How the Land Was Taken: The Legacy of the Lewis and Clark Expedition for Native Nations

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THE TOPIC OF THIS SYMPOSIUM is both fascinating and provocative. What are the enduring effects of the Lewis and Clark Expedition for Native Nations? As we contemplate the impact of the Lewis and Clark Expedition, we consider the past, present, and future of Native Nations, providing not only a much-needed snapshot of where we are, but also a vision of where we are headed. It is our own expedition into consciously creating the world that we aspire to. Historian James Ronda has asserted that “exploration journeys” are “all about the imagination’s encounter with the physical world,” which produces “new knowledge” and understandings, situated in particular places and narratives. To me, federal Indian law is a body of doctrinal law that non-Native jurists have constructed to adjudicate Native and non-Native rights to tangible and intangible resources, including rights to land, sovereignty, cultural resources, and natural resources. With ownership comes control over resources and knowledge. The Lewis and Clark Expedition manifested a basic structure for the new knowledge and understanding that would be necessary to craft the body of law that would determine the ownership of lands and resources. The cultural dynamic that resulted from this expedition has been, and continues to be, played out in a host of venues. By bringing this dynamic to consciousness, we can engage in a critical appraisal of what its impact has been on the lives and destinies of Native peoples, and what Native people must do to reclaim the agency of thought and action necessary to achieve true self-determination in the contemporary global world.

Because this paper is focused on Native land rights, I will start by offering the very basic view that, at the time of contact, Native peoples “owned” every square inch of land now comprised within the United States, in the sense that they exercised all of the rights generally associated with ownership (e.g., use, enjoyment, possession, right to alienate, right to exclude). Of course, at that time, there was no country called the United States. The sovereign nations of Europe claimed the lands owned by the sovereign Native Nations in the Americas. Thus, the whole idea of how Indians “lost” their lands traces back to a fundamental doctrine that imagined the nature of sovereignty and the relationship of sovereignty to land title: the Doctrine of Discovery.

The Lewis and Clark Expedition and the Doctrine of Discovery

The American public is fascinated with the Lewis and Clark Expedition. James Ronda asserts that the act of “reconsidering Lewis and Clark” is important to Americans, because in this process “we consider ourselves, not as an act of self-indulgence but as an act of self-discovery.” The Lewis and Clark Expedition is emblematic of the birth of a new nation carved out of “foreign soil.” In the minds of the American people, Native people are incorporated into the creation story of America, and Native narratives of place and history become subsumed within American law and history. Thus, an important part of our project in this symposium is to differentiate the “American narrative” from the narratives of Native peoples, and to document the past, present, and future of Native America according to tribal narratives and worldviews.

In a material sense, Lewis and Clark mapped and documented the character and extent of a new nation. In a symbolic sense, they appropriated the places, images, and characters of the people they encountered to construct an “American epic,” including a new frontier—the “American West”—that would be vital to the creation of the nation. The result was to incorporate Native peoples into the political and legal structure of America, not as foreign sovereigns and not as citizens, but with a peculiar hybrid status termed “domestic, dependent nations.” The brash glory of the Lewis and Clark Expedition also carries a darker underside: “discovery” and “conquest” are the twin faces of federal Indian law.

The Doctrine of Discovery as Emblematic of Western Norms

An issue to consider at the outset is whether the jurisprudence of “discovery” that has had such a profound impact upon Native peoples represents a “past” set of beliefs and norms about Native/non-Native encounters, or whether it
continues to be of significance. As Robert Williams has demonstrated, the Doctrine of Discovery originated in medieval Europe as a means for European nations to justify their conquests of “non-Christian” peoples during the Crusades. The Doctrine of Discovery was imported into federal Indian law by Chief Justice John Marshall’s 1823 opinion in Johnson v McIntosh. The litigants in that case were two non-Indians, each of whom sought to maintain the paramount claim of title to the same land. The plaintiffs had received title to the land through grants directly from the Indian tribes who were in original possession of the lands, while the defendants had received title through later grants made by the federal government. In this case, Chief Justice Marshall held that the character of the Native people was such that they could not be recognized as holding the full rights and title to their ancestral lands at the time of contact, as would be the case had they been “civilized” nations. Marshall portrayed Native people as “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.”

The inevitable consequence of this situation, according to Marshall, was a bifurcated system of legal rights, which stemmed from the international Doctrine of Discovery. Because the Native peoples of the New World were “uncivilized,” the doctrine of “conquest” that governed the relationship between civilized subjects of conquered nations and their conquerors, and generally permitted existing property rights to survive the political transition of governance, could not apply. Rather, Marshall crafted a modified version of the Doctrine of Discovery, which typically governed the first ownership of “vacant” lands. Under this rule, the first European sovereign to “discover” and “take possession” of lands occupied by Native peoples received the sovereign title to such lands. The Native peoples retained a more limited “right of occupancy,” which essentially allowed them to maintain their actual use and possession until the sovereign “extinguished” the Native peoples’ right to occupy “by purchase or conquest.” According to this account, Native people were fully capable of transferring their right of occupancy to a third party, but it was not the type of “property right” that would be enforced under American law in the American courts.

Professor Robert Williams calls the Doctrine of Discovery a “discourse of conquest,” and asserts that it confirmed the superior rights of Europeans to lands occupied by the “savage” Indians, encouraged white settlement of Native lands on the theory that, in the hands of Native people, these were “wastelands,” and vested authority in the United States to regulate the Indians’ dispossession according to the “national interest.” According to Professor Williams, the Mcintosh decision institutionalized European racism and colonialism into American law and negated Native peoples’ human rights by claiming that they were not equal to “civilized” Europeans.

The Mcintosh opinion also influenced Chief Justice Marshall’s subsequent opinions in the Cherokee cases, which formulated the notion of Native political identity as “domestic, dependent nations,” whose rights to self-governance were qualified and limited by the superior sovereignty of the U.S. government. The legal issue in the Cherokee cases was whether the State of Georgia could enforce its laws within the boundaries of the Cherokee Nation. In Cherokee Nation v. Georgia, the Cherokee Nation brought suit against the State of Georgia in an effort to enjoin enforcement of state laws that sought to foreclose the exercise of Cherokee legislative and judicial authority. Chief Justice Marshall authored the plurality opinion, finding that the Supreme Court lacked constitutional authority to hear the case because the Cherokee Nation was not a “foreign nation” for purposes of the Article III grant of jurisdiction over controversies between a foreign nation and a domestic state. Marshall found that the Indian tribes were “domestic dependent nations” because they “occupy a territory to which [the United States asserts] a title independent of their will, which must take effect in point of possession, when their right of possession ceases.” During this interval, the Indian tribes were “in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief of their wants; and address the President as their Great Father. They and their country are considered by foreign nations, as well as by ourselves, as being .. completely under the sovereignty and dominion of the United States.”

In a later opinion, Winchester v. State of Georgia, the Supreme Court further defined the character of the Cherokee Nation as a “domestic, dependent nation” and elaborated on the protective role of federal power, by holding that Georgia’s laws could not extend into the Cherokee Nation’s territory because “The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with the treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.”

The “Marshall Trilogy” effectively defined the subordinate sovereignty and land rights of Native peoples in relation to the superior sovereignty and title of the U.S. government. Although the Cherokee cases clearly confirm the
political status of Indian tribes as “nations,” they are not considered “foreign nations” because they exist within the territorial boundaries of the United States, because the commerce clause distinguished “foreign nations” from “Indian tribes,” and because, through treaties such as the Cherokee Treaty of Hopewell, some Indian Nations had placed themselves under the “sole protection” of the United States. Marshall’s conception of the relationship between the Indian Nations and the federal government has at least three enduring components. First, tribal sovereignty is clearly tied to geographical boundaries. Tribal sovereignty enjoys its fullest expression within tribal territory, often designated as “Indian Country.” Second, the concept of Indian tribes as “domestic, dependent nations” establishes the paramount authority of the federal government with respect to Indian Nations, and the lack of state power within Indian Country. This notion receives constitutional support through the commerce clause, which gives Congress the sole and exclusive right to regulate trade with “foreign nations, among the several states, and with the Indian tribes.” Finally, the trust relationship between the federal government and the Indian Nations is at the core of the relationship and is founded on the federal government’s “duty to protect” the Indian Nations. As future cases would explain, the federal government’s commerce clause authority could be employed on behalf of Native Nations by enacting statutes to protect their welfare.10

Each of these concepts plays an important role in understanding Native land claims under U.S. law. However, I want to emphasize that in all of these cases, there are competing cultural constructions about the significance of the land. It is a mistake to focus on the doctrinal claims as a feature of federal Indian law without also taking into account the significance of the claims in a cultural sense.

Native Lands and Narratives of Place and Identity

“We are the land,” writes Laguna author Paula Gunn Allen of the relationship of native peoples to the land that has sustained and nurtured them for countless generations.11 “More than remembered, the Earth is the mind of the people as we are the mind of the earth. . . . It is not a means of survival. . . . It is rather part of our being, dynamic, significant, real.” Allen highlights the fact that the earth is commonly seen as a means of physical survival when in fact it is simultaneously the source of “cultural survival” for Native peoples. For the “indigenous peoples” of this land, particular geographic areas are often constitutive of cultural identity. Many Indian Nations speak of the specific “origin place” of their people as being attached to a river, mountain, plateau, or valley. This origin place becomes a central and defining feature of the tribe’s religion and cultural worldview. Charlotte Black Elk, for example, relates that the Lakota creation story tells of the emergence of the Lakota people from the caves within the Black Hills, which are called “Wamaka Og’naké” – the “heart of everything that is.”12 The land also becomes a way to designate the cultural universe of a particular Indian tribe. For example, the Tewa of New Mexico see their world as bounded by four sacred mountains, the same mountains that were seen by the first four pairs of sibling deities as they were sent out to explore the world in the Tewa’s origin story.13 The Tewa cosmology is structured around these mountains and the associated bodies of water, spirit entities, shrines, directions, and colors that characterize these mountains and establish the place of the Tewa people within this universe. The Navajo, or Diné, people have an analogous structure, locating themselves within the confines of four sacred mountains, and articulating a relationship between the people, the land, and the spirit entities through a distinctive set of narratives, and social and religious connections. Although the Navajo and the Tewa are culturally quite distinct and different from each other, both groups perceive that they have a responsibility to care for these sacred elements of their universe, and both maintain a strong belief that there is an appropriate balance between human beings and the natural world which must be preserved in order to ensure continual survival.

