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Individual Aboriginal Rights

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INDIVIDUAL ABORIGINAL RIGHTS

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INTRODUCTION

When Whites first came to North America to stay some 500 years ago,[1] they encountered an indigenous population living in relative balance with the land.[2] It was, perhaps, not a perfect harmony,

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1. The ongoing debate about when Whites first arrived in North America was a background factor in the case of *Bonnichsen v. United States*, 217 F. Supp. 2d. 1116 (D. Ore. 2002), *aff'd* 2004 WL 2005830 (9th Cir. 2004), which dealt with jurisdiction over a 9000 year old skeleton with "Caucasoid" features. *See* John W. Ragsdale Jr., *Some Philosophical, Political and Legal Implications of American Archeological and Anthropological Theory*, 70 UMKC L. REV. 1, 39–52 (2001) [hereinafter *Theory*].

2. *See* DONALD HUGHES, AMERICAN INDIAN ECOLOGY 1–9 (1983); *see also* R. DOUGLAS HURT, INDIAN AGRICULTURE IN AMERICA 27–64 (1987); FRANCIS JENNINGS, THE FOUNDERS OF AMERICA 83–89 (1993).

as revisionist scholars have pointed out,[3] but it was, nonetheless, a relationship apparently capable of enduring indefinitely.[4] Regardless of episodic or localized instability caused by erosion, over-hunting, or deforestation,[5] the distinguishing socio-economic facts were that the native peoples, in general, did not treat the land as a commodity, they did not regard it as a freely exploitable resource, they were not preoccupied with the economic growth or personal gain, and in a religious sense, they did not believe in human domination over the rest of the world.[6] Instead, their central beliefs and core religious precepts were balance and reciprocity.[7] These formed the center of the living community among the people and with the land. They bespoke of the privilege to live and the duty to respect the gift from nature and the return of filial piety.[8] The patterns of land use in such holistic, organic settings included spiritually-based economics, subsistence agriculture, hunting and gathering, and religious pilgrimages, rites, and shrines in a sacred landscape.[9] How, if at all, were these delicately-positioned subsistence communities and economics to survive the encounter with the Judeo-Christian belief in human transcendence,[10] the relentless, calculated efficiency of the free market, capitalistic economy,[11] the commodification of the land,[12] and the enshrinement (and isolation) of the individual?[13]

The initial engagements were not abruptly and encompassingly dispossessive and genocidal. The comparatively lighter touch may have reflected an expediency forced by initially inferior members rather than moral or legal compunction.[14] Indeed, as the number and power of the non-Indians grew, their physical force and cultural arrogance seemed to increase directly.[15] The result was a series of accommodations with Whites which respected or protected at least some aspects of the indigenous

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3. *See generally* SHEPARD KRECH III, THE ECOLOGICAL INDIAN: MYTH AND HISTORY (1999).

4. JOHN COLLIER, INDIANS OF THE AMERICAS, 15–28 (1947) [hereinafter COLLIER].

5. KRECH, *supra* note 3, at 211–16.

6. HUGHES, *supra* note 2, at 1–9.

7. JOHN COLLIER, ON THE GLEAMING WAY 15–31, 159–62 (1962) [hereinafter COLLIER, GLEAMING WAY].

8. *See* WILLA CATHER, THE PROFESSOR'S HOUSE 251 (1973).

9. *See* HUGHES, *supra* note 2, at 1–9; *see also* HURT, *supra* note 2, at 27–64.

10. Lawrence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1334–35 (1974).

11. *See* COLLIER, *supra* note 4, at 23–25.

12. *See* JOSEPH M. PETULLA, AMERICAN ENVIRONMENTAL HISTORY 72–131 (1977).

13. *See* Carl Schurz, *Present Aspects of the Indian Problem*, *in* AMERICANIZING THE AMERICAN INDIAN 13–26 (Francis Paul Prucha ed., 1973).

14. I FRANCES PAUL PRUCHA, THE GREAT FATHER 11–18 (1984).

15. *Id.* at 70–72.

relationship with the tribal land, but which became, over time, increasingly restricted.

The first encounter or accommodation involved contract, though as often noted, it is quite clear that the tribes did not fully understand the concepts of agency, bargain, and sale of land, nor the language in which treaties were written.[16] Still, the treaties often assured homeland islands or reserves that were held and used as before—the qualitative depth of the life ways continued even though the quantitative breadth of occupation diminished.[17] Questions later emerged, however, as to the lands yielded and as to whether tribal usage, set in time immemorial, survived the cessions.[18]

The property inroad followed contract. The Europeans had brought their own concepts of law and property, and when their superior numbers and technology, along with their infectious diseases, afforded them physical dominance over the native inhabitants, they enforced these legal precepts over the lands acquired. White hegemony—racial, military, economic, legal, and political—limited the resultant legal contentions of the Native American population to a grinding end game of attenuated claims to the residuum.[19] In making these begrudged claims, the tribes, as "domestic dependent nations,"[20] were forced to speak in—and accept—the language and concepts of the conqueror. The claims assertable by the tribal peoples were, in the absence of the majority's formal recognition, treaty, or statute,[21] characterized by the nomenclature and inherent limitations of "aboriginal rights" or "original Indian title."[22]

Johnson v. McIntosh[23] was the keystone decision on Indian property rights and on the legitimacy of European land claims and resultant titles. Chief Justice John Marshall, responding to the "actual state of things"[24] and the needs of the time as well as his own moral

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16. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation; As Long as Water Flows or Grass Grows Upon the—How Long a Time is That?*, 63 CAL. L. REV. 601, 608–10 (1975).

17. *See, e.g.*, Ex Parte Kan-gi-shun-ca, 109 U.S. 556 (1883); *see also* Steven Paul McSloy, *The Miners' Canary: A Bird's Eye View of American Indian Law and Its Future*, 37 NEW ENG. L. REV. 733, 735–36 (2003).

18. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); United States v. Winans, 198 U.S. 371 (1905); Ward v. Race Horse, 163 U.S. 504 (1896).

19. *See generally* MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE x–xi (1997).

20. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

21. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277–78 (1955) ("Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking.").

22. *Id.* at 279–81.

23. 21 U.S. 543 (1823).

24. *Id.* at 591. Marshall stated:

proclivities, retooled the international law of discovery[25] and combined it with the English common law of property. Marshall thus created an amalgam from diverse legal origins, and created a basis for a national property system with chains of title traceable back to a point in time and a unified source. Simultaneously, the rights of the inhabitants—and the moral responsibility of a dominant power—were not wholly disregarded.[26] It was a balancing act with the paramount virtue in the preservation and legitimization of continuity and the conceptual shortfall lying in the failure to reach either of the logical extremes of absolute right in the conqueror or absolute restitution to the overborne victims.[27]

When Europe first became aware of the Americas, the international law embraced a convention whereby the discovery of new lands by a White, Christian nation was entitled to respect and recognition by other similar nations, and under which the discoverer was accorded priority in dealing with the indigenous peoples.[28] *Johnson v. McIntosh* made European discovery a seminal property event as well as an occasion for the international rule of order. Marshall wrote:

> The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy,

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> That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

Id.

25. Marshall described the doctrine of discovery in *Johnson v. McIntosh*:

> [I]t was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
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> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Id. at 573.

26. Joseph William Singer, *Well-Settled? The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 492–94 (1994) [hereinafter *Increasing Weight of History*].

27. *See* DAVID. H. GETCHES ET AL., FEDERAL INDIAN LAW 69 (4th ed. 1998).

28. *McIntosh*, 21 U.S. at 573.

