transferred lands to trust status for the Puyallup tribe and Sault Ste. Marie Chippewa Indians. Previously the Puyallup tribe or tribal members had fee simple title to lands within the boundaries of Puyallup Reservation and the city of Tacoma, Washington. The Sault Ste. Marie Chippewa Indians purchased a seventy-six-acre tract in the city limits of Sault Ste. Marie, Michigan, and requested the Bureau of Indian Affairs to transfer the land to trust status. The cities of Tacoma and Sault Ste. Marie challenged the action. Until the courts resolved the issues, the secretary of the interior stayed additional taking of lands in the city limits for these tribes. In separate decisions reached in 1978 and 1980, the U.S. District Court for the District of Columbia determined that the secretary of the interior had the authority to place lands in trust for the Puyallup tribe and the Sault Ste. Marie Chippewa Indians. The court held that the secretary could take land in trust for tribes who were not officially recognized as tribes in 1934 but subsequently were determined to have that status. It also declared that the secretary could acquire land and hold it in trust for tribes who were not completely "landless."[16]

During the 1970s and 1980s Congress returned land to the holdings of numerous tribes. In 1975 the Submarginal Lands Act conveyed over 370,000 acres of submarginal lands to trust status for seventeen Indian tribes. During the 1930s, the federal government had purchased these former reservation lands from homesteaders to return the land to the original tribal owners. Much of this submarginal land had remained in the public domain until Congress passed the Submarginal Lands Act in 1975.[17]

In 1975 Congress authorized the administrator of general services to transfer federal surplus lands located on former tribal trust lands in Oklahoma or on existing reservations in other states to the secretary of the interior to be held in trust for tribes. Subsequently excess lands have been returned to numerous tribes. The acreages ranged in size from one-half-acre plots to over 1,600 acres. Land restoration occurred by administrative action when the land was returned to the original tribal owner; otherwise congressional action was required. For example, in 1986 Congress authorized the partitioning of 5,824 acres, formerly Chilocco Indian School lands, among the Otoe-Missouri, Pawnee, Ponca, Tonkawa, Kaw, and Cherokee tribes in Oklahoma. This action required congressional approval since only the Cherokee formerly owned the land. Separate legislation was also necessary to return over 2,800 acres of federal surplus land to the Washoe in Nevada and California. Although the former Stewart Indian Boarding School lands were Washoe aboriginal lands, they were not located within an existing reservation. Consequently the land could not be restored through administrative action authorized by the surplus property act.[18]

Other congressional land returns involved land for which the aboriginal or legal title had not been legally extinguished or that had been improperly placed in the public domain or within another tribe's reservation. Some of these lands were sacred and vital to the continuation of traditional tribal religions. Most of the land restorations transferred the title to the United States in trust for the tribe. Congress returned the lands without a requirement of compensation by the tribes. This was done even during President Reagan's administration. From 1982 until the end of his presidency, his official policy was to require tribes to pay fair market value for formerly held lands that are now part of the public domain. The Bureau of Indian Affairs has often opposed land restitution bills because they did not require monetary payment by the tribes.[19]

Taos Blue Lake and Other Sacred Lands

Legislation returning the Taos Blue Lake and its watershed area to the Pueblo Indians in 1970 represented one of the most celebrated cases of land restitution. Taos Pueblo leaders had continually attempted to regain ownership of these sacred areas since 1906. At that time President Theodore Roosevelt placed Blue Lake and its environs in Taos National Forest, which later became Carson National Forest. The Taos Pueblo received no compensation for these lands. Before 1906 and until 1918 the U.S. government "recognized and protected the special and exclusive

interests" of the Taos Indians in this area. In 1924 Congress enacted the Pueblo Land Board Act to settle land disputes between the Pueblos and non-Indians. The Board offered $458,520.61 to the Taos Pueblo for lands that had been taken by non-Indians. The government paid part of the settlement, but the Taos Pueblo requested the return of Blue Lake and its watershed area in exchange for the remaining cash payment. The Indians continued to insist on receiving title to the land, and Commissioner of Indian Affairs John Collier agreed to help them attain their goal. In 1933 Congress passed legislation providing for a fifty-year permit with right of renewal for 31,000 acres of the Blue Lake area. Because of difficulties in concluding a satisfactory agreement, the Indians did not sign the permit until 1940. It granted the Taos Pueblo exclusive use to the area for their annual ceremonial period and free use of wood, forage, and water for personal and tribal needs.[20]

The Taos Pueblo continued their efforts to regain title to Blue Lake and the Rio Pueblo de Taos watershed. In 1965 the Indian Claims Commission affirmed the Taos Indians' exclusive aboriginal use and occupancy of 113,000 acres. The commission awarded a claims settlement but the tribe refused to accept monetary compensation and held out for the land. The commission supported the Taos Pueblo's efforts for return of the land, but it did not possess the authority to return it. Tribal efforts garnered widespread national support from representatives of the Roman Catholic Church, National Organization of Churches, Indian Rights Association, National Organization of American Indians, and former secretary of the interior Stewart Udall. A group of prominent Americans formed the National Committee for Restoration of Blue Lake Lands to the Taos Indians. Other individuals, including President Richard Nixon and New Mexico governor David Cargo, also joined the large number of supporters.[21]

The Taos Indians maintained that Blue Lake and its watershed area possessed spiritual significance and absolute sanctity. Blue Lake, their principal shrine, had been the site of the Indians' annual pilgrimage for seven hundred years, and individual Indians used the lake for religious worship daily. The Taos Pueblo argued that the existence of their traditional religion and cultural survival depended upon protection of the area. The tribe desired to prohibit all commercial exploitation. The Taos Indians maintained that timber, grazing, and recreational use had desecrated Blue Lake and its watershed.[22]

White supporters argued that the Taos Indians should have the land returned to their possession because of its sacred importance to the Pueblo religion. They maintained that the tribe's situation differed from other Indian efforts to regain land because of its spiritual significance, and the Taos wanted the land for religious rather than economic reasons. They also

cited the Taos Indians' long history of endeavors to regain ownership of Blue Lake and its environs.[23]