There is a second sense in which “place” is significant to Native peoples. In his book Wisdom Sits in Places, anthropologist Keith Basso documents the ethical precepts that derive from specific places and mark the cultural evolution of a people throughout history.14 According to one Apache elder, “The land is always stalking people. The land makes people live right. The land looks after us. The land looks after people.”15 According to Basso, the Apache names for geographical locations provide specific descriptions of their physical characteristics (for example, “White Rocks Lie Above in a Compact Cluster”) and, in that sense, they operate like a map, defining the boundaries of the Apache’s ancestral lands. However, place names are also used very specifically to transmit knowledge about particular events that occurred at these places, which not only links the Apaches to their ancestors in a historical sense, but also provides a code of appropriate moral behavior by which each generation should live. The place name, then, evokes not only a picture of the place, but also a story to “make you live right.”16 The ethical lessons of the land are seen as pivotal in constructing a set of principles to guide right action, and they apply to successive generations equally. The late Ronnie Lupe, an esteemed tribal leader for many years, expressed sadness that there was a marked loss of this knowledge among the young people, and said that the lack of knowledge about what happened at these places may lead some young people to get into trouble.17
The cultural connections between Native peoples and the land are quite misunderstood among non-Indians. Non-Indians typically see this as a "romanticized" notion that is of limited utility in a modern era. The "mystical" aspect of this relationship is often used to discount the reality of Native rights to the land, most commonly, by the notion that Indian people lacked any conception of "ownership." While it is true that no Native people employed the concept of the "fee simple" or maintained written land titles prior to the arrival of the Europeans, there is a rich tradition of "rights" and "responsibilities" that accompanies Native narratives about the land. In the broader sense of "ownership," Native peoples most definitely maintained political and cultural claims to their ancestral lands.

The Legacy of Discovery

The legacy of "discovery" is a profound clash of narratives. At a symbolic level, the transformation of "Native" lands to "American" lands occurred through the mapping and naming of Native lands. Throughout their expedition, for example, Lewis and Clark mapped the mountains, valleys, rivers, and other natural features of the land they traversed. In some cases, they recorded the French names or Native names that had already been given to these natural features. However, in most cases, Lewis and Clark named the places according to their own experience (e.g., whether the water was "muddy" when they visited it), or through incidents that occurred when they visited the places (e.g., the day they ran out of flour), or in commemoration of people that were important to them (e.g., the "Judith River" after Clark's fiancé; "Clark's Fork," after himself). This was a "renaming process" designed to transform indigenous understandings of the land into an "American" understanding, and to supplant Native narratives with a new "American" narrative.

At a policy level, the United States used the law of nations and the rule of "discovery" to assert that it acquired title from France and Great Britain, although the Indian people were largely in undisturbed possession and occupancy of these lands. The Lewis and Clark Expedition was intended to gather the information necessary to appropriate Native title and further restrict the free movement of Native peoples across their traditional lands. Thomas Jefferson, the primary architect of the Lewis and Clark Expedition, gave specific instructions to Meriwether Lewis to "find a navigable waterway from St. Louis to the Pacific Ocean, to make contact with the Indians he encountered, and to document all that he observed en route." In this sense, the Native peoples were seen as "both objects of scientific study and as sources of geographic information." The Lewis and Clark Expedition was the precursor to nineteenth-century Indian policy. President Jefferson understood that the United States could become a powerful nation only if it could annex lands west of the Mississippi. In 1803, when he assumed office, there were several significant obstacles to westward expansion, including the limited options for transportation and the lack of knowledge about the nature and characteristics of the western lands. The area was largely unmapped at the time, and popular mythology speculated that these lands harbored exotic creatures, such as woolly mastodons, as well as erupting volcanoes. In a confidential communication to Congress recommending exploration of the western lands, Jefferson mentioned the necessity of securing as much information about the Indians as possible in order to develop appropriate strategies to deal with their growing resistance to transferring any further lands to Europeans. Specifically, Jefferson called for two measures: first, to encourage the Indians to abandon hunting and take up agriculture, which would necessitate "less land and labor" and "maintain them better than their former hunting lifestyle"; and second, to "multiply trading houses among them, and place within their reach those things which will contribute more to their domestic comfort than the possession of extensive but uncultivated wilds." Jefferson elaborated on the latter point in a letter to William Henry Harrison, which calls for encouraging the "good and influential individuals" among the Indians to "run into debt, because we observe that when these debts get beyond what the individual can pay, they become willing to let them off by a cession of lands." By advocating for the "civilization" of Indian people and encouraging their dependency upon European trade goods, Jefferson set the stage for nineteenth-century federal Indian policy, which centered upon the dispossession of native peoples from their lands. Many land claims cases of the twentieth century trace back to these policies. In the next section, I will distinguish doctrines that allow Indian Nations to receive compensation for takings of their land and also highlight the operative pieces of federal legislation which have contributed to the loss of Native lands. By studying Native land claims cases, we can understand the legal mechanisms that have been employed to take Native lands.

Colonialism and United States Law and Policy: How the Indians "Lost" Their Lands

U.S. federal Indian law has consistently distinguished between the "aboriginal title" interests of Native peoples, which are essentially rights to use and enjoyment of land so long as the U.S. government has not extinguished this title, and "recognized title," which occurs through federal action which confirms the tribal property interests (generally a "reservation") under federal
law by treaty, statute, or in some cases by an executive order that is later ratified through congressional action. Only takings of “recognized title” are compensable under the Fifth Amendment of the U.S. Constitution, which provides for “just compensation” whenever property is taken by the federal government for a “public purpose.” However, tribes sometimes encounter difficulty proving that the government action that took their lands was in fact a “taking” and not an exercise of the federal government’s legitimate authority as “trustee” over tribal lands, which includes the power to sell such lands out of trust, as it did during the allotment era of the late nineteenth and early twentieth centuries. The Dawes Allotment Act of 1887 was designed to break up the collective landholdings of the Indian Nations by allotting Indian reservations in fee simple parcels to individual tribal members and selling the “surplus land” to non-Indian settlers. In the 1903 case of _Lone Wolf v. Hitchcock_, the Supreme Court described congressional power to allot a treaty reservation as virtually absolute and beyond the ability of the courts to adjudicate. In 1980, this ruling was modified by the Supreme Court in _United States v. Sioux Nation_, which held that federal actions with respect to tribal property would receive scrutiny under the due process clause. In that case, the federal government had made no effort to offer the Lakota people fair compensation when it enacted legislation in 1877, removing the Black Hills from tribal ownership. The Black Hills are sacred land to the Lakota and many other Plains Indian Nations, and they were located within the reservation that was created by the 1868 Fort Laramie treaty with the Lakota. The Court held that, through the 1877 Act, the federal government had committed a “taking” under the Fifth Amendment, compensable with damages for the value of the land taken in 1877 (estimated at $17.5 million) plus the accrued interest from 1877 until the present (estimated at over $400 million).

A very different legal regime applies to takings of “Native title.” In _Tee-Hilton Indians v. United States_, the Supreme Court held that federal takings of Native aboriginal title are not compensable under the Fifth Amendment because this interest merely entitled “permission from the whites to occupy” such lands. The interest “is not a property right,” said the Court, “but amounts to a right to occupy which the sovereignty grants and protects against intrusion by third parties, but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.”

Although Native title is not compensable as a constitutional matter, certain federal statutes have enabled tribes to be compensated for takings of their Native title interests, including the federal Noninterruption Act, first passed in 1790, which required federal consent to transfer lands out of tribal ownership and voided conveyances that did not have such consent, and the Indian Claims Act of 1946, which was intended to settle all Native land claims in order to pave the way for the ultimate assimilation of Native peoples into American society. Before engaging this legislation, however, this paper offers a brief survey of the federal policies and laws that have divested Indian Nations of much of their lands.

**Colonial Era (1492–1776)**

During the colonial era, the European nations employed the Doctrine of Discovery to claim sovereign title to lands in the “New World” and to divest the Native Nations of any claim, except the right of occupancy. In fact, however, the Doctrine of Discovery operated largely at the level of theory. Great Britain and France were among the European nations that executed treaties with the Indian Nations to gain cessions of land and political alliances. These treaties recognized the Indian Nations as sovereign governments with exclusive rights to their lands, thus necessitating a mutual and voluntary surrender of interest before European colonists could take possession. Prior to the War of Independence, the British colonies were required to abide by the Proclamation of 1763, which forbade cessions of land west of the Appalachian Mountains without consent of the British Crown. This document represented the sovereign’s need for centralized management of relations with the Indian Nations in order to avoid conflict and warfare. In 1764, the Crown attempted to extend this centralized authority to the management of trade between agents of the British Crown and the Indian Nations. This plan, however, was never formally approved and was only partially implemented before it was abandoned altogether in 1768.

**The Confederation Period (1776–1789)**

A major shift in relations with the Indian Nations occurred as a result of the push by the British colonies for independence. At this point, the colonies challenged all aspects of British policy, including the Proclamation of 1763, and entered intensive negotiations with the Indian Nations to secure political and military alliances.

With respect to the Proclamation of 1763, land speculators drew on a policy statement that applied to the colonies in India, which asserted that the colonies could directly negotiate with East Indian representatives for land acquisitions. Envisioning the ultimate independence of the colonies, these land speculators “purchased” vast tracts of land from the Indian Nations.