> which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.[29]

Thus a facet of the English fee simple absolute, the legal or naked fee title, was stripped from the indigenous inhabitant's ownership—without their consent, knowledge, understanding, or even awareness—at the moment of the Europeans' first physical encounter with the North American lands. Marshall's conclusion of an instantaneous divestment of legal estate in land, discerned in retrospect as occurring at the first interface between native inhabitants and the invading emissaries of European nations, was ostensibly a concession to the practical needs of nineteenth century America, but it was, nonetheless, an acceptance, if not an outright endorsement, of racist and culturalist premises.[30]

Discovery, under Marshall's opinion, left the Indians with less than the whole, but decidedly more than nothing. Marshall acknowledged that their possession was a real interest, protectable against virtually everyone—except the United States. The discoverer and its successors held "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest"[31] and thus neither the states, the local governments, nor private individuals could end the Indians' lawful possession through unauthorized force or bargain. In short, the tribes were protected, but "deemed incapable of transferring the absolute title to others."[32]

What, if any protection lay against the discoverer and its successors, themselves? If the United States decided to extinguish Indian title with conquest rather than purchase, did the affected tribes have any recourse? In a more modern sense of the question, would tribes dispossessed of aboriginal occupancy by the federal government have a claim for a Fifth Amendment taking and for just compensation?[33] It took over a century for the Supreme Court to answer this question, and its negative conclusion was, in a legal or jurisprudential sense, even more unmoored from precedent and, perhaps, logic than the decision in *Johnson v. McIntosh*.

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29. *Id.* at 592.

30. *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 325 (1990). ("The Doctrine of Discovery and its discourse of conquest assert the West's lawful power to impose its vision of truth on non-Western peoples through a racist, colonizing rule of law.").

31. 21 U.S. at 587.

32. 21 U.S. at 591.

33. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955).

The Tee-Hit-Ton Indians, denizens of the Pacific forests in Alaska since well before the White incursions, were never at war with the United States, were never signatories to a specific treaty, and thus were neither the victims of forceful expulsion nor the beneficiaries of formal recognized title. They became, instead, the victims of a legal divestment in the form of a federal timber sale within their aboriginal homeland.[34] Did such absolute governmental dominion amount to an unconstitutional taking, and to an obligation for just compensation? The Supreme Court, in *Tee-Hit-Ton Indians v. United States*,[35] held that it did not, because aboriginal title, though a right of exclusive possession protected under common law and statute against interference by state, local, or private entities, was not property worthy of federal constitutional protection.[36] The Court said that unrecognized aboriginal title was "mere possession"[37] and that "[n]o case in this Court has ever held that taking of Indian title or use by Congress required compensation."[38]

There were some distinct non-sequiturs in the Court's analysis. A statement that aboriginal title was less than a full fee interest, and a right only of possession does not necessarily avoid the issue of constitutionally-compelled compensation. Clearly, there are less than fee interests such as life estates, leases, and easements that are protected against uncompensated federal confiscation.[39] Such rights and the cases that support them, however, have involved non-Indians.[40] The Courts'

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34. *Id.* at 273 n.1 (1955). The court described the governmental action as "a partial taking." *Id.*

35. 348 U.S. at 272.

36. The court stated:

> This is not a property right but amounts to a right of occupancy which the sovereign 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.

348 U.S. at 279.

37. *Id.*

38. *Id.* at 281.

39. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979); Leo Sheep v. United States, 440 U.S. 668 (1979).

40. The court stated that:

> The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

348 U.S. at 288–90.

basis of distinction may have been that all Indians were, or could have been, conquered people. The Court seemed to believe that all tribes were implicitly, if not literally, conquered at discovery, and thereafter entitled only to a possession at the will or whim of a dominant sovereign.[41] It may also have been that the Court, responding expediently to "the actual state of things,"[42] did not wish to obligate the federal government to pay just compensation at twentieth century fair market prices in order to extinguish vast areas of Indian interests in the new state of Alaska.[43] In either event, the Supreme Court crafted some new rules of property in order to justify its holding of non-compensability. It is of, at least, academic interest to speculate whether the Court, in redefining the limits of protectable property, went so far afield from the common expectations as to run afoul of the taking clause guidelines emergent later in the bellwether case of *Lucas v. South Carolina Coastal Commission*.[44] Justice Scalia, with non-Indian property owners and their reasonable, investment-backed expectations on his mind, intimated that both legislatures and courts might be precluded by the Constitution from redefining property, as an alternative to condemnation or regulation, if such restatement was not grounded in the common or settled law, and was not, therefore, foreseeable.[45] It would seem more than a little ironic if the Supreme Court's holding of no compensability in *Tee-Hit-Ton* could be retroactively regarded as itself an unconstitutional taking.

A partial statutory redress for the loss of aboriginal possession was enacted before the *Tee-Hit-Ton* case in the Indian Claims Commission Act[46] but was unavailable in the tribe's suit because the jurisdiction of the Act was limited to pre-1946 claims. The Act provided, with respect to claims on aboriginal lands, that an administrative tribunal could make compensatory, non-interest bearing awards, based on the land's market value at the time of the confiscation, for "taking by the United

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41. *See id.* at 279.

42. *See* Johnson v. McIntosh, 21 U.S. 543, 591 (1983).

43. Nell J. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980). According to Newton:

> The rule in Tee-Hit-Ton may represent the court's attempt to save the public treasury from having to pay out what were perceived as nearly ruinous damage awards on claims pending before the Indian Claims Commission. By promulgating the rule in Tee-Hit-Ton, the court left Congress free to extinguish aboriginal title to Alaska, where the land's wealth in resources was just becoming known, without incurring a duty to compensate the natives.

Id. at 1248.

44. 505 U.S. 1003 (1992).

45. *Id.* at 1029. ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place on land ownership.").

46. 25 U.S.C § 70 (1946).

States, whether as a result of treaty, owned or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant."[47]

Proceedings before the Indian Claims Commission provided a number of questionable results where tribal groups, represented by aggressive, self-interested non-Indian attorneys, made stipulations regarding the taking of the land.[48] These attorneys may have compromised not only the amount of the monetary award but, even worse, some live title claims involving unextinguished possession.[49] One of the more noted—or notorious—of the Indian Claims Commission proceedings involved the lands of the Western Shoshone,[50] and the ensuing litigation proved to be the springboard for the unprecedented legal concept of individual aboriginal rights.

Individual, or miniaturized, entitlements to aboriginal rights, held to inhere in particular individuals rather than the tribe, might well seem anomalous in cultural setting where the relation of the people to the land has been predominately collective.[51] Traditional Indians may tend to regard the private ownership of rights in land as exploitive or anti-communitarian.[52] Yet these individualized tendrils—overlooked or ignored by the "courts of the conqueror"[53]—may well be of present and future significance to the tribal setting. Like saplings clinging to earth and life after the falling of the parent tree, they are rooted in the uses and traditions that have nurtured the tribes since deep in the past. They thus may provide a bridge, albeit a slender, swaying one, from the prehistoric roots, over the travails of the present, and into a more hopeful future. In short, such rights may provide a means to maintain the special connections of the people with particular lands and sacred places.

Traditional Indian individuals, in contrast to the dominant society and its unresolvable tension between personal aspiration and general welfare, are not necessarily counterpoised against their collectivity.[54] The traditional Indians pursue salvation as a community rather than as separate individuals.[55] They can thus hold individual aboriginal rights, not as pure personal privilege, but in trust or stewardship for the tribe and its future.[56] The threads

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47. 25 U.S.C § 70a(4) (1946).

48. *See* GETCHES ET AL., *supra* note 27, at 283–84.

49. *Id.*

50. *See infra* Section I.A.

51. *See infra* notes 144, 176–80.

52. *See infra* notes 179–80.

53. *See* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U.L. REV. 753 (1992).

54. *See* FRANCIS PAUL PRUCHA, THE INDIANS IN AMERICAN SOCIETY 53 (1985).

55. *See* CHARLES F. WILKINSON, THE EAGLE BIRD 40–42 (1992); *see also* LAURA THOMPSON, CULTURE IN CRISIS: A STUDY OF THE HOPI INDIANS 126 (1973).