A small group of vocal congressmen, lumbermen, sportsmen, and U.S. Forest Service officials opposed the return of Blue Lake. They claimed that the Taos Indians possessed every right to religious freedom under the supervision of the U.S. Department of Agriculture as they would with the land held in trust by the Bureau of Indian Affairs. Some opponents argued that conservation practices would best be served with jurisdiction of the land under the forest service. Most of the adversaries argued that return of Blue Lake would establish a precedent that would enable other tribes to regain claimed lands in place of traditional monetary compensation.[24]

In December 1970, Congress restored 48,000 acres to the Taos Indians. The U.S. government held the land in trust for the tribe. The legislation stipulated that Blue Lake and the surrounding land remain a wilderness area and that the tribe only use it for traditional purposes, such as conducting religious ceremonies, hunting and fishing, accessing water sources, providing forage for domestic livestock, and harvesting timber, and for personal uses.[25]

Although the return of Taos Blue Lake to the Taos Pueblo has been the most publicized restitution of sacred lands, several other tribes have also regained such lands. The Pueblos in New Mexico have been the most successful. Since 1978, Congress has restored sacred lands to the Zuñi, Zia, and Cochiti Pueblos. Within the areas returned are religious shrines, which still play a prominent role in the Pueblo religion and culture. The Pueblos wanted the lands to be held in trust for their use so they could perform their rituals in private and prevent outsiders from desecrating the sacred places. The aboriginal Zuñi lands that Congress returned to tribal ownership in 1984 could be used only for religious purposes. The Cochiti return was unusual in that the Pueblo's claim was based not only on aborginal use, but also on a paper title dating to 1744. Furthermore the United States had purchased the land in the 1930s for tribal use but instead of returning the land to the Pueblo, the federal government had allowed non-Indians to use the submarginal lands. A few other tribes such as the Makah and the Yakima in Washington also had sacred lands returned to their ownership.[26]

Several tribes unsuccessfully attempted to protect sacred sites, located in the public domain, from desecration by commercial development or tourism. They filed lawsuits basing their religious freedom claims on the First Amendment and on the American Indian Religious Freedom Act of 1979. The courts, to date, have ruled against the tribes, denying them constitutional protection. The Hopis sought to enjoin the construction of a ski resort in the San Francisco Peaks, the home of their Kachinas. The Yurok,

Karok, and Tolowa tribes in Northern California fought to prevent the completion of a logging road through their most sacred lands in the Six Rivers National Forest. Its construction would destroy the religious sanctity of the area. The Navajo and the Sioux also have tried to prevent further desecration of sacred sites.[27]

Congress has restored land to a few other tribes during the 1970s and 1980s. In most cases the tribes had a valid claim to the land. The Bureau of Land Management had placed lands belonging to the Santa Ana Pueblo in grazing districts during the 1930s. The property was returned to tribal ownership in 1978. Several land restorations involved tribal land that had been excluded from the reservation and included in U.S. forests as a result of erroneous boundary surveys in the late 1800s. This occurred on the Warm Springs, Yakima, and Tule River reservations. Federal surveys of the Ute Mountain Ute Reservation and the Navajo Reservation had included the same 15,000 acres of land within the boundaries of both reservations. After the Supreme Court ruled that title belonged to the Navajo, Congress passed legislation conveying title in fee simple to 3,000 acres of federal lands to the Utes and awarding them $4 million as compensation for lost oil and gas royalties. The tribe had previously leased the grazing land from the Bureau of Land Management.[28]

Havasupai Land Return

Congressional approval of the return of 185,000 acres in the Grand Canyon to the Havasupais in 1975 marked another significant settlement of Indian land claims. Havasupai attempts to regain some of their ancestral lands dated to the early twentieth century. For six centuries, the Havasupais migrated from the plateau lands on the rim of the canyon to the canyon floor in the summer. Use of both areas provided subsistence for the tribe. In 1882 the Havasupais were allotted a 518-acre reservation on the floor of the Grand Canyon. In 1919 Congress established Grand Canyon National Park but allowed the tribe to continue using the plateau. National Park Service officials restricted Indian free use of the area, however, compressing the Havasupais on 518 acres of which only 200 acres were arable. The tribe maintained that their survival depended on the return of the plateau lands. In January 1975, President Gerald Ford signed the legislation designating 185,000 acres as trust lands for the Havasupais. Restrictions limit tribal use of the land to religious rituals and grazing.[29]

Alaska Native Claims Settlement Act

The year after the Taos Blue Lake restoration, Congress enacted the Alaska Native Claims Settlement Act. It awarded title in fee simple to the largest amount of land ever received by American Indians for the extinguishment of aboriginal title. The Alaskan tribes claimed ownership to most of the

375 million acres contained in the state's land mass. According to the provisions of the settlement act, Alaska Natives received clear title to 40 million acres, $462.5 million, and 2-percent royalty on mineral development on state and federal lands in Alaska up to $500 million. The act authorized the land distribution among twelve native profit-making district corporations. They would allocate acreages to eligible villages, who would receive fee simple title to the surface estate while the regional corporation retained subsurface rights. Some Alaska Natives chose to select fee simple ownership of land instead of coming under the provisions of the act.[30]

In 1972 Secretary of the Interior Rogers C. B. Morton reserved 99 million acres from which the Alaska Natives could select their 40-million-acre allocation. Four years later, the secretary of the interior made the first land conveyance to a regional corporation.