The treaties of this era exemplify the political relations that existed between the colonial governments and the Indian Nations. For example, the 1778 Treaty of Fort Pitt with the Delaware Nation speaks of the United
States' engagement in a "just and necessary war" with Great Britain and entreats the Delaware Nation to "give free passage through their country" and to offer up any "warriors" of the Delaware Nation that were willing to join the troops of the United States in a military alliance. The document calls for a mutual and bilateral political relationship between two sovereigns, including consent to punish citizens of the other sovereign in tribunals that offer mutual justice. The document further invites the Delaware Nation to join the present confederation of the United States and form a state with political representation in Congress, at such time as this would be found "conducive to the mutual interest of both parties."28

In 1781, the United States approved the Articles of Confederation, in which Article IX vested the Continental Congress with the "sole and exclusive right and power of ... regulating the trade and managing all affairs with Indians not members of any of the states; provided, that the legislative right of any state within its own limits be not infringed or violated."29 This provision was intended to secure the benefits of centralized management of Indian affairs (e.g., to keep the peace with the Indian Nations), while still recognizing the political autonomy of the former colonies, who were actively involved in securing further land cessions. In Oneida Indian Nation v. New York,30 the Second Circuit Court of Appeals upheld the legality of two treaties between the Oneida Nation and the State of New York, which took place prior to the ratification of the U.S. Constitution, on the theory that Article IX of the Articles of Confederation preserved the right of the state to purchase lands directly from the Indian Nations.

**The Nonintercourse Act**

That situation changed when the U.S. Constitution was ratified in 1787. As Chief Justice Marshall noted in his famous trilogy of Indian law cases, the commerce clause of the Constitution recognized the exclusive authority of Congress to regulate trade with the Indian Nations, including any cession of tribal lands. The first Congress acted immediately to assert this exclusive control by enacting the Trade and Intercourse Act of 1790, also known as the Nonintercourse Act, which prohibited the sale of Indian lands to any person or to any state without first securing permission from the federal government. The 1790 Act was, by its terms, temporary, leading to the enactment of several similar laws in subsequent years, and culminating in the enactment of the 1834 Trade and Intercourse Act, which is intended to be permanent and binding on all states and third-party purchasers, and is currently codified at 25 U.S.C. 177. In recent years, several Indian Nations have successfully litigated their continuing right to lands that were removed from tribal possession in violation of the Nonintercourse Act. In Joint Tribal Council of the Passamaquoddy Tribe v. Morton,31 the Passamaquoddy tribe (which was then not federally recognized) prevailed in its claim seeking a declaratory judgment that the tribe was entitled to federal protection under the Indian Nonintercourse Act at the time that its lands were taken by the State of Maine in violation of the Nonintercourse Act. This holding ultimately led to the Maine Land Claims Settlement Act, which settled claims on behalf of the Passamaquoddy, Penobscot, and Maliseet Indians to large portions of Maine.32 Through this legislation, the affected tribes received federal recognition and other benefits, including a monetary settlement designed to enable the tribes to acquire trust lands. The Act also formally extinguished the tribes' aboriginal title claims.

**The Removal Period (1835–1861)**

The federal government's removal policy inspired some of the most devastating losses of tribal landholdings, resulting in the complete exclusion of many groups from any portion of their aboriginal landbase. The Removal Act was an outgrowth of the dissatisfaction expressed by the states about the existence of autonomous tribal enclaves within state boundaries. After the War of 1812, the federal government became more responsive to state concerns because it no longer perceived the Indian Nations to hold an important balance of power in the United States' claim to nationhood. The removal process began slowly, with the federal government encouraging Indian Nations to voluntarily consent to move westward in treaties that promised Indian Nations permanent political autonomy once they were outside state boundaries. However, toward the end of the 1820s, the federal government became much more coercive. President Andrew Jackson, who was elected in 1828, was a fervent supporter of Indian removal. In the wake of the Cherokee cases, which held that the State of Georgia had no right to impose its laws on the Cherokee Nation, removal was seen as the only solution to an intractable problem. The Removal Act of 1830, designed to use Congress's exclusive authority over Indian affairs to gain further land cessions, spoke of securing the "consent" of Indian Nations to remove to western lands. However, in the Southeast, the removal of Indian Nations such as the Cherokee, Choctaw, Chickasaw, Creeks, and Shawnee to the "Indian Territory" was primarily a military and forcible operation. Tribes in the Northeast were also coerced to sign removal treaties, although the political environment was different in these areas, and for many tribes, such as the Menominee and Ho-Chunk (Winnebago), this only resulted in a partial removal of the Indian Nations.33 The net effect of the removal policy was not only to divest the tribes of their aboriginal homelands, but to break down tribal autonomy, in some cases breaking
Indian Nations into fractionated political units and, in other cases, forcing distinct Indian Nations to occupy lands in common with tribes that had not been historical allies and did not share a common cultural basis.

**Reservation Policy (1861–1887)**

The federal government also asserted its exclusive authority to regulate trade with the Indian Nations by entering into numerous treaties with Indian Nations to secure further cessions of their lands. The goal of the treaty policy was to reserve smaller tracts of land under the protection of federal agents as “reservation lands.” The treaty policy vastly circumscribed the traditional aboriginal use areas of Indian Nations to smaller tracts of land that were under the legal ownership of the United States but held for the beneficial use of Indian people. In addition to the goal of acquiring as much land as possible for white settlement, reservations were seen as necessary to keep Indian people separate from white settlers, to minimize conflict between the two groups, and also to start the “civilization” process. The treaty reservations, of course, were portrayed to the Native Nations as their “permanent homelands.” In actuality, however, the federal government would periodically reopen negotiations with the tribes to gain further land cessions. Thus, for example, the Lakota, Cherokee, and other Indian Nations entered a series of treaties with the United States, each of which was designed to procure further land for white settlement, but each of which was accompanied by several benefits (e.g., monetary payments, rations, promises of education) designed to entice the tribes to consent. In 1871, the U.S. Congress officially ended the treaty-making process with Indian Nations, inspiring the use of more coercive mechanisms to divest the tribes of their lands (e.g., purported “agreements” which were then “confirmed” by congressional action).

During the treaty era, the United States signed over 370 treaties with Indian Nations, which resulted in the loss of nearly 2 billion acres of Indian lands when the treaty-making period ended in 1871 (the last treaty was made and ratified in 1868). The Indian Nations retained approximately 140 million acres of land on about 200 reservations. Thus, while Indian treaties do acknowledge tribal sovereignty, and in that sense are important political instruments, they also served as the legal means to extinguish title to vast sums of aboriginal lands.

**The Allotment Period and Forced Assimilation (1871–1934)**

The nineteenth century and early part of the twentieth century marked an intensive effort of federal policy designed to break down tribal political autonomy and acculturate individual Indians to the norms of Western society. The reservation policy facilitated this effort by placing the administrative responsibility for Indians on a reservation in the hands of a non-Indian agent. The Indian agents were often Christian missionaries who saw the need to Christianize Indians and “civilize them” by transforming tribal lifeways into an agrarian model. The assimilation policy was multifaceted. The use of Indian agents and the formation of “tribal police” that operated under the Code of Federal Regulations to punish infractions—such as marriage to multiple wives, or the ceremonial gifting of family property through “potlatch” or “giveaway” ceremonies—supplanted traditional tribal governance structures and enforced the norms of Anglo-American culture by penalizing contrary Native norms. The boarding-school policy broke down Indian family units and educational systems, and forced Indian children to speak English, become Christians, and learn skills that would serve them in non-Indian society (such as household labor or farm labor).

An important component of this policy was to break the norm of “tribalism” altogether and institute a social norm that would exalt the individual/nuclear family structures of non-Indian society. This policy was implemented in the context of landholdings by the allotment policy, which sought to allot tribally held lands into separate lots or parcels that were assigned to tribal members for a permanent home. These “trust allotments” were to be of an appropriate size for an individual or family farm unit, and the benefit of such ownership often included access to farm implements and training in agrarian pursuits. The allotment policy was an informal part of several treaties with Indian Nations from the 1850s to the end of treaty-making in 1871. However, the allotment policy became pervasive with the enactment of the 1887 General Allotment Act, which gave the federal government the authority to negotiate with Indians on any reservation to allot the reservation and sell all “surplus” lands that remained after the tribal members each received their share.

The Allotment Act resulted in a devastating loss of tribal lands. According to Vine Deloria Jr. and Clifford Lytle, Indian landholdings were reduced from a total of 138 million acres in 1887 to 48 million acres in 1934, when the Indian Reorganization Act officially ended the allotment policy. The net loss of tribal lands in acreage, of course, does not correlate to the net loss in the value of tribal lands. The federal officials in charge of allotting the reservations often allotted the lands of poorest quality (measured in terms of suitability for irrigation or timber harvesting) to tribal members, reserving the prime lands to be sold to non-Indian settlers in order to entice them to move to reservation lands. The allotment policy also had several other negative consequences for Indian Nations and tribal members. The trust restriction on sale or alienation of allotments to tribal members was designed to be temporary.
the tribes selected for termination possessed incredibly valuable timber and mineral resources. The Klamath tribe in Oregon and Menominee tribe of Wisconsin, for example, both possessed reservations with rich timber resources. Each tribe selected for termination was then required to agree to an administrative “plan” to effect termination, which generally included the abolishment of the reservation, sale of Indian lands and natural resources, and a payment distribution to tribal members. Without fail, the tribes selected for termination suffered terribly, being divested of valuable reservation lands as well as the political identity that sustained their survival as distinct nations within the United States.

During the termination era, approximately 109 tribes and bands were terminated. Although there has yet to be an accurate accounting of the impact of termination, it is estimated that over 1.3 million acres of Indian lands and approximately 12,500 individuals were affected by termination. Overall, the termination policy resulted in a net loss of about 3.2 percent of all remaining tribally held land. It should be noted that some of the Indian Nations that were terminated later were reinstated to federal status and, in some cases, regained portions of the lands that they lost. However, this was a bitter struggle for most tribes, and the residual effects of this federal policy are overwhelmingly negative.