56. *See infra* note 353.

and filaments of the once vibrant pattern may ultimately recombine and reweave into a living tissue of people united within communities and with the sacred land.[57]

This Article will, in Section I, deal with the legal development of the concept of individual aboriginal rights. It will focus on the Western Shoshone land claims before the Indian Claims Commission, and the federal government's trespass claims against the ranching operations of the redoubtable, irrepressible Dann sisters. Section II will explore the development and utilization of the doctrine of individual aboriginal rights in a series of cases involving the Dann sisters, subsequent Western Shoshone, and other efforts by native people to secure subsistence hunting and fishing rights and possession of or access to sacred sites. Section III will explore some related concepts in western public land law. This Section suggests that custom, prescription, access under nineteenth century self executing right of way statutes, regulatory efforts, and administrative accommodation have provided at least some protection for the access of tribal peoples to sacred sites. Section IV will speculate about the future expansion of such efforts, and explore the possibility that the growth of colorblind equal protection doctrine will spread into the area of Indian law and threaten what Charles Wilkinson has called the "measured separatism" of tribal sovereignty and property.[58]

I. THE DEVELOPING CONCEPT OF INDIVIDUAL ABORIGINAL RIGHTS

A. *The Western Shoshone Experience Prior to the Indian Claims Commission Act*

When White men first arrived in the Great Basin, lying between the Rockies and the Sierra Nevada, they found the Newe, or Western Shoshone, living much the same as they had for the preceding millennia. The small, autonomous bands, usually composed of extended families,[59] moved lightly over the pinion-crested mountain ranges and the sage brush valleys of the region that the Whites ultimately called Nevada. The Western Shoshone were peaceful hunters and gathers who subsisted on deer, rabbit, wild fowl, and pine-nuts, and who avoided warfare with other tribes.[60] The balance point for life in this arid high desert area is narrow and precarious, but the Western Shoshone, a deeply spiritual

57. *See* COLLIER, *supra* note 4, at 7–16.

58. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 14–19, 106–11 (1987).

59. David Hurst Thomas et al., *Western Shoshone*, *in* GREAT BASIN 274–79 (Warren L. D'Azevedo ed. 1986). The group structure later proves to be doctrinally significant as the concept of individual aboriginal rights emerges out of the experience of the Dann Family, and its use of the land prior to 1934. *See* discussion *infra* at Part I.C.

60. *See* STEVEN J. CRUM, THE ROAD ON WHICH WE CAME (1994).

people, loved the land, respected it, and kept an ongoing, workable harmony, which stretched from the far reaches of prehistory into relatively recent historical times. Then the White men came, first from the south through Mexico, and then from the east.

The explorers, miners, trappers, soldiers, and later, the roads, wire, cattle, and permanent settlement affected Indian society and the hunting economy.[61] The Western Shoshone were forced to reorganize and form larger groups for defensive and retaliatory reasons.[62] Skirmishes between the Whites and Indians became more frequent, especially after the tribesmen were able to acquire equalizing technology in the form of guns and horses.[63]

The 1840s proved to be a critical divide. Americans displaced Mexican sovereignty in the West after a pretext war. Miners discovered gold in California and in western Nevada's Comstock Lode. Tensions in the North and South over slavery began to heat up, and movement into the West accelerated.[64] After passage of the Homestead Act and the Pacific Railway Act in 1862,[65] and in anticipation of even more emigration and conflict after the Civil War ended, the United States entered into a series of treaties with the Great Basin people. One of the treaties was called the Treaty of Ruby Valley, or more formally, the Treaty with the Western Shoshone.[66]

The treaty, signed on October 1, 1863 by twelve bands of the Western Shosone,[67] was—and remains—enigmatic. The agreement calls for "peace and friendship" and a cessation from "hostilities and depredations upon the emigrant trains, the mail, and telegraph lines, and upon the citizens of the United States within their country."[68] The reference to "emigrant" trains and "their country" would seem to acknowledge the ownership of the bands of the Western Shoshone. The agreement also states that "the boundaries of the country claimed and occupied by said

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61. *Id.* at 18.

62. *Id.* at 18–19.

63. *Id.* at 18.

64. *See* PAULA MITCHELL MARKS, IN A BARREN LAND 128–45 (1998).

65. *See* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 362–77, 394–99 (1968).

66. Treaty with the Western Shoshoni, October 1, 1863, U.S.-W. Shoshoni, 18 Stat. 689 [hereinafter Treaty of Ruby Valley].

67. In spite of the multiple signatories, the treaty did not represent the agreement of all or most of the Western Shoshone. In fact, three quarters of the people living within the treaty boundaries were unrepresented at the negotiations. *See* CRUM, *supra* note 60, at 26. The ability of a compliant minority to legally or politically bind even an unwilling majority has been the hallmark of much federal Indian law, not only in the case of treaties, but also with respect to organization under the Indian Reorganization Act, 25 U.S.C. § 461 (1934) and claims under Indian Claims Commission Act, 25 U.S.C. §§ 70–70V (1946).

68. Treaty of Ruby Valley, *supra* note 66, art. 1.

bands are defined and described by them as follows,"[69] and makes reference to "Shoshone country, now or hereafter used by [W]hite men."[70]

The main thrust of the treaty would appear to be the establishment of rights of non-Indian passage over, and limited use on, the lands of the Western Shoshone.[71] The document does, however, also seem to be inconsistent with a full acknowledgement of Western Shoshone sovereignty and proprietary interests, as it contains an agreement on the part of the bands that:

> Whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which they now led, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary, within the country above described and they do hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.[72]

Did the Treaty of Ruby Valley recognize Western Shoshone title in the land and thereby create a constitutionally protected property interest, or did it extinguish the Indians' possessory title and leave them with nothing for their 24,000,000-acre area of aboriginal use and occupation except a subsequent statutory claim for monetary compensation? As befits the conflicting and contradictory language, the courts have declared that the treaty did neither.

The conclusion that the Treaty of Ruby Valley failed to recognize the Western Shoshone lands was made indirectly, as dicta, although the inference seems clear enough. The Supreme Court decided in *Northwestern Bands of Shoshone Indians v. United States*[73] that the Box Elder Treaty,[74]

69. *Id.* at art. 5.
70. *Id.* at art. 2.
71. *Id.* at art. 3–4.
72. *Id.* at art. 6.
73. 324 U.S. 335 (1945).
74. Box Elder Treaty, July 30, 1863, 13 Stat. 663.

which was similar to the Treaty of Ruby Valley in timing, purpose, and language,[75] could not be interpreted as a recognition of title.[76]

The more long-standing and technically unresolved question is whether the treaty could be taken as an extinguishment of Western Shoshone aboriginal title. The Indians deny this vehemently, although some legends seem to support the idea that the treaty was imposed on them rather than negotiated.[77] What is clear is that, following the Civil

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75. Justice Reed, writing for the majority, declared:

> As the distances made it impracticable to gather the Shoshone Nation into one council for treaty purposes, the commissioners made five treaties in an endeavor to clear up the difficulties in the Shoshone county.... It is sufficient here to say that by the treaties the Indians agreed not to molest travelers, stage coaches, telegraph lines or projected railroads. All the Shoshone treaties were similar in form. They show that the boundaries claimed, as petitioner points out, covered the entire Shoshone country. After all five were negotiated Commissioner Doty was able to trace a rough map of the Shoshone country to show the Commissioner of Indian Affairs "the exterior boundaries of the territories claimed by the *Shoshonees* in their recent treaties, as also the lines of the county occupied by different portions of the tribe indicated upon it as correctly as the map will allow." He had asked Indian Affairs for the map upon which this information was traced "to show the boundaries of the country ceded by the Shoshones."