Much litigation has resulted from passage of the Alaska Native Claims Settlement Act. Some of the lawsuits have contested the secretary of the interior's rulings that declared certain native villages ineligible for receiving land. Other legal disputes have developed over the pattern of selection by native corporations, the state of Alaska, and the federal government.[31]

The adjudication of Indian land claims culminated a century of unsettled title to 90 percent of the land in Alaska and several decades of native efforts to obtain title. A number of native organizations originated in the mid-1960s as a result of the land-rights issue. In 1966 Alaska Natives created a statewide association, the Alaska Federation of Natives. The discovery of oil in Alaska promoted the swift settlement of native claims. Desire for immediate exploitation of this valuable resource prompted the oil companies to join forces with Alaska Natives to clear land titles. A receptive administration in Washington also contributed to an early settlement. The Nixon administration wanted to settle the land-claims issue before it approved the Alaskan pipeline project.[32]

From the time the United States purchased Alaska in 1867 from Russia, Congress had neglected to clarify aboriginal land rights. The purchase agreement, the organic act, and the statehood act recognized native rights of use and occupancy. The latter two documents left the settlement of such rights to Congress.[33]

Some Alaska Natives withheld approval of the Alaska Native Claims Settlement Act. William Willoya, an Eskimo, believed the legislation would be detrimental to the continuation of the aboriginal subsistence lifestyle and entailed a sellout to the corporations. He maintained that Congress excluded traditional hunting, fishing, and wood and berry gathering areas used seasonally by nomadic Alaska Natives from the land allotted to the native corporations. He claimed that more than twenty thousand tribesmen would be forced off the land in the next twenty years. Willoya also expressed a concern shared by other Alaska Natives that the legislation

settlement "without creating a reservation system of lengthy wardship or trusteeship." Although some courts have interpreted the language in the section to imply the complete termination of trust status for Alaska Natives, the provision seems to run contrary to the general intent of the act. ANILCA provides native corporations with special protections to ensure their survival, and it implied trust status by not repealing any previous legislation regarding native welfare or sovereignty. Section 2(b) will most likely be ignored in the future as a misplaced carryover from a much harsher settlement bill sponsored by Senator Jackson two years before the enactment of the Alaska Native Claims Settlement Act.[39]

The special federal relationship with Alaska Natives was further implied with the implementation of the Alaska Native Claims Settlement Act Amendments of 1987. By adding more special protections, the new legislation reduced Alaska Native fears of a reenactment of the Dawes Act. The provision mandating that native corporations issue salable stock in 1991 was repealed, among other reasons, to prevent takeover by nonnatives. The native shareholders were given the option to decide as a group if and when they want to sell their shares. The amendments also protected Alaska Natives from the rigors of economic cycles by making undeveloped lands of the native corporations immune from adverse judgments originating from unpaid taxes, corporate debt, or bankruptcy. Some Alaska Natives opposed the legislation because it did not grant similar recognition of tribal sovereignty enjoyed by Indians in the lower forty eight states.[40]

Final assessment of the overall benefits of the legislation cannot be made for some time. But thirty years from now the settlement act may be seen, despite added protections, in the same light as the General Allotment Act with its resulting loss of native landownership, dislocation, and loss of native culture. Much will depend on the success of the native corporations in retaining title to the land and maintaining traditional lifestyle and culture. The white ideological basis of the Alaska Native Claims Settlement Act rested with the hope of assimilating the Alaskan Eskimos, Indians, and Aleuts into the Western business economy. Profit-making organizations with a competitive corporate structure comprised a concept alien to most Alaska Natives' cooperative subsistence culture. The impact of mineral exploitation, speculation, and a money economy threaten their traditional way of life.

Lands Returned through Executive Authority

In addition to regaining land by congressional legislation, Indians have also secured possession of former lands through presidential executive orders. On 20 May 1972, President Richard Nixon issued an executive order directing the return of part of Mt. Adams and 21,000 acres to the Yakima tribe, culminating over four decades of tribal efforts at recovery. After discovering a map delineating the proper boundaries set by the 1855 Treaty of Walla Walla, the Yakimas presented their claims to the federal government. The map showed that errors made by the surveyors resulted in a reduction of 421,465 acres of their reservation. In 1904 the federal government restored 300,000 acres to the tribe. Finally the Indian Claims Commission in 1968 ruled that the Yakimas were entitled to an additional 121,465 acres. Since 98,000 acres comprised rich farmland owned by whites, the commission awarded the tribe fifty cents an acre for them. The remaining lands were located in the Gifford Pinchot National Forest. The commission determined that the federal government did not have to return the land and left the ultimate decision to the discretion of the president. Since the government's acquisition of the land had not constituted a legal taking, it could be restored to the tribe by executive action. This led to Nixon's executive order returning some of the land. Although the Yakima considered Mt. Adams to have special religious significance, they did not urge its restoration on the basis of its sacred nature.[41]

Land Returns and Attempted Returns through Judicial Action

Indians also used the judicial system to regain lands. During the 1970s the Pomo Indians on Robinson Rancheria in California obtained the return of their reservation to trust status. The U.S. Supreme Court in 1970 determined that the Cherokee, Choctaw, and Chickasaw tribes owned the riverbed of the Arkansas River in Oklahoma. A U.S. Circuit Court of Appeals decision in 1978 declared that the Western Shoshones might possess aboriginal title to twenty-two million acres in Nevada. The appellate court remanded the case to U.S. district court to determine whether the Western Shoshones had beneficial title to the disputed lands.[42]

The issue centered around the Shoshones' refusal to accept a $26-million Indian Claims Commission judgment for the extinguishment of their aboriginal title. On remand, the district court held that payment had been made and the Shoshones possessed no aboriginal claims. The U.S. Court of Appeals again reversed the district court and the case ended up in the Supreme Court. The Western Shoshones lost the case in 1985 when the Court ruled that payment of the claims award to the United States as the tribe's trustee and its placement of the funds in a tribal account maintained by the U.S. Treasury Department had extinguished aboriginal title to the twenty-two million acres. Tribal approval of the award was not necessary when the tribe's trustee had accepted it as a settlement for outstanding claims.[43]