### Federal Land Policies in the Twentieth Century

The federal government’s Indian land policies in the twentieth century have been very uneven. The Indian Reorganization Act (IRA) of 1934 ended the allotment policy; however, other than extending the trust restriction on allotments in perpetuity, the Act did little to alleviate the negative effects of allotment, which continue to plague Indian Nations in the present day. Overall, the IRA had a beneficent approach to tribal land rights. On the other hand, the termination policy of the 1950s was as devastating to the affected tribes as the nineteenth-century policies, such as the removal policy. In 1955, House Concurrent Resolution 108 expressed the “policy of Congress” to secure “equal citizenship” for Indian people by freeing them from federal supervision and control as rapidly as possible. The “termination” of federal supervision and control technically referred to the severance of the federal trust relationship with an Indian Nation, including the sale and disposition of tribal assets, including land and natural resources. The ultimate goal of termination was that the “tribe” would no longer have any viable purpose, and that individual Indians would move to urban areas and live exactly like their non-Indian neighbors. The BIA’s relocation policy, designed to encourage Indians to move from the reservation to urban areas and participate in educational programs and job training, was an important adjunct to this policy. The federal government purportedly “selected” the tribes for termination on the basis of their ability to make that transition. This meant that the tribes that were more “successful,” as measured in socioeconomic terms, were deemed fit for termination. Not surprisingly, however, many of

### Summary

In 1970, President Richard M. Nixon called for an end to termination and for a commitment to tribal self-determination. This statement ushered in what has been called the “era of self-determination,” most notably represented by the Indian Self-Determination and Educational Assistance Act of 1975, which empowered the Secretary of the Interior and the Secretary of Health and Human Services to contract with, and make grants to, Indian tribes and other Indian organizations for the delivery of federal services. The self-determination policy and statutes enacted pursuant to the policy uphold the federal trust responsibility and the bureaucracy that has resulted from the trust, but seek to empower Indian Nations to make decisions about the administration of federal policy on their lands and for their membership. In that sense, the policy maintains a commitment to tribal self-governance, although it is not the same vision of political autonomy and agency that is represented under the doctrine of self-determination under international law.

Since the end of termination, there has not been any overt federal policy designed to remove lands from Native ownership. (What do they retain today?) In the next section of the paper, I will address how Indian Nations have dealt with the historic loss of tribal lands.
Responding to the Historic Loss of Tribal Lands: The Land Claims Process

Overall, Indian Nations have employed three primary strategies in the effort to deal with the historic loss of tribal lands.

First, many tribes have litigated their land claims as actions for damages, largely pursuant to the Indian Claims Commission Act and special jurisdictional statutes that were passed to enable such claims for particular tribes.

Second, many tribes have used funds derived from land settlements and from gaming revenues or other economic development initiatives to purchase lands. In some cases, the lands purchased are outside the reservation. In other cases, the lands purchased are within the reservation, and these purchases are designed to reconsolidate tribal landholdings within the reservation. Many of the re-acquisition cases involve the issue of petitioning to take the lands into trust.

Third, in some cases, tribes have successfully petitioned to have Congress restore lands that are of particular importance to the tribe or that were taken for “temporary” federal purposes, such as for military installations. I will refer to these cases as encompassing claims for “repatriation” of tribal lands.

This section of the paper responds to the first category, and the next section of the paper will discuss the second two categories.

An Overview of the Indian Land Claims Process

As the above discussion illustrates, the federal government divested Indian nations of their lands through many different legal instruments and through a variety of policies, which are at best described as “misguided” but are more appropriately understood as “immoral,” and perhaps downright “evil.” The United States, of course, is a sovereign nation and, like all sovereign nations, is immune from suit for its misfeasance without its consent. In 1855, the Court of Claims was established for the American people to litigate their claims against the United States under a carefully circumscribed list of possible actions. Interestingly, Indian claims were expressly excluded from the jurisdiction of the Court of Claims on the ground that Indians were not American citizens. Until 1946, Indian claims against the United States could be litigated only if Congress passed special legislation authorizing the suit. This was a cumbersome process that resulted in over 140 distinct jurisdictional acts that authorized particular tribes to sue for particular claims. If the tribal claimant, through its government-appointed attorney, prevailed, the amount of any award was routinely “offset” by the value of any “gratuities” that had been given to the tribe, such as the value of health and education services, farm implements, and commodities. Not surprisingly, the federal government rarely was required to pay out more than 50 percent of the award.

In 1946, Congress enacted the Indian Claims Commission Act (ICCA) as a vehicle to extinguish all pending Indian claims with a “final settlement” and pave the way for the termination of the federal government’s tryst relationship with the tribes, thus ending the financially onerous obligation to support the tribes. Congress saw the necessity of assembling a tribunal that would have specialized knowledge about Indian claims and could do its work efficiently. Thus, the Act established a three-member commission (later enlarged to five members) to adjudicate Indian claims. The claims had to have arisen prior to 1946 and were required to be filed by August 13, 1951. No other statute of limitations applied, nor was the defense of laches applicable. Initially, Congress envisioned that the commission could complete its work within five years. However, the commission’s tenure was extended several times before it was finally dissolved in 1978. Claims that arose after 1946 were required to be filed directly in the Court of Claims.

Under Section 2 of the ICCA, the commission was authorized to adjudicate five different causes of action:

1. Claims in law or equity arising under the Constitution, laws, or treaties of the United States and executive orders;
2. All other claims in law or equity, including those sounding in tort, that raise claims against the federal government (an extension of the Federal Tort Claims Act);
3. Claims which would result if treaties, contracts, or agreements between the tribe and the United States were revised on contract principles (fraud, duress, unconscionable consideration, mistake);
4. Claims arising from takings by the United States of lands owned or occupied by the claimant without payment of compensation (this section opened the door for aboriginal title claims);
5. Claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity (a catch-all category designed to account for “moral wrongs”).

Most of the cases brought under the Indian Claims Commission Act encompassed claims to redress uncompensated cessions of Indian land, forcible removals from aboriginal lands, to force the United States to adhere to express treaty obligations, or to impose liability upon the United States for its failure to properly manage tribal funds and other trust assets. Although the ICCA did not expressly provide that recovery was limited to monetary damages, this was expressed in the legislative intent of the statute, and the tribes’ non-Indian lawyers were motivated to litigate these cases for monetary damages because they were eligible to receive 10 percent of the claims award. Importantly, the
payment of any claim by the federal government constitutes a full discharge of liability on the part of the United States and precludes any further litigation. Thus, Indian Nations like the Lakota, who revised their initial claims to seek return of the land, rather than monetary damages, have been barred from any further litigation after payment of the judgment, regardless of their refusal to accept the award.41 Similarly, autonomous bands who dissented from the decision of a larger tribal unit to bring claims under the ICCA have been held to be bound by the ensuing judgment.42

Over $800 million had been awarded to Indian tribes under the ICCA, leading some commentators to view this statute as a positive force for tribal claimants. I would like to discuss two categories of cases—those for extinguishment of aboriginal title and those for takings of recognized title—to demonstrate the difference in the doctrines of property law that apply and the impact of these doctrines on Indian Nations. I have selected current examples of cases litigated under these principles to illustrate the contemporary impact of the doctrines of the ICCA and related statutes.

The Aboriginal Title Cases
As the Court recognized in this case, aboriginal title claims encompass the right of Native peoples to use and occupy lands that they had held for “time immemorial.” Aboriginal rights include subsistence rights exercised in a manner consistent with their ancient custom and practice. Aboriginal title includes a legally enforceable right of possession; however, it is subordinate to the fee simple, and upon extinguishment, the fee holder has full possession and use of the land. Until extinguishment, however, tribes maintain the right to bring legal action against trespassers, including an action for accounting, even if they no longer physically occupy the land. As the Supreme Court held in the Oneida case, the federal Nonintercourse Acts provide the basis for the principle that Indian Nations have a federal common-law right to sue to enforce their aboriginal title rights.43 The operative question in all of these cases is whether the federal government has acted to extinguish the tribe’s aboriginal title. As the Supreme Court noted in United States v. Santa Fe Pacific Railway,44 extinguishment can occur “by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise.”

The most recent aboriginal title case in the United States is Alabama-Coushatta Tribes of Texas v. United States.45 The Alabama-Coushatta case is the culmination of an extraordinarily complex set of litigation brought by the Alabama-Coushatta tribe of Texas to vindicate its aboriginal title claims. The tribe’s original claim arose prior to 1946, but the tribe failed to bring the claim within the statutory deadline of August 13, 1951. The tribe maintained that it had not received written notice about the ICCA or its terms prior to the deadline, and was able to confirm this through pieces of correspondence. In 1975, the tribe unsuccessfully tried to intervene in another action, brought by the Caddo Nation of Oklahoma. Finally, in 1983, Congress passed House Resolution 69, authorizing the tribe to bring its claim in the U.S. Claims Court. The tribe duly filed its action on February 22, 1984, asserting aboriginal title to approximately 6.3 million acres.

In its 2000 decision, the Federal Claims Court review panel vacated an earlier 1996 ruling and found that the tribe had established aboriginal title to approximately 5.5 million acres of land in east Texas by 1830, and that subsequent land grants and settlements did not extinguish the tribe’s aboriginal title. The panel concluded, however, that the United States could only be held liable for damages with respect to 2.8 million acres of these lands, which were illegally occupied by settlers after 1845, when Texas achieved statehood, and which the U.S. government failed to protect on behalf of the tribes pursuant to its trust responsibility. The panel found that the United States had no liability for any dispossession of aboriginal title that took place prior to 1845, when the lands were annexed into the United States. The panel further found that the tribe’s claim persisted until 1954, when the tribe’s federal trust status was terminated. The Alabama-Coushatta tribe’s federal trust status was formally restored in 1985 by the Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Restoration Act. The next phase of the litigation will calculate the damages from a negotiated “date of taking” until 1954.