324 U.S. at 341–43.

76. According to the Court:

> It seems to us clear from the circumstances leading up to and following the execution of the Box Elder Treaty that the parties did not intend to recognize or acknowledge by that treaty the Indian title to the lands in question. Whether the lands were in fact held by the Shoshones by Indian title from occupancy or otherwise or what rights flow to the Indians from such title is not involved. Since the rights, if any the Shoshones have, did not arise under or grow out of the Box Elder treaty, no recovery may be had under the jurisdictional act.

324 U.S. at 354. It is also noteworthy that the case was a prelude to *Tee-Hit-Ton v. United States*, 348 U.S. 272, 281 (1955). Justice Reed said, with respect to the extinguishments of aboriginal title:

> Since *Johnson v. McIntosh*, decided in 1823, gave rationalization to the appropriation of Indian lands by the [W]hite man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss. Exclusive title to the lands passed to the [W]hite discoverers, subject to the Indian title with power in the white sovereign alone to extinguish that right by "purchase or by conquest." The [W]hites enforced their claims by the sword and occupied the lands as the Indians abandoned them.

Id. at 339 (citations omitted).

77. Frank Temoke, Sr., Traditional Chief of the Western Shoshone until his death in 1994, wrote:

War, Whites moved into the area to settle, to mine, to graze their cattle, and to build the railroad lines.[78] Though the Western Shoshone were not completely displaced, their hunting and gathering lifestyle was affected—native grasses were consumed, pinion groves were leveled, and game was depleted—and many were forced to adjust to an agricultural or industrial livelihood.[79]

Though some of the Western Shoshone moved to the small reservations established by the federal government in Nevada after 1877,[80] most remained on the aboriginal lands that they believed were assured to them under the Treaty of Ruby Valley.[81] The land that they resided on, hunted, and ran cattle over, was considered an unreserved public domain by the United States and, prior to 1934, was wholly unmanaged. Indeed, there was an implied license to use the open range,[82] and the Western Shoshone were able to graze much of Central Nevada with no substantial interference. The Taylor Grazing Act of 1934[83] (TGA) brought the possibility of basic management to the public rangelands and gave the Secretary of the Interior the authority to establish grazing districts and regulate usage. The

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> And so it was that at the appointed time the Indians together with the chiefs did come to this place in Ruby Valley and they came unarmed and the soldiers together with the government representatives also came but the soldiers had rifles which they stacked in bunches. So when the Indians had all gathered, the soldiers grabbed the rifles and killed an Indian which they had previously captured and brought with them. Then they cut the Indian up and put him in a huge iron pot which they had in those days and they cooked him and then the soldiers aimed their rifles at the heads of the people and forced the people to eat some of this man they had killed. Men, women and children were all forced to eat some of this human flesh while the soldiers held their guns on the people. And it was after this terrible thing which the [W]hite man did to our people that the Treaty of 1863 was signed. So it is hard for us of the Western Shoshone people to understand why the [W]hite man doesn't wish to keep this Treaty. And why the government insists through its agents and attorneys that this Treaty is no good.

Frank Temoke, Sr., *Ruby Valley Treaty Western Shoshone Indians of Nevada*, Historical Commemoration, October 1, 1863, *at* http://www.yvwiiusdinvnohii.net/history/1863rubyhist.htm.

78. CRUM, *supra* note 60, at 30.

79. *Id.*

80. *Id.* at 35, 43; *see also* Treaty of Ruby Valley, *supra* note 66, at art. 6.

81. CRUM, *supra* note 60, at 59.

82. Buford v. Houtz, 133 U.S. 320 (1890). The Court stated:

> We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.

Id. at 326.

83. 43 U.S.C. §§ 315–315(r) (1934).

initial efforts at control by the Bureau of Land Management (BLM) were rudimentary at best.[84] At mid-century, the Western Shoshone remained in actual, unchallenged possession of several million Nevada acres,[85] and in theoretical possession of nearly sixteen million acres of federal lands that had not been used or taken by Whites in their various economic endeavors.[86]

It is significant to note that, prior to 1934, a large number of Western Shoshone extended families lived on the land in a social, political, and economic state fundamentally similar to how they lived before the White incursion. True, the specific modes of production may have changed from predominantly hunting and gathering to primarily agriculture and grazing, but what had not changed was the decentralized nature of the economy, cohering around an extended family or band, and the intimate ties of the groups to particular places and land. While the United States may have been a dominant sovereign and the BLM may have been the nominal regulatory authority it remained arguable that the vestigial federal control in the form of grazing districts, without more, could not be deemed a clear cut extinguishment of Indian aboriginal title.[87]

B. *The Indian Claims Commission Proceedings*

The Indian Claims Commission Act[88] was an amalgamated product, forged from a variety of sources and motives. Some of these were divergent, if not incompatible. From one angle, the Act seemed a good faith attempt to improve America's moral posture regarding its oft-displaced native inhabitants and to compensate them for dispossession of tribal lands and rights.[89] From another approach, the Act may have been an effort to hot-wire moribund, post-war reservation economies with unrestricted cash awards.[90] Finally, the Act could be seen as terminationist in direction

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84. *See* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCE LAW, 781–86 (5th ed. 2002).

85. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 734 (The Michie Co. 1991) (1973).

86. JERRY MANDER, IN THE ABSENCE OF THE SACRED 308 (1991).

87. Michael J. Kaplan, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. FED. 425 (1997).

88. Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70a–70 v–3 (2001) (omitted upon termination of the Indian Claims Commission on September 30, 1978).

89. Sandra C. Danforth, *Repaying Historic Debts: The Indian Claims Commission*, 49 N. D. L. REV. 359, 366 (1973).

90. CLINTON ET AL., *supra* note 85, at 723.

and reflective of a desire to settle federal accounts with the tribes and prepare them for the cutting of the ties of obligation.[91]

In accord with the thrust towards justice, the Act expanded the federal jurisdiction over the types of tribal claims that had long been frustrated on the basis of sovereign immunity, or the lack of treaty or statutory recognition.[92] Simultaneously, however, and with an eye toward assimilation, economy, and termination, the Act implicitly limited the scope of relief to the award of monetary compensation rather than the return of land or the confirmation of title.[93] Federal courts compounded this effect by holding that the Indian Claims Commission (ICC) was the exclusive forum for Indian land claims.[94] Consequently, tribes were often forced to forego claims for quieting title and to bring live disputes before the Commission rather than the federal district courts.[95] The ICC thus became an inescapable conduit for Indian land contests and a compactor that reduced even viable claims for present possession of particular lands into fungible claims for deeply discounted monetary relief.[96] The ICC, in short, became an engine for the consumption of Indian land at nineteenth century interest-free prices.[97]

A parasitic accompaniment to the exclusively monetary focus was the overreaching of the big-city lawyers, whose eyes were fixed on the contingency fee of ten percent of the tribe's recovery[98] and the possibility of subsequent Indian resource business, such as brokering below-market leases for Indian minerals.[99] Such lawyers often attempted to find compliant tribal members—the modern day equivalent of the notorious "government chiefs"[100]—that would be willing, even if not authorized, to speak, sue, stipulate, or settle for the whole group.[101]

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91. CRUM, *supra* note 60, at 123; *see also* DONALD L. FIXICO, TERMINATION AND RELOCATION 41 (1986).

92. Danforth, *supra* note 89, at 362-63.

93. GETCHES ET AL., *supra* note 27, at 280.

94. CLINTON ET AL., *supra* note 85, at 735-36.

95. *See, e.g.*, Ogalala Sioux Tribe v. United States, 650 F.2d 140, 143–43 (8th Cir. 1980), *cert. denied*, 455 U.S. 907 (1982) (holding that the Indian Claims Commission Act provided an exclusive remedy for claims dealing with the taking of Indian lands); *see also* Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1467 (10th Cir. 1987) (holding that even live title disputes should be filed under the Indian Claims Commission Act); Richard Hughes, *Indian Law*, 18 N.M. L. REV. 403, 410 (1988) (criticizing this interpretation).