The Pit River Indians of northern California tried to get their land-claims case before the courts throughout the 1970s. They claimed title to 3.5 million acres of land taken by the federal government in the 1850s. The Indian Claims Commission acknowledged their aboriginal use and occupancy of

the area in question and awarded a cash settlement of $29 million as part of a joint judgment with a loosely named group, the California Indians. Other state tribes readily accepted the restitution. The Pit River Indians, however, rejected the money settlement and requested return of their former lands. The Bureau of Indian Affairs invalidated the results of the Pit River election and conducted a subsequent election through the mails that overturned the earlier tribal decision. Tribal leaders alleged that the Department of the Interior improperly conducted the election and deemed the later results invalid. The tribe later voted to reject the monetary compensation and demanded the return of their lands. The Pit River Indians appealed to the Indian Claims Commission to review the 1963 judgment but the commission refused the petition. Some of the Pit River Indians resorted to the tactic of occupying tracts of claimed land as well as bringing suit against the Hearst corporation, Pacific Gas and Electric, other giant corporations, and the federal government. In the mid-1970s a federal court decision declared that the Pit River Indians did not have title to the disputed lands. Some of the Pit River Indians declared their intention to continue their recovery efforts.[44]

Land Returns Resulting from Violation of the 1790 Trade and Intercourse Act

A significant number of Indian land claims have been based on state violations of the 1790 Trade and Intercourse Act. This federal statute prohibited states from obtaining Indian lands or treatying with tribes without federal approval. In most of these cases tribal leaders combined judicial efforts with negotiation and legislative action.

The Narragansett tribe of Rhode Island asserted claims against that state for making transactions in violation of the 1790 law. The Narragansetts based their claim for 3,500 acres of land on a series of state statutes enacted by the legislature before 1890. Tribal leaders initiated court action against the state of Rhode Island, and in 1978 the parties negotiated a settlement. Subsequently the U.S. Congress approved the agreement that provided for the return of 1,800 acres to the Narragansetts. In August 1979 the Rhode Island legislature approved it.[45]

The settlement authorized the appropriation of $315 million of federal funds to purchase 900 acres from private landowners and 900 acres of state public lands. A state-chartered corporation controlled by eight persons—five Indians and three state officials—would acquire and hold the land in trust for the tribe. Nine-tenths of the land was restricted to permanent conservation, and about 225 acres could be developed subject to the approval of the corporation. Terms of the settlement included tribal agreement to congressional extinguishment of any claim to land in Rhode Island.

During the 1970s the Penobscot and Passamaquoddy tribes asserted aboriginal ownership of a large part of Maine. Proceeding from the position that transactions between the state of Massachusetts and these tribes beginning in 1794, and later actions by the state of Maine, violated the Trade and Intercourse Act of 1790, Penobscot and Passamaquoddy leaders requested that the federal government assist them in bringing suit against these states. The Interior and Justice departments refused because the tribes lacked federal recognition. Then the Penobscot and Passamaquoddy tribes took their claim case to court and the resulting judicial decrees stated that the tribes possessed tribal status under the Trade and Intercourse Act and that the government must act as trustee on their behalf. Following the 1975 decision, Justice and Interior department officials assisted the Maine tribes in their land claims.[46]

Because of the cloud placed on the validity of land titles in Maine, President Jimmy Carter intervened in an attempt to settle the land controversy. In 1977 Carter assigned William Gunter as a special representative to investigate the land claims of the Maine Indians and to recommend a settlement plan. Gunter recommended that the federal government pay the tribes $25 million and that Maine provide 100,000 acres of its public lands situated in the claims areas to the Penobscot and Passamaquoddy tribes. In return the Indians would agree to relinquishment of all aboriginal claims to land in Maine. Tribal leaders refused to accept the plan. Not only had Gunter recommended a small land return, but also that Congress extinguish aboriginal title to the land claimed by the tribes, except state public lands, in the event the tribes refused to consent to the proposed settlement.[47]

At the request of the governor and attorney general of Maine, the state congressional delegation introduced legislation during the spring of 1977 that retroactively ratified the illegal treaties consummated with the Penobscot and Passamaquoddy tribes since 1790.[48]

In February 1978 leaders of the two tribes and a White House work group announced they had reached a "memorandum of understanding." However, the proposed agreement was not accepted by the disputing parties. The following year tribal leaders and state officials continued negotiations for settlement of the Penobscot and Passamaquoddy tribes' 12.5-million-acre land claim. The next compromise, the Hathaway Plan, was favored by the landowners and state officials, but did not satisfy the tribes. It would have awarded the Indians $37 million, plus options to purchase 100,000 acres of land from several major timber companies.[49]

Finally the parties reached an agreement and after Congress approved it in 1980, President Carter signed into law the Maine Indian Land Claims Settlement Act. It extinguished the aboriginal land claims of the Passamaquoddy tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians in the state of Maine. Monetary compensation totaled $81.5 mil-

lion. A $27-million trust fund for general tribal purposes was established, $13.5 million for the Passamaquoddy tribe and $13.5 million for the Penobscot Nation. The legislation authorized $54.5 million for the purchase of 150,000 acres of land for the Passamaquoddy tribe, 150,000 acres for the Penobscot Nation, and 5,000 acres for the Houlton Band of Maliseet Indians. These lands were to be held in trust by the secretary of the interior for the benefit of the tribes. The Penobscot Nation and Passamaquoddy tribe would have generally the status of state municipalities with persons and property within these two nations subject to state law. Payments would be made in lieu of taxes on real and personal property within the Indian territories.[50]

Although the Maine Indian Land Claims Settlement Act was hailed by the *Christian Science Monitor* as the "biggest Indian victory since Little Big Horn," the act drew criticism from within the Indian community. Although the approximately 300,000 acres of newly purchased land would be held in trust by the federal government, the Indian nations would be subject to payments "in lieu of taxes" on these properties. This arrangement also applied to their reservations, which until the settlement had been tax-exempt. If the Indian nations failed to meet these obligations, the payments could come from the $27 million trust fund originally meant to create jobs. To pay the taxes the Department of the Interior could also open the lands to the kinds of economic development that violate the Indian nations' cultural values.[51]

Since the 1970s the Oneida tribe of New York has been involved in litigation against that state and Oneida County. The tribe filed suit for approximately six million acres they alleged was illegally obtained by the state. The Oneidas contended that their nation's land-cession treaties of 1785 and 1788 negotiated with the state of New York were void because federal approval, which was required according to the Articles of Confederation and other documents, was not given. Even if the treaties were ruled legal, the tribe maintained that the "rental agreements" stipulated in the treaties, not to mention fraudulent dealings by the state of New York, left it with some remaining interest in the lands. The Oneidas argued that the 1839 Act of New York, which capitalized all the remaining rent payments in one lump sum, was illegal because it also violated the 1790 Trade and Intercourse Act.