The Alabama-Coushatta case is widely considered a victory for Native land rights in the modern era. It is interesting to compare that case with other cases where the Native claimants have not prevailed, often due to political or economic concerns. One such case is State v. Elliott,46 in which a group of Abenaki fishermen claimed that they should be exempt from the State of Vermont’s fishing license requirements based upon their “aboriginal title” to the land and its associated resources. The Abenaki tribe was a large historical Indian Nation that encompassed several subgroups, in this case, the Missiquoi. Although the tribe lacked federal recognition, this was not the key to the Vermont State Supreme Court’s finding that the fishermen lacked aboriginal rights. The court accepted the assertion that the Abenaki constitute an “Indian tribe” for the purposes of maintaining “aboriginal title” rights, but found that the Abenaki’s aboriginal rights were extinguished through a series of historical events, prior to Vermont’s admission to the Union in 1791. After ascertaining the same general legal framework identified in the Alabama-Coushatta case, the court emphasized that “extinguishment is irrevocable; once it takes place, Indian title cannot be revived.” The court then went on to discuss a series of land grants, commencing with a set of 1763 grants made by the governor
of New Hampshire to several third parties and ending with a series of acts designed to confirm land titles (and separate these from conflicting claims by New York and New Hampshire) prior to Vermont's admission to statehood in 1791.

In the Elliott case, the court could not identify any action taken by the British Crown or the United States that affirmatively extinguished Native title. Rather than insisting upon such an event, the court maintained that "extinguishment may be established by the increasing weight of history." Based upon the cumulative effect of many historical events, the Court concluded that there had been actual settlement and appropriation to the exclusion of competing claims, and that Congress had ratified this upon Vermont's admission to statehood.

In so ruling, the Vermont State Supreme Court foreclosed the Abenaki tribe from pursuing further remedies under the Nonintercourse Acts. Consistent with Alabama-Coushatta, the U.S. government would have no liability for damages for failing to protect Indian tribes from the actions of third parties prior to the time the state was admitted to the Union. The Elliott case illustrates the lack of political power in a tribe that lacks federal recognition, and the obvious effort of the state court to protect land titles in the state of Vermont from the type of "cloud" that emerged in other eastern land claims cases when the tribe was recognized as having an aboriginal claim in a currently heavily populated area of the state. This latter point leads into the discussion of the economic consequences of recognizing "Native title."

The Dann-Western Shoshone litigation exemplifies the economic consequences of aboriginal title cases. In 1951, certain members of the Shoshone tribe sought compensation under the ICCA for the loss of aboriginal title to lands located in California, Colorado, Idaho, Nevada, Utah, and Wyoming. Eleven years later, the Indian Claims Commission entered into an interlocutory order holding that the aboriginal title of the Western Shoshone had been extinguished in the latter part of the nineteenth century. The commission later awarded the Western Shoshone in excess of $26 million in compensation, which was later affirmed by the Court of Claims. On December 6, 1979, the Clerk of the Court of Claims certified the commission's award to the General Accounting Office, which, under the relevant statute, automatically appropriated the amount of the award and deposited it for the tribe in an interest-bearing trust account in the U.S. Treasury.

The Western Shoshone Nation historically comprised several autonomous bands, many of whom had dissented from the decision to pursue monetary damages for the appropriation of their ancestral lands. Due to the inability of the bands to agree to a plan of distribution for the $26 million judgment, the funds were not distributed. Two Shoshone sisters, Mary and Carrie Dann, who were members of one of the autonomous bands, continued to graze their cattle in the disputed area, contending that they still maintained aboriginal title to the land. When the United States brought an action in trespass against the sisters, they defended the suit by contending that their aboriginal title to the land precluded the government from requiring grazing permits.

In United States v. Dann, the U.S. Supreme Court held that "payment" occurred within the meaning of the Indian Claims Commission Act when the funds were placed by the United States into a Treasury account for the Shoshone tribe, thus releasing the federal government from further claims to continuing aboriginal title. The Court based its decision on the two articulated purposes of the ICCA: the first to dispose of the "Indian claims problem" in favor of a decision that had concluded that there ought to be a "prompt and final settlement" of all claims between the Government and its Indian citizens; and the second, to transfer from Congress to the Indian Claims Commission the responsibility for determining the merits of Native American claims.

The practical implications of the decision are significant. The opinion implicitly holds that a monetary judgment by the ICCA extinguished aboriginal title, and also holds that a minority group within a tribe who maintains such an action can determine the rights of all other members of the tribe, assuming that the petitioning group otherwise meets the standing requirements to maintain an action under the ICCA. The Court reserved the question of whether the Danns could possess individual, as well as tribal, aboriginal rights, noting that these are not foreclosed by the "final discharge" language of the ICCA with respect to tribal claims that are certified for payment. Although the Dann sisters chose not to litigate the claim of individual aboriginal title on the merits, the Ninth Circuit Court of Appeals did issue a ruling in support of the position that the Dann family's grazing or use rights in the affected area were established prior to the time that the Taylor Grazing Act established an exclusive mechanism to secure such rights, and that, procedurally, the Danns were entitled to litigate this claim.

The Dann sisters instead chose to actively resist the U.S. Bureau of Land Management's efforts to enjoin the Danns' "trespass on federal lands" and efforts to seize their livestock. In 1993, the Dann sisters, represented by the Indian Law Resource Center, filed a complaint with the Inter-American Commission on Human Rights, alleging violations of the American Declaration of the Rights and Duties of Man, as well as other international human rights norms and principles. In September of 2002, the commission ruled in favor of the Danns, concluding that the Danns "did not play a full or effective role in retaining, authorizing, or instructing the Western Shoshone claimants in the ICC process," and that the finding of extinguishment was
“not based upon a judicial evaluation of pertinent evidence, but rather was based upon apparently arbitrary stipulations as between the U.S. government and the Temsoak Band regarding the extent and timing of the loss of indigenous title to the entirety off the Western Shoshone ancestral lands.” This ruling, however, is purely advisory and carried no binding effect on the United States, which continues to maintain that the ICCA was a fair and efficient statute to address Native land claims. Even after the ruling, the BLM has continued to actively prosecute the Danns for their trespass on what it perceives to be “federal land.”

The Recognized Title Cases

Another very important category of land claims cases involves Native claims for the appropriation of treaty-guaranteed lands and other reservation lands under “federal” trust status. Here, the Fifth Amendment to the Constitution protects the tribes’ land claims, unlike the aboriginal title cases. However, the land claims in this category are sometimes difficult to articulate because of the plenary power and trust doctrines within federal Indian law, which give the U.S. Congress the authority of a “trustee” to make alternative dispositions of tribal lands, which can include sale or transfer of the lands, when deemed to be in the “best interest” of the Indians. That principle stems from the 1903 case of Lone Wolf v. Hitchcock, in which the Supreme Court upheld the legality of the allotment statute which broke up the Kiowa, Comanche, and Apache Reservation confirmed by the Treaty of Medicine Lodge in violation of that treaty’s express requirements that any further land cessions must be approved by three-quarters of the adult males of the tribes.31 The Court found that “plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning,” and constituted a “political question” outside the scope of review of the federal courts. Thus, Congress was free to pass a statute which unilaterally abrogated an Indian treaty in full or in part, including the provision with respect to land rights, because the Indian people, as dependents, had no right to consent. Rather, Congress, as the trustee, might be compelled to make a “partition and disposal of tribal lands” on relatively short notice, and could not be expected to do so only with tribal consent. Moreover, Congress possessed “full administrative power” over tribal property, and so long as it was acting in “good faith,” such dispositions are merely a “change in the form of investment of Indian tribal property.” Thus, because most of the allotment statutes required the tribes to be compensated for the loss of tribal lands designated as “surplus lands” available for purchase by non-Indians, the allotment statutes are generally seen as a benign exercise of the trustee’s authority. The ICCA left such claims open to the extent that tribes could prove misfeasance, such as duress and coercion, or to the extent that the value offered was so minimal that a “moral wrong” could be found. Damages were paid for these claims without the interest award that accompanies constitutional takings.

In comparison, where tribes were able to prove that the trustee did not act in good faith and merely used its power to appropriate lands from the Indians for the public benefit without any attempt to offer compensation, constitutional redress is available. The classic case on this doctrine is the Sioux Nation case.

The Fort Laramie Treaty of 1868 between the United States and the various autonomous bands and political units (Lakota, Dakota, Nakota) of the Sioux Nation established the Great Sioux Reservation, an expansive area that included much land comprised within the contemporary states of Montana, Wyoming, North Dakota, South Dakota, and Nebraska, and included the Black Hills. The Fort Laramie Treaty, which was solicited by the United States, guaranteed the Sioux people the absolute and undisturbed occupation of these lands, including the sacred Black Hills, in perpetuity in exchange for the Sioux Nation’s agreement to cease military warfare against the United States and allow safe passage of American citizens across the Bozeman Trail. The United States pledged that it would protect the Sioux Nation’s possessory rights against trespassers and that no further land cessions would be effective unless signed by three-quarters of the adult Indian males occupying these lands.

Less than a decade later, the United States reneged on its treaty promises and enacted an 1877 statute that vastly diminished the Great Sioux Reservation, appropriating the Black Hills and other valuable lands. Although the United States purported to have secured the consent of the Sioux people, it was clear that the agreement was a product of coercion and starvation and was secured after an official military order to force the Sioux people to locate to the Agency and to cease hunting and fishing on their traditional lands. The document lacked the agreement of the requisite number of Sioux males and did not give any compensation other than a commitment to continue rations. The substandard rations, much of which never even made it to the Indian people but were illegally sold by corrupt government contractors and agents, were designed to “compensate” the Indians for the loss of land of incomprehensible cultural value and an estimated economic value in excess of $100 million, not counting the wealth in extracted gold, uranium, and timber. In 1889, the remaining Great Sioux Reservation was broken up and allotted in order to separate the various bands and break any military alliances that would threaten the United States’ interest.