96. GETCHES ET AL., *supra* note 27, at 281; MANDER, *supra* note 86, at 307–08.

97. GETCHES ET AL., *supra* note 27, at 281.

98. GETCHES ET AL., *supra* note 27, at 283–84; MANDER, *supra* note 86, at 306.

99. CHARLES WILKINSON, FIRE ON THE PLATEAU 284–87 (1999).

100. Federal government officials charged with treaty negotiations often selected Indian individuals who were friendly or corruptible, designated them as "chiefs," regardless of their stature or authority in their tribe, and conducted transactions purporting to bind tribes not present. *See* Wilkinson & Volkman, *supra* note 16, at 608–19.

101. MANDER, *supra* note 86, at 306.

The jurisdiction of the Indian Claims Commission was limited to tribal claims and individuals, and even those with compelling tales of wrongdoing by the government had no standing before the tribunal.[102] Yet, the seeds of some individual rights and possible relief came out of these adjudications of tribal claims. The development of the concept of individual aboriginal rights began with the Western Shoshone claims before the Indian Claims Commission.

In August 1951, as the jurisdictional window of the Indian Claims Commission Act was about to close,[103] the Western Shoshone, represented by the Te-moak Band and Ernest Wilkinson of the Wilkinson, Cragin and Barker law firm, filed a claim for compensation before the ICC.[104] The Te-moak Band, though organized under the Indian Reorganization Act[105] (IRA) and recognized by the federal government, actually spoke for only a portion of the Western Shoshone[106] who, in general, rejected not only the

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102. *See* W. Shoshone Legal Def. and Educ. Ass'n v. United States, 531 F.2d 495 (Ct. Cl. 1976) [hereinafter *Western Shoshone Case*].

> A claim under the Claims Commission Act is not an aggregation of individual claims but a group claim on behalf of a tribe, band or other identifiable group. The suing claimant represents that group interest, and it is reasonable to say that at least prima facie the organized entity "recognized by the Secretary of the Interior as having authority to represent such [claiming] tribe, band, or group" should be the exclusive suing party. An Indian claim under the Act is unlike a class suit in that there is no necessity that the position of each individual member of the group be represented; it is only the group claim which need be put forward. If there are circumstances in which the organized entity fails properly to represent the group, the normal method of redress is through the internal mechanism of the organized entity.

Id. at 503–04 (citations omitted).

103. Claims accruing on or prior to August 13, 1946 were to be handled by the ICC if the claims were filed on or prior to August 13, 1951. *See* Indians Claims Commission Act, 25 U.S.C. § 70a. Claims arising after August 13, 1946 were to be within the jurisdiction of the United States Court of Federal Claims. *See* 28 U.S.C.A. § 1505 (West 1994); Navajo Tribe v. United States, 586 F.2d 192, 199 (Ct.Cl. 1978); *see also* JUDITH ROYSTER & MICHAEL C. BLUM, NATIVE AMERICAN NATURAL RESOURCE LAW 127–28 (2002).

104. Wilkinson was instrumental in the passage of the Indian Claims Commission Act. *See* Creek Nation v. United States, 168 Ct. Cl. 483, 483 n.5 (1964). Wilkinson was later replaced by Robert W. Barker. *See* CRUM, *supra* note 60, at 131. Reid P. Chambers, in turn, replaced Barker. *See* Te-moak Band of W. Shoshone Indians, Nev. v. United States, 593 F.2d 994, 997 (Ct. Cl. 1979).

105. The organizational provisions of 25 U.S.C.A. § 476 enable a tribe or band to adopt a constitution by majority vote and submit it to the Secretary of the Interior for approval.

106. The ICC found, in 1962, that the Te-moak Bands of Western Shoshone Indians was organized under "the Indian Reorganization Act of 1934, 48 Stat. 984," and was recognized by the Secretary of the Interior as having the authority to maintain a suit. Western Shoshone v. United States, 11 Ind. Cl. Comm. 387, 388 (1957). The Te-moak Band was thus deemed authorized to sue "for and on behalf of the aboriginal Western Shoshone Identifiable Group." *Western Shoshone Case*, 531 F.2d 495, 499 (Ct. Cl. 1976). As authorized

IRA, but also the idea of a monetary claim for their aboriginal lands.[107] The resisters, composed largely of traditionals, felt that the Western Shoshone still owned and occupied substantial portions of Nevada and they did not wish to venture into an ICC thicket that seemed to hold no real promise of a confirmed tribal land base.[108]

In 1957, the Western Shoshone's claim for lost lands, backed by anthropological evidence of aboriginal possession,[109] was finally presented for the often-glacial consideration of the ICC. Five years later, the commission concluded that the Western Shoshone had held aboriginal possession to 24,396,403 acres within the Great Basin.[110] The Commission further found that the settlers, miners, railroad men, and other non-Indians gradually encroached on this possession. Then, in 1966, though no formal congressional act of extinguishment was confirmed by the ICC,[111] and although the encroachment was by no means total, the Te-moak Band attorneys stipulated with the government that a valuation date for lands taken in Nevada would be July 1, 1872.[112]

A stipulation to the extinguishment of aboriginal title by private encroachment, even if such encroachment may have been encouraged by the implications of federal treaties and land disposition laws, was inconsistent with the holding in *Johnson v. McIntosh*[113] and the prohibitions of the

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representatives for the larger group before the ICC, the Te-moak Bands could be displaced as the exclusive representative only on a showing of "fraud, collusion, or laches." *Id.*

107. *See* CRUM, *supra* note 60, at 126–32.

108. *Id.* at 124.

109. Wilkinson hired Omer Stewart of the University of Colorado, who provided evidence of the Western Shoshone's exclusive occupation and use of the Central Great Basin. *Id.* at 131.

110. *Western Shoshone Case*, 531 F.2d at 496.

111. United States v. Dann, 706 F.2d 919 (9th Cir. 1983) [hereinafter *Dann II*]. The Court held that: "aboriginal title had not been extinguished as a matter of law by application of the public land laws, by creation of the Duck Valley Reservation, or by inclusion of the disputed lands in a grazing district and issuance of a grazing permit pursuant to the Taylor Grazing Act." *Id.* at 933.

112. *Western Shoshone Case*, 531 F.2d at 497.

113. *See* Johnson v. McIntosh, 21 U.S. 543 (1823); *supra* notes 26–27, 30. In *United States v. Sante Fe Pacific R.R. Co.*, 314 U.S. 339 (1941), Justice Douglas, in upholding a tribal claim to unextinguished aboriginal possession on a railroad land grant, declared that only Congress could extinguish Indian title:

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political not justiciable issues. As stated by Chief Justice Marshall in *Johnson v. McIntosh*, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.

Santa Fe Pac. R.R. Co., 314 U.S. at 347 (1941) (citations omitted).