Federal courts ruled against some of these arguments in 1982 and dismissed the rest in 1986. They decided that the wording of the 1785 and 1788 cession treaties specified a sale of land with no reversionary interests to the Oneidas, regardless of rent payments. Thus, there was no interest to the land lost in the Act of New York and subsequently no violation of the 1790 Trade and Intercourse Act. The courts also ruled that the federal approval required for land transactions under the Articles of Confederation, Fort Stanwix Treaty and Proclamation of 1783 was not needed within state boundaries. Thus the state of New York had the right to purchase the Oneidas' land, which was located within its borders.[52]

The Oneidas had better luck in a parallel lawsuit, *Oneida County v. Oneida Indian Nation*. They sued for two years' rent from 900 acres currently owned by Oneida and Madison counties. This land was part of 100,000 acres the Indians conveyed to New York in a 1795 treaty. Since the state did not get federal approval, it was a direct violation of the 1790 Trade and Intercourse Act. The defense did not question the illegality of the land sale, but generally whether the Indians had the right to sue 175 years after the fact. In a five-to-four decision the U.S. Supreme Court ruled in favor of the Oneidas, stating that "the Indian's common law right to sue is firmly established."[53]

Although the amount of damages won was only two years' rent on 900 acres (about $20,000 plus interest), the implications of the suit are considerable. Oneida and Madison counties and the state of New York may be liable for the entire 100,000 acres, much of which is held privately. Local property values have suffered. Concern about land titles and predictions of evictions have led to uncertainty in the real estate market. To remedy the problem the Oneidas have supported a quick, negotiated settlement involving cash and land, and the Supreme Court has urged Congress to act on the claims in a manner similar to the Rhode Island and Maine settlements.[54]

The Catawbas in South Carolina also based their land claim on state violation of the 1790 act. The tribe sought to regain 140,000 acres. After the Fourth Circuit Court of Appeals ruled in favor of the Catawba claims, the Supreme Court in 1986 reversed and remanded the earlier decision. The adverse ruling was largely a result of the tribe's acquiescence to the termination policy of the 1950s. The Supreme Court held that the Catawba Tribal Division of Assets Act signed by the tribe in 1959 negated special federal protection to the tribe and subjected the Catawba land claim to the state statute of limitations. This, in effect, rendered the previous violation of the 1790 Trade and Intercourse Act null and void.[55]

Wampanoag Indians in Mashpee, Massachusetts, also attempted to regain land they claimed was alienated in violation of the 1790 act. In February 1979, the U.S. Court of Appeals for the First Circuit upheld the lower court decision that the act did not protect the Mashpees since they were not a tribe in 1790 nor in 1976. This ruling was reaffirmed in 1987 by the same court. In the second round of litigation the Mashpees submitted essentially the same nineteenth-century documents that supported their claim to tribal status. They argued that the documents showed tribal status through a principle akin to estoppel. The court found the documentation insufficient.[56]

A more successful land return based upon a violation of the Trade and Intercourse Act of 1790 involved the Wampanoag Tribe of Gay Head, Massachusetts. In 1746 the state legislature appointed trustees or guardians for the tribe and gave them authority to lease and allot land in the Gay Head area. This trustee arrangement continued until an act passed in 1869 gave citizenship to the Indians and guaranteed title to lands they owned individually. Another act, in 1870, incorporated the area into the town of Gay Head. All common lands, common funds, and fishing rights were transferred to the newly incorporated town. This arrangement did not seem to disturb the Gay Head Wampanoags in managing their financial and cultural affairs, since they owned and controlled most of the town at the time. But over the years many Indians sold their allotments to non-Indians, thus reducing the Wampanoags' local economic and political base.[57]

In 1974 a newly formed Wampanoag Tribal Council filed a lawsuit against the town of Gay Head. It alleged that the act of 1870 deeding the Indians' common lands to the town violated the 1790 Trade and Intercourse Act. Soon after the suit was initiated the litigants entered into negotiations. By fall 1983 an agreement had been ratified by the Gay Head Tribal Council, the town, and the state.

Congress approved the plan in 1987. The settlement provided the Wampanoags with 178 acres of land for tribal housing and an additional 250 acres to be held in trust in exchange for extinguishing all land claims within the town of Gay Head. The $4.5-million cost would be shared equally by the state of Massachusetts and the federal government.[58]

Native Americans have attempted to recover former lands throughout the twentieth century despite mixed results. Victories during the 1970s increased Indian nationalistic efforts to regain land. To obtain their goal, tribes have resorted to judicial and legislative action as well as negotiation.