In 1920, Congress passed a special jurisdictional statute authorizing the Sioux to bring suit in the Court of Claims for the taking of the Black Hills
by the 1877 Act without just compensation in violation of the Fifth Amendment. The case, handled by a local attorney, ended up being dismissed in 1942 as a “moral claim” not compensable under the Fifth Amendment. After the Indian Claims Commission Act was passed in 1946, the Sioux Nation revived its claim. The Claims Commission found that the 1877 Act was a taking under the Fifth Amendment, and that the Black Hills had been acquired through “unfair and dishonorable dealings.” The commission awarded the Sioux claimants a sum of $17.5 million, plus accrued interest. The Court of Claims reversed this decision in part, finding that the 1942 decision barred relitigation of the constitutional claim under the doctrine of res judicata, but sustained the damages judgment without accrued interest (estimated at $90 million at the time) under the statutory cause of action in the ICCA.

In 1978, Congress passed a statute allowing the Court of Claims to review the takings claim without regard to the defenses of res judicata and collateral estoppel. The Court of Claims then found that there had been a taking and that the Sioux Nation could recover the principle sum of $17.5 million plus accrued interest at 5 percent annual interest since 1877, resulting in a total award of over $105 million. That case ultimately went to the U.S. Supreme Court, which affirmed the Court of Claims judgment, and clearly repudiated the “political question” doctrine of Lone Wolf. In this case, the Court held, Congress had not made a “good faith effort” to give the Indians full value of the land, which would sustain the notion of congressional power to transmute tribal property “from land to money.” Because Congress had not done this, it had violated its trust duty to the Indian people. The Court affirmed congressional power to condemn Indian land under its eminent domain power for another “public purpose.” However, the Court held that when Congress is acting in the exercise of its eminent domain power, it must pay Indians “just compensation” under the Fifth Amendment.

Note that the Sioux Nation case is widely perceived as a victory for Indian people. However, the doctrinal subtext of the case clearly states that tribal interests are not entitled to any greater protection than property interests of private non-Indian citizens. Thus, Indian Nations, such as the Seneca, have been divested of huge portions of their treaty-guaranteed reservations to facilitate “public projects” like the Kinzua Dam. Justice Black, who dissented in that case, would have protected Indian peoples’ treaty rights under a stricter standard, on the theory that “Great Nations, like great men, should keep their word.” However, the eminent domain power has been sustained again and again, so long as “just compensation” has been paid. The “just compensation” award is purely a function of the economic value of the land. The cultural value of the land is not even a factor in the inquiry.

Thus, the second consequence of this doctrine for Native people is that, as in the Dam case, a final payment of the judgment into a Treasury account constitutes full satisfaction of the claim and precludes any further litigation on the subject. The Sioux Nation has never accepted payment of the monetary judgment and continues to assert that it maintains legal rights to the land under the Treaty of Fort Laramie. The Sioux Nation’s subsequent attempts to litigate the claim in a way that would vindicate its right to use, possession, or cultural access to the actual lands (and an ability to preclude culturally harmful uses such as uranium mining) have all failed on the theory of res judicata and collateral estoppel. Nor have any of the Sioux Nation’s efforts to protect its interests under the Free Exercise clause of the First Amendment been sustained. Although Congress possesses the power to make a political solution (e.g., through an settlement act that would provide for return of some lands in the Black Hills to the tribe in combination with monetary compensation), none of the proposed solutions have garnered enough political support to result in legislation.

Responding to the Historic Loss of Native Lands: Land into Trust and Repatriation of Tribal Lands

In an article I co-authored with Wallace Coffey, the current chairman of the Comanche Nation, we wrote of “cultural sovereignty” as “the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures.” The notion of “cultural sovereignty” is intended to capture the essence of an Indian Nation’s “inherent sovereignty,” and is located within the cultural and political structures of a specific Nation. It does not come from the federal government, nor can it be accurately defined by the federal courts. The expression of “cultural sovereignty” is uniquely that of a distinctive Indian Nation. In the article, we suggested that cultural sovereignty evoked an ethic of “repatriation” of land, wisdom, and cultural identity. These components are vital to the continued exercise of tribal sovereignty in the modern era.

Cultural sovereignty, as it relates to land and resources, is being exercised in a number of ways. Many Indian Nations are acquiring lands outside the reservation and attempting to place them in trust status. Some Indian Nations are exploring ways to protect cultural resources located off the reservation, within the boundaries of their traditional lands. And Indian Nations are litigating to preserve their treaty rights to hunt, fish, and gather resources outside the reservation. The crucial intersection of political and cultural sovereignty is represented by each of these efforts. This section of the paper discusses some contemporary efforts by Native peoples to repatriate lands that
were taken from them, examines the current controversies over land consolidation and taking land into trust, and evaluates tribal efforts to protect significant places (e.g., sacred sites) that are located off reservation.

**Repatriation of Tribal Lands**

Today, Indian Nations are actively attempting to rebuild their land bases and mitigate the devastating legacy of allotment. The most compelling instances of cultural sovereignty involve cases in which Native people actually fought for and achieved repatriation of tribal lands. Most of these cases involve lands that were taken by the federal government for a specific and limited purpose—for example, for use in connection with a military installation—that is no longer appropriate. Because the lands are still in federal ownership, they can be transferred back to the affected Indian Nation without involving myriad political issues that would arise if the lands were in private or state ownership. An example of this occurred in 2000 when the Department of the Army transferred 4,900 acres of land at Lake McFerron on the former Fort Wingate Army Depot in New Mexico to the Bureau of Indian Affairs for the Navajo and Zuni tribes.56 These lands constituted the first part of a projected transfer that would involve 21,881 acres. Malcolm Bowerkary, who was governor of the Zuni Pueblo at the time, described the transfer as “the first big step to reclaiming our ancestral grounds” and “a tribute to our forefathers who always told us to have patience and tolerance.” Similarly, the Navajo Nation’s president, Kelsey Begaye, expressed the happiness of the Navajo people that they were able to “come back to the land or the land has come back to us.” The partnership between the Navajo Nation and the Zuni Pueblo was a notable instance of tribal cooperation in the exercise of cultural sovereignty.

There are also instances where Indian Nations have successfully repatriated sacred lands that were incorporated into federal public land preserves. The classic example is the Taos Pueblo’s repatriation of Blue Lake, which is a very sacred site to the Taos Pueblo and is a fundamental part of their continuing cultural and religious practices.57 In 1906, President Theodore Roosevelt appropriated Blue Lake from the Taos Pueblo when he established the Taos Forest Reserve, which was ultimately incorporated into the Carson National Forest. For many years, Pueblo elders and leaders traveled to Washington, D.C., annually to testify before Congress and petition for the return of Blue Lake. Finally, in 1970, President Nixon signed House Resolution 417, which restored 48,000 acres of land, including Blue Lake, to the Taos Pueblo. Acoma poet Simon Ortiz has described the dedication of the Taos people as “truly epic” and tied to the power of an oral tradition and daily lived practice that affirmed the continued existence of Blue Lake as Taos land, even while it was in federal “ownership.”

These claims have been handled on a case-by-case basis, necessitating congressional legislation to effect the land transfer. Although there have been proposals to pass broader legislation authorizing the transfer of sacred sites on public lands to Indian Nations, none of these efforts has been successful.58 There are often many contentious political issues to resolve, depending upon the existing use of the affected lands, including objections by recreational users of public lands59 and even objections by other tribes, where a particular tribal claim is seen as damaging to an interest of another tribe.60 Thus, it is unclear what type of federal legislation would best meet the needs of Indian Nations for repatriation of ancestral and sacred lands.

**Land Consolidation and Land into Trust Issues**

In 1934, the Indian Reorganization Act formally ended the allotment policy that devastated many reservations across the United States due to loss of land and an inability to effectively manage those interests that remained in Native ownership but were badly fractionated. To ameliorate the problems caused by allotment, Congress authorized the Secretary of the Interior to purchase lands in trust for the benefit of individual Indians or tribes as part of the IRA, and more recently, Congress has passed additional legislation directed toward the need for land consolidation.

**LAND INTO TRUST.** Congress envisioned the need for land to be taken into trust as part of the Indian Reorganization Act. Section 5 of the IRA (codified at 25 U.S.C., Section 465) authorized the Secretary of the Interior to acquire any interest on lands, water rights, or surface rights for Indians “within or without a reservation” through “purchase, relinquishment, gift, exchange or assignment.” When such lands are acquired, they are taken in the name of the United States and held in trust for the Indian tribe or individual Indian for which the land is acquired, and thereafter, the lands are deemed to be exempt from state and local taxation. Section 465 applies to all tribes, whether or not they are formally under the IRA.61 In 1980, the Department of the Interior issued regulations at 25 C.F.R., Part 51, to guide the secretary’s Section 465 authority. These regulations were amended in 1995 to address concerns raised by state and local governments about the impacts of decisions to take land into trust on those governments, and the broad discretion that had been exercised by the secretary over such decisions.

The regulations provide that land may be acquired in trust status only “when such acquisition is authorized by an act of Congress,” although Section
465 is generally used to supply that authorization. The purposes and standards for such acquisition include a determination that "the acquisition of land is necessary to facilitate tribal self-determination, economic development, or Indian housing." Applications commence with a written request to the secretary to take the land into trust title.

If the lands are located within or adjacent to an existing Indian reservation, there must be a formal notification of the state and local governments that have regulatory jurisdiction over the land to be acquired and a thirty-day comment period for them to respond. Applicants then have a period of time to respond to any concerns raised. Once the application is complete, the secretary is required to consider several factors, such as compliance with the National Environmental Policy Act (NEPA), the impact on the state and local governments that would result from removing the lands from the tax rolls, and any jurisdictional problems or conflicts over land use that are likely to arise. In order to satisfy NEPA, the applicant must either secure a Finding of No Significant Impact (FONSI) on the environment or conduct an exhaustive Environmental Impact Study (EIS).