Non Intercourse Acts.[114] The federal common law, embraced in *Johnson*, and the express legislative statements confirm that Congress is the exclusive architect of extinguishments and that private efforts without specific authorization are ineffectual and possibly illegal.[115] The ICC was apparently untroubled by the legally unsupportable stipulation in the Western Shoshone case because, for one thing, neither the Indians nor the United States actually contested the extinguishment issue. For another reason, the ICC's consistent orientation was toward the monetary settlement of land claims, rather than the confirmation of unextinguished tribal title or possession. The trouble with this cozy willingness to waive the law stemmed from the fact that the stipulation encompassed not only land lost, but land still within the tribe's actual or constructive possession.[116]

The sawing on the limb upon which the tribe was seated reached the crisis stage in 1972 when the ICC calculated the Western Shoshone's total loss, at 1872 non-interest-bearing prices, to be around twenty-six million dollars.[117] With the final and formal dispossession of their entire aboriginal domain looming before them, including the lands currently occupied, and with the Te-moak Band asleep at the wheel, a group of traditional Western Shoshones attempted to intervene in the ICC proceedings and raise the argument that the tribe still held unextinguished aboriginal title to some twelve million acres.[118] The ICC rejected the at-

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114. The Act stated:

> The Indian Trade and Intercourse Act of June 30, 1834, 4 Stat. 729, was extended over "the Indian tribes in the Territories of New Mexico and Utah by" [§] 7 of the Act of February 27, 1851, 9 Stat. 574, 587. The 1834 Act, which derived from the Act of July 22, 1790, 1 Stat. 137, made it an offense to drive stock to range or feed "on any land belonging to any Indian or Indian tribe, without the consent of such tribe"; gave the superintendent of Indian affairs authority "to remove from the Indian country all persons found therein contrary to law;" made it unlawful to settle on "any lands belonging, secured, or granted" . . . "from any Indian nation or tribe of Indians." The Act of 1851 obviously did not create any Indian right of occupancy which did not previously exist. But it plainly indicates that in 1851 Congress desired to continue in these territories the unquestioned general policy of the Federal government to recognize such right of occupancy. As stated by Chief Justice Marshall in Worcester v. Georgia, the Indian trade and intercourse acts "manifestly consider the several Indian nations in distinct political communities, having territorial boundaries, which [sic] which their authority is exclusive and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States."

Id. at 347–48 (citations omitted).

115. *Id.*

116. CLINTON ET AL., *supra* note 85, at 734.

117. *Western Shoshone Case*, 531 F.2d at 497.

118. CRUM, *supra* note 60, at 180; see Te-moak Band of W. Shoshone Indians v. United States, 593 F.2d 984, 996 (Ct. Cl. 1979) [hereinafter *Te-moak Band*]; *Western Shoshone Case*,

tempt to intervene and their judgment was sustained by the United States Court of Claims, which viewed the intervention attempt as merely an intertribal squabble over "litigation strategy."[119]

The Te-moak Band, shaken into wakefulness by the failed intervention of the traditionals, then sought to change its own approach. It wanted to retroactively limit the scope of its prior stipulation and to seek, additionally, a declaration that the Western Shoshone still held unextinguished aboriginal title to twelve million acres.[120] To this end, the Te-moak's fired their original lawyers and hired the legendary Reid Chambers, a foremost Indian law scholar and litigator. Chambers's efforts to halt or shift the ICC's quarter-century of momentum building, however, went for naught. The Commission found that it was too late in the day to adjudicate the case on a new theory, and the Court of Claims agreed.[121] The Commission, having denied the Te-moak's attempt to stay the proceedings, then entered its final judgment in 1977,[122] and the Court of Claims, also agreeing with this conclusion, suggested that if the Western Shoshone were unhappy with the cash-for-land result, they could appeal to Congress to "undo the course of litigation."[123]

C. *The Dann Litigation and the Establishment of Individual Aboriginal Rights*

After an executive order created the Duck Valley Reservation on the Nevada-Idaho border in 1877, the United States occasionally tried to persuade the nomadic Western Shoshone bands to relocate; however, only about a third complied.[124] The majority remained on their Great Basin

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531 F.2d at 503. The interveners also charged that there was collusion between the Te-moak Bands and the government to treat the title as extinguished. *Te-Moak Band*, 593 F.2d at 996.

119. *Western Shoshone Case*, 531 F.2d at 503.

120. *Te-moak Band*, 593 F.2d at 997.

121. *Id.* at 997–98.

122. The ICC's monetary award to the Western Shoshones was placed in trust in 1979 and, with accumulated interest, now amounts to around 138 million dollars. The tribe has continuously refused to participate in any plan for distribution, fearing that acceptance would preclude any future claims to the land. In recent years opposition to this stance has emerged. A substantial segment of the tribe, feeling that the Supreme Court decision in *United States v. Dann*, 470 U.S. 39 (1985) effectively ends tribal claims to the land and aware that per capita payouts from the fund now approach $20,000 for each eligible member, has indicated a desire to distribute the trust fund. Senate Bill 958, the Western Shoshone Distribution bill, was considered by Congress in 2002, but died on November 14, 2002, in the House of Representatives. *See* Valerie Tallman, Shoshone Payout Bill Dead, Death Valley. U.S. Forums, (2003), *at* http://death-valley.us/article278.htm.

123. *Te-moak Band*, 593 F.2d at 999.

124. CRUM, *supra* note 60, at 43. ("This government effort failed because the Shoshones were too deeply attached to particular places where their ancestors had lived. As a result, only one-third moved to Duck Valley, while the other two-thirds remained at or near their native places.").

aboriginal range, and this traditional life-pattern continued on into the twentieth century.[125] But it did not continue unimpeded. The non-reservation Indians had a difficult time economically, as the hunting and gathering patterns were increasingly disrupted.[126] The Indians turned more to ranching and grazing on the unreserved and unregulated public domain.[127]

One of the Western Shoshone who undertook ranching on the open range of Crescent Valley was Dewey Dann, who began herding cattle in the 1920s.[128] Cattle ranching involves two distinct aspects of usage and claims of property right. The rancher first asserts an exclusive possession over the ranch's base land—the residence, barns, pens, and curtilege—and then exercises a usufruct or non-exclusive usage of lands over which the cattle graze.[129]

Sometime, in the late 1920s or early 1930s,[130] Dewey, and his wife Sophie Dann acquired a fee patent to 160 acres under the Homestead Laws,[131] and also purchased 640 additional acres from the Southern Pacific Railroad.[132] These fee lands, superimposed over lands claimed by Shoshones as aboriginal right, served as the base of the Dann Ranch, which extended its grazing operations over the adjacent and unregulated federal public lands. Free passage over and use of the public lands was, however, about to change. In 1934 the passage of the Taylor Grazing Act[133] brought the open range to at least a theoretical close and greatly limited the opportunities for acquiring title under the homesteading acts.[134] The open range was placed into large, loosely operated management units called

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125. *Id.* at 59.

126. *Id.* at 63.

127. *Id.* at 63–66. Withdrawal of the public domain from disposition and unregulated use began with the reservation of Yellowstone National Park in 1872 and rapidly expanded with the General Revision Act of 1891, which authorized the reservation of timber lands as national forests. *See* I GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW §§ 2.9–2.14 (2000).

128. United States v. Dann, 873 F.2d 1189, 1193 (9th Cir. 1989) [hereinafter *Dann III*].

129. *Id.*; *see also* United States v. Dann, 470 U.S. 39 (1985); United States v. Cramer, 216 U.S. 219 (1923).

130. "The district court found that Dewey and Sophie Dann obtained their homestead patent 'in the 1930's.' The government asserts that 'the patent was issued in 1928." *Dann III*, 873 F.2d at 1193, n. 2.

131. *Id.* at 1193; *see also* GATES, *supra* note 65, at 495–529.

132. GATES, *supra* note 65, at 495–529; *Dann III*, 873 F.2d at 1193.

133. 43 U.S.C. §§ 315–315(r) (1934).