Hawaiian Land Recovery

Hawaiian Homes Commission Act

Hawaiians also have attempted to regain possession of portions of their lands. The first major success occurred in the 1920s and has remained a consistent part of Native Hawaiian endeavors until the present time. In 1921 the nationalistic Kūhiō Kalaniana'ole, the part-Hawaiian congressional delegate from the territory of Hawai'i, succeeded in his attempts to have the U.S. government return some land for the use of Native Hawaiians. Congress enacted the Hawaiian Homes Commission Act, which created the Hawaiian Homes Commission with control over approximately 194,000 acres set aside for Native Hawaiians. Kalaniana'ole sincerely believed that the only hope for the continuation of the indigenous Hawaiians as a distinct race was to return them to the land. In 1920 he stated that "The Hawaiian race is passing. And if conditions continue to exist as they do today, this splendid race of people, my people, will pass from the face of the earth." Kalaniana'ole pointed out that Hawaiians possessed a metaphysical relationship with the land. He believed that if they could live on the land and return to their ancient relationship with it, the process of decimation and demoralization would come to an end.[59]

The death rate of the Hawaiians was higher than that of any other American minority. The population has been estimated at 300,000 at the time of Cook's visit to the Hawaiian islands. Full-blood Hawaiians numbered only 40,000 at the time of annexation, and by 1920 the figure had declined to 23,723. In addition the native birth rate fell below the national level and infant mortality was eight times as high as the national average. Western diseases were primarily responsible for the dramatic decimation rate. Thousands of Native Hawaiians died from measles, cholera, smallpox, and venereal disease introduced by traders, sailors, and missionaries. Hawaiians developed some immunity to these pestilences only in the latter part of the nineteenth century. Demoralization caused by alienation of the Hawaiians from their land and nation and disorientation prompted by the influx of foreign settlers and their growing influence in the economic, religious, and governmental structure of Hawaiian society also contributed to their decline.[60]

The rhetoric of American supporters of the Hawaiian homes legislation contained a philosophy similar to that espoused by promoters of removal of the Five Civilized Tribes from the South in the 1830s and the General Allotment Act of 1887. Advocates claimed the proposal would save the dying Hawaiian race and rehabilitate it by restoring the Native Hawaiians to the land. No one considered placing them on reservations although some Americans regarded Hawaiians as "blanket" Indians. Advocates of the Hawaiian Homes Commission Act hoped to Americanize the Native Hawaiians and then assimilate them. They wanted to create a class of small independent New England–type farmers. Then, they believed, the race would once again thrive, prosper, and become self-reliant.[61]

Besides saving the Hawaiian race from extinction, supporters of the act also wanted to return land that had been taken from them in the nineteenth century. When assessed in terms of benefiting the Hawaiians, earlier attempts at land distribution had been ineffective. Supporters of Hawaiian rehabilitation claimed that the native people had not obtained their equal share of the lands in the mid-nineteenth-century land revolution. Speculators also had taken advantage of Native Hawaiians, stripping them of their tiny parcels. In addition, advocates of native rehabilitation maintained that

SH4, 83, 108, 133, 135, 154–155, 184, 192, 214, 258–259, 266–268; HH–SH1, 137, 172–173, 177, 180–182, 221, 224, 225, 257.

7. HH3, 46–51; SH4, 40–41, 80–82, 90–93, 112, 189; HH–SH1, 83, 136, 165, 220, 257; 124 *CR* 15050-57 (1978).

8. 120 *CR* 21705-08 (1974); 121 *CR* 1192-94 (1975); HH3.

9. SH4, 62–75, 83, 95, 100–101, 156, 189, 266; HH–SH1, 67–70, 220; 121 *CR* 41541 (1975).

10. 124 *CR* 15050-57 (1978); SH4, 108, 124–125, 180, 229, 246, 254, 332, 410; HH–SH1, 75, 80, 163–167, 188, 212, 218, 225, 266–272, 335–336; 94 Stat. 3324 (1980).

11. SH17, 3, 7, 603.

12. See generally SH17; HH5; *Native Hawaiians Study Commission Report on the Culture, Needs and Concerns of Native Hawaiians,* 2 vols. (Washington, D.C., 1983).

13. HED2, xiii.

14. *Hawaii Revised Statutes* sec. 10-2(4)(5) (Supp. 1984); see generally Hawaii Constitutional Convention File, 1978, AH.

15. For example, during the 1980s land was added to reservations under the authority of section 7 of the Indian Reorganization Act. Some of the land restorations included 139 acres to the Coushatta Indian Reservation in Louisiana, 46 *Federal Register* 1040 (1981); 55 acres to the Lower Elwha Reservation in Washington, 46 *Federal Register* 9788 (1981) and 47 *Federal Register* 31753 (1982); 1,500 acres to Grand Portage Reservation in Minnesota, 47 *Federal Register* 23813 (1982); 750 acres to St. Croix Chippewa Reservation in Wisconsin, 48 *Federal Register* 30764 (1983); 500 acres to the Mescalero Apache in New Mexico, 50 *Federal Register* 3979 (1985); creation of reservation for the Wisconsin Winnebago, 49 *Federal Register* 1431 (1984). Theodore H. Haas, "The Indian Reorganization Act in Historical Perspective," in *Indian Affairs and the Indian Reorganization Act: The Twenty Year Record,* ed. William Kelly (Tucson, 1954), 22.

16. *City of Sault Ste. Marie v. Andrus,* 532 F.Supp. 157; *City of Tacoma v. Andrus,* 457 F.Supp. 342.

17. 89 Stat. 577 (1975). The exact boundaries of the submarginal lands returned to the tribes were published in the *Federal Register*; for example see 43 *Federal Register* 18049 (1978), 18,749 acres to the Cherokee in Oklahoma. Before 1975 Congress occasionally passed legislation transferring submarginal land title to individual tribes; for example see 86 Stat. 795 (1972), 13,077 acres to the Stockbridge Munsee Community, Wisconsin; 86 Stat. 806 (1972), 762 acres to the Burns Indian Colony, Oregon.

18. 88 Stat. 1954 (1975). The Bureau of Indian Affairs published notices in the *Federal Register* indicating the return of surplus federal lands to individual tribes; for example see 50 *Federal Register* 49620 (1985), 345 acres to the Cherokee in Oklahoma; 47 *Federal Register* 31325 (1982), 10 acres to the Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Montana; 40 *Federal Register* 50732 (1975), 1,600 acres to the Oglala Sioux, Pine Ridge Reservation, South Dakota.

19. Reagan and the Bureau of Indian Affair's policy was expressed at congressional hearings on many of the land restitution bills; for example see SH12, 9–12.