If the lands are located outside the reservation and are not contiguous to existing reservation boundaries, all of the above requirements must be met, and in addition, the application must specify the location of the land relative to both state boundaries and the boundaries of the tribe's existing reservation. The same requirements for notice to state and local governments and an opportunity to respond apply, and the regulations further specify a heightened standard of scrutiny to be applied by the secretary. As the distance between the tribe’s reservation and the land acquired increases, the secretary "shall give greater scrutiny to the tribe’s justification of anticipated benefit from the acquisition." The tribe must also submit a business plan for any such lands acquired for business purposes.

The land into trust process requires a full title examination, and distinguishes the treatment given to lands that will be used for gaming, as opposed to nongaming uses. If the land to be acquired in trust is nongaming related, the secretary has delegated the exercise of his discretion to approve the acquisition to the regional offices of the BIA. On the other hand, if the land is to be used for gaming purposes (including supplemental uses such as a parking lot), the approval must be issued from the Washington, D.C., offices of the BIA. In addition, Section 20 of the Indian Gaming Regulatory Act (IGRA) of 1988 (codified as 25 U.S.C. 2719) expressly prohibits the use of newly acquired lands for gaming purposes, with narrowly defined exceptions. Some of these exceptions are specified to particular tribes or regions. However, generally, the provision recommends taking such lands into trust for gaming purposes only if this would be in the best interest of the Indian tribe and its members, would not harm the surrounding community, and the governor of the state in which the land is located consents to the secretary’s determination.

The issue of land into trust continues to be politically divisive, and attempts to revise the current regulations to facilitate the process for Indian tribes have failed due to the opposition expressed by state and local governments over the loss of the tax base, control over economic development and land use, and potential jurisdictional conflicts.

LAND CONSOLIDATION The problems attendant to fractionation of allotments were apparent as early as the 1930s. In 1960, both the House and Senate undertook comprehensive studies of the problem, which indicated that one-half of the approximately 12 million acres of allotted trust lands were held in fractionated ownership, with over 3 million acres held by more than six heirs to a parcel. With each generation, the problems intensified, leading Congress to enact a comprehensive piece of legislation in 1983, the Indian Land Consolidation Act (ILCA). The Act authorized the buying, selling, and trading of fractional interests and provided for the escheat to the tribes of land ownership interests of less than 2 percent. The escheat provision was invalidated by the U.S. Supreme Court in Hodel v. Irving as a taking of a vested property interest under the Fifth Amendment of the Constitution without payment of "just compensation." The Supreme Court reasoned that the escheat provision was unconstitutional because there could be tangible economic value in a fractional interest and the statute "effectively abolishes both descent and devise of these property interests." Although Congress had tried to resolve the constitutional problems in 1984 amendments to the statute by limiting its effect to shares of minimal economic valuation and offering property owners the right to devise their interests to any other owner of the affected parcel, the Court held that the amendments were also unconstitutional under the Fifth Amendment in its 1997 ruling in Babbitt v. Youpee.

The Indian Land Commission Act was again amended in 2000 to address the fractionated heirship problem and the constitutional challenges. The 2000 amendments attempted to address the constitutional problem through restrictions which make certain heirs and devisees ineligible to inherit in trust status (e.g., non-Indian spouses) and require that certain interests be held by the heirs and devisees as joint tenants with rights of survivorship. The legislation also provided for the consolidation of fractional interests. Tribes and individual owners can now consolidate their interests by purchase or exchange with fewer restrictions. The legislation also sought to enhance economic development opportunities by encouraging the use of negotiated agreements, recommending standardization of procedures and relaxing owner consent requirements. Finally, the legislation extended the secretary's authority to acquire
fractional interests at fair market value through the Indian land acquisition pilot program, with the establishment of an Acquisition Fund and authorized annual appropriations to fund the program. While many of the provisions were immediately effective, the inheritance restrictions were not, and efforts continue to resolve the probate issues before final implementation of these provisions.70

Sacred Sites Dilemma

Many sites of religious and cultural significance to contemporary Indian Nations are located off reservation, on federal public lands, state lands, and even on lands in private ownership. Due to the tendency of American jurisprudence to privilege the interests of property "owners," Indian Nations have encountered substantial difficulty in their efforts to ensure access to such sites and to protect these places from harm. The American Indian Religious Freedom Act of 1978 specifies that it is "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise" their traditional religions. The statute was specifically designed to recognize that Native religions are often premised on practices that are quite distinctive from those of other religions, and may require access to and use of particular lands and geographic places. However, the statute does not contain any legally enforceable cause of action.

Because of this, Native Nations sought protection for sacred sites under the First Amendment free exercise clause of the U.S. Constitution. Although some lower federal courts were initially willing to recognize such claims where the sacred site was "central" to the practice of a continuing Native religion, the Supreme Court rejected the theory in the context of a Native sacred sites claim on federal land in Lyng v. Northwest Indian Cemetery Protective Association.71 That case involved a claim by several tribes in northern California that the proposed construction of a road through a federally owned wilderness area would jeopardize their ability to continue necessary religious practices that were vital to the continuation of their religions. The Supreme Court held that the free exercise clause did not even apply to a government road construction project because the government was the land owner and the project was the product of an entirely neutral administrative decision. Even though anthropologists commissioned by the government confirmed that the construction of the road would virtually destroy the ability of the tribes to practice their religion, Justice O'Connor's opinion maintained that the First Amendment must "apply to all citizens alike, and it can give none of them a veto over public programs that do not prohibit the free exercise of religion." The Court's opinion further finds that the "Constitution does not . . . offer to reconcile the various competing demands on the government" that arise from a pluralistic society. On the contrary, to do so in favor of the Indian plaintiffs in this case would be to require "de facto beneficial ownership of some rather spacious tracts of public property." An additional problem has been raised in the context of the establishment clause. For example, in the Bear Lodge case,72 the NPS issued a voluntary ban on hiking at the Devil's Tower National Monument in order to accommodate Native religious use during the month of June. A group of recreational rock climbers challenged the policy as a violation of the establishment clause. Although the Court of Appeals did not consider the issue on the merits, because it found that the mountain climbers lacked standing, the Court described the policy as essentially designed to serve cultural, educational, and historical purposes, and therefore was not designed to uphold one religion against all others.

Today, sacred sites issues on public lands are subject to the requirements of two federal executive orders, designed to protect tribal interests.

The first order, the 1996 Executive Order on Indian Sacred Sites,73 was intended to protect the interests of Indian Nations in preserving sacred sites from harmful development activities. The executive order requires federal agencies with responsibility for the management of federal lands to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; (2) avoid adversely affecting the physical integrity of such sites; and (3) maintain the confidentiality of such sites. The executive order offers agencies considerable discretion in achieving these goals and requires them to adhere to these goals only if "practicable" and only to the extent "permitted by law." Furthermore, the action must not impair "essential agency functions." The executive order further specifies that it does not create any right, benefit, or trust responsibility that would be enforceable "at law or in equity."

The second order, the 2000 Executive Order on Consultation and Coordination74 with Indian Tribal Governments, acknowledges the government's trust responsibility to federally recognized Indian Nations and establishes specific requirements that agencies must follow as they develop and execute policy actions that affect Indian Nations. This executive order is important in the context of federal public lands policy because it requires consultation with Indian Nations with respect to actions that affect tribal interests. As a result of this executive order, most federal agencies have now designated an official with primary responsibility for implementing this order. The "Indian liaison" in each agency was charged with developing regulations to implement the policy and for outreach efforts to tribal communities. As might be expected, the effectiveness of each agency varies, and there is still widespread disagreement over what an adequate "consultation" with tribal officials requires.
Cultural resources on public lands may also receive some protection through the provisions of the 1966 National Historic Preservation Act (NHPA), which requires federal agencies to assess the impacts of development activities on significant historic resources, including any structure, area, or district listed or eligible for listing on the National Register of Historic Places. The NHPA is primarily a procedural statute, and section 106 of the statute imposes detailed consultation requirements upon the agencies undertaking the activities. If an agency fails to comply with its responsibilities, the agency and its permittees may be enjoined from proceeding with the undertaking. Sites that have religious or cultural significance to Indian Nations may be eligible for listing on the National Register even if they are essentially “natural”—as opposed to “manmade”—properties. The NHPA covers “Traditional Cultural Properties,” which are sites that are associated with the cultural practices and beliefs of a living community and are important in maintaining the community's continuing cultural identity. Thus, the NHPA provides a means to protect places that are considered sacred to an Indian Nation or several Indian Nations.

Under the 1992 amendments to the NHPA, if a proposed federal undertaking might affect a site that is eligible for listing on the National Register as a Traditional Cultural Property, the agency must consult with the tribe as part of the Section 106 process. This requirement applies regardless of the ownership status of the land. In addition, Section 470(d) of the statute sets a model for cooperative management of “historic properties of Indian tribes” by specifying that the secretary “shall foster communication and cooperation between Indian tribes and the State Historic Preservation Officers in the administration of the national historic preservation program to ensure that all types of historic properties and all public interests are given due consideration,” and encourages tribes to work cooperatively with the federal agencies and the preservation officers in the “identification, evaluation, protection, and interpretation of historic properties.”

**Emerging Challenges**

As we move forward into this new century, many of the things that Native people have come to view as the “norm” for federal Indian policy may be challenged. Let me mention a few areas of concern.

First, many Native people and non-Natives have intensified their challenge to the continuing utility of the trust doctrine. The Supreme Court in the Navajo Nation and White Mountain Apache trust cases has narrowed the cause of action for a compensable breach of trust to situations where the federal government has assumed a nearly exclusive management of tribal prop-

erty, has committed itself in writing to trust management of these resources, and has committed some act of waste or misappropriation that follows common-law principles for breach of a trust by a fiduciary. The *Cobell* litigation has inspired many federal policymakers to call for an end to the trust, and thus to the potential liability of the federal government. Many proposals have been advanced, to privatize these interests and to advocate that tribes and individual Indians protect their own interest through nongovernmental mechanisms. Indeed, the entire premise of “self-determination” and “self-governance” is that tribes become the managers, assuming the benefits and the risks of this decision-making authority.