134. *See* Stewart v. Penny, 238 F. Supp. 821 (D. Nev. 1965); COGGINS ET AL., *supra* note 84.

grazing districts. Grazing was transformed from an unrestricted privilege[135] into a special permit use, necessitating user payment and a conditioned approval from the Bureau of Land Management (BLM).[136]

In 1936, Dewey Dann obtained grazing permits from the BLM to cover lands used by his ranching operations.[137] He held these permits and paid the fees until his death. Dann's eldest daughter, Mary, the successor to the ranch, began herding in the 1940s and was joined a decade later by her sister, Carrie. The Dann sisters did not seek or receive grazing permits; they claimed, instead, that they were entitled to graze the federal lands in accord with Western Shoshone aboriginal rights reflected in the Treaty of Ruby Valley. Their grazing activities overlapped and conflicted with other area ranches who had subsequently acquired permits to graze the lands once held under permit by Dewey Dann.[138]

In 1979, the United States filed suit against the Dann sisters in federal district court, alleging that their continued grazing on federal lands without a Taylor Grazing Act permit was a trespass and that the government was entitled to an injunction and damages.[139] The Danns responded that the Western Shoshone Tribe held aboriginal title to the contested area since time immemorial, and as tribal members, they could use the lands under tribal law and custom and need not comply with BLM regulations. The federal government contended that the issue of whether the ICC had extinguished the tribe's aboriginal title had been decided by the ICC and the district court concurred.[140]

On appeal, the Ninth Circuit disagreed, holding that the ICC decision on extinguishment was neither final as a matter of procedure, nor correct as a matter of substantive law.[141] While the remanded case was pending in the district court, the Western Shoshone claims proceeding ended in 1979 with the ICC certification of an award of twenty-six

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135. Wayne Hage, and other Nevada ranchers, have long insisted that unrestricted grazing of the public lands was a matter of right. See WILLIAM PERRY PENDLEY, WAR ON THE WEST 76–79 (1995). The legal basis for this position has been clearly refuted. See United States v. Gardner, 107 F.3d. 1314 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 264 (1997); *see also* Robert Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647 (1997).

136. 43 U.S.C. § 315b; *see* United States v. Fuller, 409 U.S. 488, 489 (1973); E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 214–24 (1951) (cited in COGGINS ET AL., *supra* note 84, at 133–35).

137. United States v. Dann, 873 F.2d 1189, 1193 (9th Cir. 1989).

138. *Id.*; *see also* Alves v. United States, 133 F.3d 1454 (Fed. Cir. 1998).

139. *Dann III*, 873 F.2d at 1191 (federal acreage at issue in the case was about 5120 acres); *see* United States v. Dann, 470 U.S. 39, 43 (1985).

140. *See* United States v. Dann, No. R-74-60 (Jan. 5, 1977) (cited in United States v. Dann, 470 U.S. 39, 44 (1985)).

141. United States v. Dann, 572 F.2d 222 (9th Cir. 1978) [hereinafter *Dann I*] ("[W]hatever may have been the implicit assumptions of both the United States and the Shoshone Tribes during the litigation . . . the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided.") *Id.* at 226–27.

million dollars.[142] According to the district court, this certification, if not the prior private encroachment or the federal land laws, operated as an extinguishment of aboriginal title—and as a preclusion of the Dann's defense to trespass.[143] The Ninth Circuit again reversed, stating that the Western Shoshone were not barred procedurally and could raise the substantive issue of extinguishment.[144] More specifically, the court stated that the doctrine of issue preclusion did not bar the Danns because the precise issue of extinguishment had been stipulated to before the ICC, but had not been actually litigated.[145] The statutory bar, contained within the Indian Claims Commission Act, did not operate against the Danns, despite the ICC's certification of the award, because there was no plan of distribution for the award and no actual payment to the tribe.[146] Finally, with the procedural hurdles cleared, the court concluded that, as a matter of law, there could be no extinguishment of aboriginal title without a clear expression of congressional intent, and this was not demonstrated by the administrative establishment of the Duck Valley Reservation or by the general operation of the public land laws.[147]

The United States Supreme Court reversed the Ninth Circuit Court of Appeals with a bloodless, formalistic conclusion that the ICC's certification of an award to the Government Accounting Office (GAO) was dispositive of the Western Shoshone's tribal claim to aboriginal title

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142. *See* United States v. Dann, 706 F.2d 919, 923 (9th Cir. 1983); *Dann III*, 873 at 1192.

143. United States v. Dann, No. R-74-60 (April 25, 1980) (cited in United States v. Dann, 470 U.S. 39, 44 (1985)).

144. *Dann II*, 706 F.2d at 923.

145. *Id.* at 924.

146. Judge Canby asserted:

> Although funds have been appropriated and credited to an interest-bearing Treasury account in the name of the Tribe, no monies have actually passed into the hands of the Western Shoshone group or its members, nor have any been used for their benefit. Distribution and use of the awarded funds can only take place pursuant to a plan of use or distribution timely prepared by the Secretary of Interior and acquiesced in by Congress, or by separate legislation. We are advised that in the present case no timely plan was submitted, so that separate legislation will be required. Congress therefore retains significant control over the claims process until the distribution scheme is actually put into effect. We conclude that "payment" has not occurred within the meaning of section 70u(a) until Congress has taken its final look at the award and has either permitted a plan of distribution to become effective pursuant to 25 U.S.C. § 1403 or has legislated one. One reason for so concluding is that the ordinary meaning of "payment" does not seem satisfied by a transfer of funds that leaves such significant legal blocks in the way of delivery to the payee.

Id. at 925–26 (citations omitted).

147. *Id.* at 933.

and simultaneously preclusive of the Dann sisters' reliance on tribal title as a defense to federal charges of trespass.[148] The Court held that the Indian Claims Commission Act's chief purpose was final disposition of Indian claims and, therefore, payment to the GAO should be interpreted to bar further litigation concerning a tribe's aboriginal rights, even in cases where Congress had not yet adopted a formal plan for distribution of the award.[149] The Court avoided consideration of the federal common law of extinguishment, voiced no opinion on the Western Shoshone's now unraisable claim that no extinguishment had, in fact, taken place, and demonstrated no concern that the Western Shoshone's pyrrhic (and undesired) victory of compensation at nineteenth century prices was achieved at the cost of land they were actually using.

But the Supreme Court tossed a bone to the otherwise luckless Danns: the residual possibility of individual aboriginal rights to graze at least some of the lands in question.[150] Though the Court cited some precedent for its suggestion,[151] these cases were far from formulaic, and not immediately applicable to the Danns' situation.

Before turning to the lower court's embellishment and particularization of the concept of individual aboriginal rights, it is worth a preliminary exploration into the Supreme Court's somewhat cryptic reference. Indeed, individual aboriginal rights seem in some sense to be anomalous or even oxymoronic. From an Indian standpoint, relations with particular lands were preeminently collective.[152] Individuals and families within the tribal context could have the ability to use discrete portions of

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148. *See* United States v. Dann, 470 U.S. 39 (1985).

149. *See id.* at 45.

150. *See id.* at 49.

151. *Id.* at 50 (citing Cramer v. United States, 261 U.S. 219 (1923) and United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941)).

152. JAMAKE HIGHWATER, THE PRIMAL MIND 127–28 (1981); *see* HUGHES, *supra* note 2, at 61; *see also* COLLIER, GLEAMING WAY, *supra* note 7, at 24. Donald Hughes wrote:

> Land in the Indian view was not "owned" in the sense that word had in Western European societies; rather it was held in common. In the widest meaning, Indians felt that all living beings share the land, and that includes plants and animals as well as human beings. But in a more local sense, ownership was tribal and the land was considered to belong to the community even when it was used by families or individuals. Among Indians, cooperation and group interests predominated, particularly where ecological conditions meant subsistence living in a difficult environment. They were tolerant of individual desires, appreciative of individual contributions to the group, and slow to use sanctions against individuals, but they were not individualists. An Indian felt himself or herself primarily as part of the family, clan or tribe, and the world of life. Most ceremonies and economic activities were done by cooperative groups. A competitive attitude was regarded as antisocial or malevolent. Generosity, hospitality, and the customary exchange of gifts provided for sharing food and goods throughout the local group.