20. Walter J. Hickel to Senator Henry M. Jackson, 8 July 1970, SR5; *AKN* 2 (Sept. 1970): 9; 43 Stat. 636–637 (1924); 48 Stat. 108 (1933).

21. Hickel to Jackson, 8 July 1970, SR5; *AKN* 2 (July–Aug. 1970): 18; *AKN* 2 (Sept. 1970): 8–9.

22. See note 21.

23. See note 21.

24. See note 21.

25. 84 Stat. 1437 (1970).

26. 92 Stat. 244 (1978), 618 acres to the Zuñi; 98 Stat. 1533 (1984), 11,050 acres to the Zuñi; 92 Stat. 1679 (1978), 4,850 acres to the Zia; 100 Stat. 3356 (1986), 1,840 acres to the Zia; 98 Stat. 315 (1984), 25,000 acres to the Cochiti; 98 Stat. 179 (1984), 80 acres to the Makah; SH14, 20–34; SH6; SH15; SH16; HR7.

27. *Lyng v. Northwest Indian Cemetery Protective Association,* 108 S.Ct. 1319 (1988) (Yurok, Karok, and Tolowa); *Wilson v. Block,* 708 F.2d 735 (Hopi); *Badoni V. Higginson,* 638 F.2d 172 (Navajo); *Crow v. Gullet,* 706 F.2d 856 (Sioux).

28. 92 Stat. 1672 (1978), 16,000 acres to Santa Ana Pueblo; 86 Stat. 719 (1972), 61,000 acres to Warm Springs; 94 Stat. 1067 (1980), 14,400 acres to Tule River; 94 Stat. 2565 (1980), 3,000 acres to Ute Mountain Ute. See also 96 Stat. 1946 (1982), 570 acres to Pascua Yaqui; 97 Stat. 1121 (1983), 133 acres to Kaw; 98 Stat. 11 (1984), 4,770 acres to Paiutes in Utah; 100 Stat. 828 (1986), 1,950 acres to Reno Sparks Indian Colony, Nevada; 97 Stat. 1383 (1983), 3,800 acres to Las Vegas Paiutes.

29. 88 Stat. 2091 (1975); *AKN* 3 (June 1971): 20; *AKN* 5 (Late Summer 1973): 15; *AKN* 6 (Early Summer 1974): 38–39; *AKN* 7 (Early Spring 1975): 36.

30. 85 Stat. 688 (1971). In January 1976 Alaska Natives residing in Oregon organized a thirteenth regional corporation. The courts and Congress upheld this action; *Alaska Native Association of Oregon v. Morton,* 459 F.Supp. 459; 89 Stat. 1145, 1149 (1976).

31. For example see *Koniag v. Kleppe,* 405 F.Supp. 1360; *Aleut Corporation v. Arctic Slope Regional Corporation,* 417 F.Supp. 900; *Tyonek Native Corporation v. Secretary of the Interior,* 629 F.Supp. 554. In the latter case the village of Tyonek in 1974, pursuant to the terms of the Alaska Native Claims Settlement Act, claimed certain lands within its vicinity only to find that they had already been claimed by Alaska under the Mental Health Enabling Act of 1956. As a result the Bureau of Land Management rejected Tyonek's application for the acreage. Tyonek filed suit claiming that Alaska did not have valid title to the land. But in 1986 the U.S. District Court ruled in favor of Alaska stating that the language of A.N.C.S.A. did not allow native claims to nullify state interest in the property.

32. *AKN* 2 (Apr. 1970): 12; *AKN* 9 (Early Spring 1977): 10–11; *AKN* 10 (Autumn 1978): 21; see generally Berry, *The Alaska Pipeline.*

33. 15 Stat. 539 (1867); 23 Stat. 26 (1884); 31 Stat. 321, 330 (1900); 72 Stat. 339 (1959).

34. *AKN* 3 (Late Autumn 1971): 6; *AKN* 3 (Early Winter 1971): 4; *AKN* 9 (Early Spring 1977): 10–11; *AKN* 10 (Autumn 1978): 21.

35. Thomas Berger, *Village Journey: The Report of the Alaska Native Review Commission* (New York, 1985), 59–70; Alaska National Interest Lands Conservation Act, 94 Stat. 2371 (1980).

36. 742 F.2d 1145.

37. *Village of Gambell v. Hodel,* 774 F.2d 1414; *Amoco Production Co. v. Village of Gambell,* 107 S.Ct. 1396.

38. 803 F.2d 1016; *Juneau Empire,* 23 May 1986.

39. Patricia Barcott, "The Alaska Native Claims Settlement Act: Survival of a Special Relationship," *University of San Francisco Law Review* 18 (1981): 157; John F. Walsh, "Settling the Alaska Native Claims Settlement Act," *Stanford Law Review* 38 (1985): 244–245. For a detailed study on the legal rights of Alaska Natives see David S. Case, *Alaska Natives and American Laws* (Fairbanks, 1984).

40. *Anchorage Daily News,* 30 Oct. 1987; Alaska Native Claims Settlement Act Amendments of 1987, 101 Stat. 1788 (1988).

41. Executive Order 11670, *Weekly Compilation of Presidential Documents,* 8 (22 May 1972): 880–881; *AKN* 2 (Nov.–Dec. 1970): 9; *AKN* 3 (Jan.–Feb. 1971): 15; *AKN* 3 (Late Spring 1971): 43; *AKN* 4 (Late Spring 1972): 8.

42. *Wassaja,* 5 (May 1977): 17; *Choctaw Nation v. Oklahoma,* 397 U.S. 620; *AKN* 8 (Early Autumn 1976): 18; *AKN* 10 (Late Spring 1978): 15; *United States v. Dann,* 105 S.Ct. 1058.

43. *United States v. Dann,* 105 S.Ct. 1058.