So, what does this mean for tribal lands? Recently, Lance Morgan, the CEO of Ho-Chunk Enterprises, Inc., gave a talk at ASU’s law school in which he advocated for the end of trust status for Indian lands. He cited figures illustrating the significant economic value of tribal lands and resources, but he claimed that Indian people are unable to capture the value of these resources because of the onerous restrictions that apply to Indian lands and are inconsistent with efficient economic use of such lands. There is certainly a great deal of truth to this as a factual statement, and the problems with efficient use of tribal lands and allotted lands are legendary. However, is this the time to dispense with the trust, or is there another way to look at that doctrine that will protect Indian Nations from the risks and harms of the market system without hampering their ability to gain the full economic value of their resources?

That difficult question ties into another issue, which is jurisdiction. Mr. Morgan’s premise was that anyone should be able to own land in fee within the reservation, but that tribes should still have jurisdiction as governments over that land. However, the Supreme Court’s jurisprudence has increasingly narrowed the scope of tribal jurisdiction over non-Indian-owned land on the reservation. Under the doctrines of *Montana* and *State*, tribes lack jurisdiction to regulate non-Indians on non-Indian fee land within the reservation, and they lack jurisdiction to adjudicate tort cases between non-Indians arising on state-owned right of ways that run through the reservation. Under the doctrine of *Atkinson*, the same rationale was applied to the Navajo Nation’s attempt to tax a non-Indian hotel and its guests, even though the primary reason for non-Indian tourism at the hotel was to enjoy the cultural experience of visiting the Navajo Nation! We are even starting to see incursions of state authority on tribal land and over tribal members. The lower federal courts have begun to extend *State’s* doctrine to cases where a tribal member is involved in a highway accident, and in the *Hicks* case, the Supreme Court authorized a search by state game officials of a tribal member’s home on the reservation for evidence of an off-reservation crime. The operative distinction in all of these
cases is not purely the status of the land, but rather the status of the persons involved. If all parties are tribal members, the Court has shown little interest in divesting the tribe of jurisdiction. However, anytime the tribe is seeking to exercise jurisdiction over a nonmember, the Court's jurisprudence becomes much more restrictive, presumably on the theory that nonmembers' individual rights are not adequately protected by laws such as the Indian Civil Rights Act, which largely submit civil rights cases to exclusive tribal jurisdiction.

Many people continue to believe that Congress can enact legislation that would "cure" the jurisdictional problems caused by the Supreme Court's jurisprudence. This may be true, but it is difficult to place that level of trust in a political body that is, after all, comprised of representatives of the states. Moreover, the Supreme Court in decisions such as Land81 has set the stage for a conversation about the ability of Congress to legislate in a way that violates American constitutional norms. There is a balance of power between the federal courts and Congress, but the boundaries have not been fully illuminated in the area of federal Indian law.

The last thing I will share with you on this is the Supreme Court's recent decision in City of Sherrill, New York v. Oneida Indian Nation.82 This case involved land within the city of Sherrill to which the Oneida maintained unextinguished aboriginal title and which was also comprised within the Oneida's 300,000-acre reservation that had been taken by New York in violation of the 1795 Nonintercourse Act. The Oneidas thus had a clear possessory claim under federal law, and this claim was enhanced because of the status of the land at the time of transfer as a federally confirmed reservation under the 1794 Treaty of Canandaigua.

The Oneida's treaty lands were "purchased" by the State of New York, and many of the Oneidas were moved from their reservation lands to Wisconsin. Some Oneidas stayed in New York, but the individual Oneidas who remained sold the lands in question to the State of New York in the 1840s. After positive case law from the Supreme Court affirming the continuing validity of Oneida possessory rights to areas that were improperly ceded under the Nonintercourse Acts, the Oneida Indian Nation purchased several parcels of land within its original reservation. In this case, the Oneidas maintained that these properties were exempt from state taxation, including the assessed property taxes. The City of Sherrill initiated eviction proceedings in state court, and the Oneida Nation sued Sherrill in federal court. In this case, the Oneidas sought equitable relief, prohibiting currently and in the future the imposition of property taxes, as well as a declaratory judgment against the county that the properties in Madison are tax exempt.

The Second Circuit affirmed the district court ruling in favor of the Oneidas, reasoning that the parcels qualify as Indian Country because they were part of a treaty reservation that had never been disestablished or diminished. The Supreme Court, however, reversed this decision and held that the tribe could not exercise sovereignty over these parcels unless they were placed in trust status pursuant to the federal statutory and regulatory framework, and that the state was free to tax until then. Why? The Court articulated three reasons. First, the United States had been indifferent to the illegality of the state "purchase" and governance of the lands at issue. Second, the properties are currently of substantial economic value, which was not the case 200 years ago, and it has been only "lately" that the Oneidas sought to "regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill." And finally, the area is now over 90 percent non-Indian in population and in land use, leading to the "justifiable expectations" of the people living in the area that New York is the jurisdictional authority and not the Oneida Indian Nation.

In other words, Sherrill has now negated the long line of cases saying that only the federal government has the authority to diminish or disestablish a reservation. This one no longer exists because of the "long passage of time," and the "justifiable expectations" of the non-Indians that now populate the area, and frankly, because non-Indians are responsible for the current "value" of the lands. They were a "wilderness" in the hands of the Oneidas, and now they are urban economic centers, and the shift in jurisdiction would be so "disruptive" that it might disturb this scheme. The Court specifies that the sole remedy for the Oneidas is to go through Section 465 and the regulations to petition for trust status for the land, which then would imply immunity from state taxation.

So, the bottom line is: do Indian Nations really want to give up "trust" status for Indian lands?

The Future of Native Property Rights
My assigned topic was "land rights" and I have kept to that topic. I want to suggest, however, that the Doctrine of Discovery and the policies of the nineteenth century with respect to land are now being applied in other areas of "property" law. Today, cases like Boninichsen83 seek to extend the rationale of the Doctrine of Discovery to Native claims to ancestral human remains, on the theory that, because they cannot be scientifically or culturally tied to a contemporary Native group, they are the "common property" of Americans and thus can be scientifically studied without any need to comply with the requirements of NAGPRA. This is also a growing assumption about genetic material. The DNA of Native people is valuable to researchers because Native peoples constitute "population isolates" who often maintain distinctive
group markers that might be used to ascertain the origin of human populations or might be used to craft a gene patent for use in health research. While current laws do specify that research subjects must be given "informed consent," the prevailing doctrine holds that once cells, blood, and tissue are removed from a human subject, these are no longer the "property" of the individual and can be used at will by researchers for any research that is otherwise permissible under existing law. How will Indian Nations respond to the newest applications of the Doctrine of Discovery? I will leave that thought for all of you to consider, and I thank you for your time and attention today.

Notes
   16. Basso, Wisdom Sits in Places, quoting Benson Lewis, who describes the name of a particular mountain as being "like a picture. Stories go to work on you like arrows. Stories make you live right. Stories make you replace yourself."
   25. Ter-Hi-Ton v United States.
   29. Clinton, Goldberg, and Tsosie, American Indian Law, 23.
   33. Clinton, Goldberg, and Tsosie, American Indian Law, 27.
   35. Sutton and Beals, Irredeemable America.
   42. E.g., Dann litigation.
50. United States v. Dann, 873 F.2d. 1189 (9th Cir. 1989).
51. Lone Wolf v. Hitchcock.
52. See case re: Bear Butte, Fools Crow v. Calf, 706 F.2d 856 (8th Cir., 1983).
54. See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999), upholding tribe's claim that the USFS had not fulfilled its obligation under the National Historic Preservation Act to minimize the adverse effect of transferring a portion of the tribe's ancestral transportation route under a land swap with a private landowner who sought the land for logging.
55. See, e.g., Minnesota v. Mille Lacs Band of Sippewa Indians, 526 U.S. 172 (1999), holding that tribe retained its off-reservation hunting, fishing, and gathering rights originally secured in an 1837 treaty.
58. See, e.g., H.R. 2419, 108th Congress, Section 6(a), sponsored by California Representative Rahall, which would have authorized federal agencies to transfer sacred lands into trust for the benefit of an Indian tribe or tribes so long as the tribes would agree to "manage the land in perpetuity to protect that sacredness."
59. See Bear Lodge case: a group of recreational hikers opposed the NPS plan to accommodate tribal religious concerns by imposing a voluntary ban on hiking during the month of June. Bear Lodge v. Babbitt, 175 F.3d 814 (10th Cir. 1999).
60. See Virginia de Leon, "Tribe Longs for Home," Spokane Review 8 (September 2003): A1, discussing the efforts of the Wenatchi tribe to regain their lands within an 1855 treaty reservation, which were subsequently taken and incorporated into the Wenatchee National Forest and the tribe relocated to the Colville Reservation, where it is now one of the twelve bands that constitute the Confederated Tribes of the Colville Reservation; to date, the Yakimas have opposed the plan due to concerns over their fishing rights, which were part of the 1855 treaty.
61. See Indian Consolidation Act of 1983, 25 U.S.C. 2202, specifying that Section 465 is applicable to "all tribes" and supersedes any other provision of federal law that would restrict the acquisition of lands by a tribe.
62. 25 CFR 151.3.
63. 25 CFR 151.10.
64. 25 CFR 151.11.
65. See Keewenaw Bay Indian Community v. United States, 136 F.3d 469 (6th Cir. 1998), discussing application of the gubernatorial concurrence of section 2719 to a parcel of land in Michigan acquired immediately prior to the enactment of IGRA and placed into trust after the statute's enactment.

70. Testimony of Ross Swimmer, discussing American Indian Probate Reform Act of 2004.
76. See, e.g., Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1999).
77. 16 U.S.C. 470 (f).
82. City of Sherrill, New York v. Oneida Indian Nation, C. Cr. (March 29, 2005).
83. Bonnichsen et al. v. United States et al., 357 F.3d 962 (9th Cir. 2004).