44. *United States v. Gemmill,* 535 F.2d 1145; *AKN* 2 (July–Aug. 1970): 1, 2, 4; *AKN* 2 (Sept. 1970): 28, 31–32; *AKN* 2 (Nov.–Dec. 1970): 12, 13, 16, 17; *AKN* 3 (Mar. 1971): 44; *AKN* 3 (Early Summer 1971): 12; *AKN* 3 (Late Summer 1971): 21; *AKN* 4 (Early Spring 1972): 8; *AKN* 4 (Late Spring 1972): 12; *AKN* 4 (Late Autumn 1972): 13; *AKN* 6 (Late Spring, 1974): 38; *Wassaja* 5 (Feb. 1977): 20.

45. *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.,* 418 F.Supp. 798; *Narragansett Tribe of Indians v. Murphy,* 426 F.Supp. 132; 92 Stat. 813 (1978); *Wassaja* 7 (Apr. 1979): 13; *AKN* 10 (Autumn 1978): 11; *Norman Transcript,* 19 Aug. 1979.

46. *Joint Tribal Council of the Passamaquoddy v. Morton,* 528 F.2d 370, 376–377, 380; *Wassaja* 4 (Jan. 1976): 3; *Wassaja* 4 (June 1976): 15.

47. William B. Gunter, "Recommendation to President Carter From William B. Gunter," *American Indian Law Review* 5 (1977): 427–430; Telegram, "Passamaquoddy and Penobscot Tribes to Carter," 26 July 1977, *American Indian Law Review* 5 (1977): 430; *AKN* 9 (Autumn 1977): 18–19.

48. 123 *CR* 5692-99 (1977); *Wassaja* 5 (Apr. 1977): 1, 3.

49. *AKN* 10 (Early Spring 1978): 22; *Wassaja* 7 (Mar. 1979): 8.

50. Maine Indian Claims Settlement Act, 94 Stat. 1785 (1980).

51. HR3; *AKN* (Late Spring 1980): 24.

52. *Oneida Indian Nation v. New York,* 649 F.Supp. 420.

53. *County of Oneida v. Oneida Indian Nation (Oneida II),* 105 S.Ct. 1245; see *Oneida Indian Nation v. County of Oneida (Oneida I),* 414 US Reports 661. The Court's decision should make it easier for tribes to win in other cases involving state violations of the Trade and Intercourse Act.

54. *New York Times,* 5 Mar. 1985, 13 Apr. 1986, 29 Dec. 1986.

55. *South Carolina v. Catawba Indian Nation,* 106 S.Ct. 2039.

56. *Mashpee Tribe v. Secretary of Interior,* 820 F.2d 480; *Mashpee Tribe v. New Seabury Corp.,* 592 F.2d 575.

57. HR10.

58. Wampanoag Tribal Council of Gay Head Inc. Indian Claims Settlement Act of 1987, 101 Stat. 704 (1987); Native American Rights Fund, *News Release,* 31 Aug. 1987. The Miccosukee and Mashantucket Pequot also obtained land claims settlements for state violations of the Trade and Intercourse Act; Florida Indian Land Claims Settlement Act (Miccosukee), 96 Stat. 2012 (1982), 25 *USCA* sec. 1741; Connecticut Indian Land Claims Act (Mashantucket Pequot), 97 Stat. 851 (1983), 25 *USCA* sec. 1751.

59. 59 *CR* 7453 (1920); Hawaiian Homes Commission Act, 42 Stat. 108 (1921).

60. Bureau of the Census, *Fourteenth Census of the United States,* 1920, vol. 3, *Population* (Washington, D.C., 1922), 1172–73; Carey McWilliams, *Brothers Under the Skin* (Boston, 1948), 182.

61. HR2, 6; Gavan Daws, *Shoal of Time: A History of the Hawaiian Islands* (New York, 1968), 297.

62. See note 61.

63. SH2, 118.

64. 42 Stat. 108 (1921); Theon Wright, *The Disenchanted Isles* (New York, 1972), 32–35; Ralph Kuykendall and Lorin Gill, *Hawaii in the World War* (Honolulu, 1928), 403.

65. SH1, 38.

66. HH2, 121–122, 127–128.

67. Ibid.; HR2, 6; 42 Stat. 108 (1921).

68. 42 Stat. 108 (1921).

69. 42 Stat. 1221 (1923); Hawaii Department of Hawaiian Home Lands, *Annual Report, 1976–1977,* 13.

70. Hawaii Department of Hawaiian Home Lands, *Annual Report, 1976–1977,* 13, 26–27. Since statehood, the Department of Hawaiian Home Lands, a state agency, has managed the homelands program. The Hawaiian Homes Commission, an executive committee, heads the department.

71. Diana Hansen, *The Homestead Papers: A Critical Analysis of the Management of the Department of Hawaiian Home Lands* (Honolulu, 1971), 5, 13.

72. Ibid., 37.

73. Ibid., 3–4; SH4, 21; HH-SH1, 278; Hawaii Department of Hawaiian Home Lands, *Annual Report, 1976–1977,* 14.

74. Hansen, *Homestead Papers,* 4–7; SH4, 23, 149. During the 1976 hearings, Chairman of the Department of Hawaiian Home Lands Billie Beamer noted that the 112,000 acres leased to business had a total rental price of $730,000.

75. Hansen, *Homestead Papers,* 11–18; SH4, 281; Herman S. Doi, *Legal Aspects of the Hawaiian Homes Program,* Hawaii Legislative Reference Bureau Rept. no. 1A (Honolulu, 1964), 14–16, discussed the question of contracts to pineapple companies. He quoted Hawaii attorney generals' opinions that such arrangements were not considered subleases. In 1960 a state court decision upheld such contracts but would not allow a Hawaiian homesteader to divide her tract and sublease part of it to her daughter.

76. SH4, 258; Hansen, *Homestead Papers,* 4, 7–10, 38, 54; Donald Clegg and Richard Bird, *Program Study and Evaluation of the Department of Hawaiian Home Lands, State of Hawaii* (Honolulu, 1971), 51–52; Hawaii Constitutional Conven-