HUGHES, *supra* note 2, at 61.

the land, but the reversion after cessation remained with the people.[153] As a matter of expediency, if not political theory and property law, the invading Europeans and expansionist Americans postulated that land interests were held and transferable by the tribe rather than individuals.[154] The Supreme Court, in its development of the federal Indian law, has tended (or preferred) to view Indians' assertable land claims, whether aboriginal, treaty-based, or statutory, as tribal issues, with individual rights of user subsumed in the tribal context.[155]

Yet, the Supreme Court in *United States v. Dann* skirted these precedents and intimated that a concept of individual aboriginal rights could be linked to the 1923 case of *Cramer v. United States*.[156] In *Cramer*, the Court held that three individual Indians had a legally protectable interest against a subsequent railroad grantee and its successors, despite the fact that the prior Indian possession was not in accord with the requirements of the homestead acts.[157] The Indians were, in fact, part of a tribe and were within an area covered by a negotiated treaty that was pending for ratification at the time of the 1866 grant to the railroad.[158] The treaty, however, was not ratified by the Senate and the Court could not, therefore, resolve the dispute on the basis of prior recognized tribal title. Rather, the Court had to deal with the question of whether Indian individuals acquired prior rights on the basis of enclosure, residence, cultivation, and irrigation of a 170 acre tract from 1859 until the

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153. D'ARCY MCNICKLE, NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS 78–79 (1973).

154. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF POLITICAL ANOMALY 211–12, 226–34 (1994). According to Prucha:

> There was no clear criterion—except, perhaps, expediency—for determining what Indian political unit would be used for carrying on the negotiations. The United States varied its decisions, sometimes treating with separate small divisions of a "tribe," as in many treaties with Potawatomis and with Chippewas, and at other times seeking to find (or designate) a single tribal chief to represent all the bands together (even over the objections of the Indians, who declared that a unitary chief was not their practice). In a good many instances tribes were grouped together for a single treaty. Sometimes these were quite disparate or even hostile groups, brought together to deal with some common issue; at other times the negotiators might represent a dominant tribe with fragments of other Indians traditionally attached to it. Treaty commissioners did not always know ahead of time how many of the tribes and bands invited to a council would actually appear—or when. So they dealt with those at hand or extended the time of signing to accommodate latecomers.

Id. at 212.

155. *See* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 609–10 (1982).

156. 261 U.S. 219 (1923), *noted in* United States v. Dann, 470 U.S. 39, 50 n.14 (1985).

157. *Cramer*, 261 U.S. at 227.

158. *Id.* at 225.

present action to cancel part of the defendant's patent.[159] The Supreme Court felt that this actual exclusive possession, even though not in accord with the letter of the land disposition laws, was within "the policy of the federal government . . . to respect the Indian right of occupancy which [can] only be interfered with or determined by the United States."[160] This actual occupation by Indian individuals allowed them to not only acquire possession of an amount of land greater than that available under the homesteading acts, but also to prevail in all cases where the United States had not clearly extinguished the Indian interests.[161]

Cramer was not really a theoretical keystone. It can be more properly regarded as an offshoot of late-nineteenth, early-twentieth century United States policies regarding the privatization of federal public land, and the assimilation of the Indian peoples.[162]

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159. According to the Court:

> The Act of July 25, 1866, granted to the predecessor of the defendant company a series of odd-numbered sections of land, including those named, but expected from the grant such lands as "shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of."

Id. at 225 (citations omitted).

160. The Court held:

> It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department to which in land matters this court has always given much weight.

Id. at 227.

161. *Id.* at 222; *see also* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).

162. *Id.* at 227–29; *see also* John Ragsdale, *The Movement to Assimilate the American Indians: A Jurisprudential Study*, 57 UMKC L. REV. 399, 406–07 (1989) [hereinafter Ragsdale]. In *Cramer*, Justice Sutherland stated:

> The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating and improving the soil and establishing fixed homes thereon was in harmony with the well-understood desire of the government which we have mentioned. To hold that by so doing they acquired no possessory rights to which the government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.
>
> The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy.

Cramer, 261 U.S. at 228–29.

The result in *Cramer* was due in part to a long tradition in public land law that favored actual possession over constructive possession or possession based on a legal technicality. The history of land and resource disposition in the Western United States is replete with examples of assertive frontier individuals—settlers, grazers, loggers, irrigators, and miners—taking or using the federal government's resources—land, timber, water, and minerals—outside the parameters and letter of the law. The United States as owner of this land not only silently and knowingly acquiesced in these trespasses, but retroactively validated them with confirmatory law.[163] *Cramer* was also traceable to the policy of assimilation which followed the Dawes Act of 1887[164] and which centered on the individual, non-tribal holding of land.[165] *Cramer* reflects the policies of individualism and assimilation, if not the letter of allotment or the focused efforts at tribal deconstruction.

There is a significant difference between the individual claims in *Cramer* and *Dann* cases. Whereas *Cramer* dealt with exclusive, physical occupation of 170 acres, the *Dann* case dealt with non-exclusive grazing over an area thirty times as large. The question, then, is the significance of the difference between exclusive possession and usufructuary practices. The task for resolution after remand fell first to the District Court.

The Nevada District Court, after remand from the Ninth Circuit, in accord with the Supreme Court's decision, stated that Dewey Dann held an individual aboriginal title to the exclusive occupancy of a section of land, and a usufructuary interest, measured by the extent of use rather than area, in grazing 170 head of cattle, plus calves, and ten head of horses, plus foals.[166] The Court further held that the subsequent actions of Mary and Carrie Dann to accommodate grazing by 598 head of cattle, plus calves, and 840 head of horses, plus foals expanded the usufructuary rights.[167] The district court held that the aboriginal rights to graze, in contrast to the right of exclusive possession, were held in common with other BLM permittees, but were not to be subject to regulation.[168]

The Danns, on appeal, persisted in their dogged efforts to claim that tribal aboriginal rights had survived private encroachment, the passage of the general land management laws, the ICC, and even the Supreme Court.[169] Judge Canby, however, bound by precedent as a jurist, if not convinced substantively as an Indian law scholar, expressed resignation to the reality that

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163. *See* GATES, *supra* note 65, at 219–47, 690–723; A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES §§ 5:6–9 (2003).

164. *See* JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887–1934 1–5 (1991).

165. *See* Ragsdale, *supra* note 162, at 411–15.

166. *Dann III*, 873 F.2d 1189, 1194 (9th Cir. 1989).

167. *Id.*

168. *Id.*

169. United States v. Dann, 470 U.S. 39 (1985).

the tribal aboriginal rights claim was simply not viable.[170] Canby then turned his attention to the issue of individual aboriginal rights.

Canby, advancing some scholarly dicta, wrote that there was no theoretical reason why individuals couldn't establish aboriginal rights in a manner similar to tribes.[171] They could show, for instance, that present individuals and their lineal ancestors had occupied land exclusively since time immemorial and that Congress had never clearly extinguished this possessory title.[172] Canby's observation seems especially applicable to situations such as that of the Western Shoshone in the Great Basin where the aboriginal occupiers were more likely to be mobile, autonomous extended families, rather than aggregated, hierarchically-organized political entities.[173]

The Danns, however, did not assert individual aboriginal rights from time immemorial, or claim individual rights.[174] They continued with an assertion that their individual use was an aspect of an overarching, unextinguished tribal right. According to Judge Canby, this position was now precluded by the Supreme Court's ruling that tribal title to aboriginal lands and any remnant of tribal title that might inhere an individualized user had been extinguished pursuant to the proceedings of the ICC.[175]

There remained, however, the possibility of a limited form of individual aboriginal rights—not derivative from the tribe, not created by unbroken, exclusive individual possession since time immemorial, and, apparently, not even dependent on an affirmative claim by the Danns. The Supreme Court had given a tentative endorsement for this concept with its reference to the *Cramer* case,[176] and it became Judge Canby's task to verify the doctrine and tailor it with respect to the Danns' particular situation.

Canby suggested that *Cramer* was reflective of the early-twentieth century policies favoring land disposition and settlement in general, and individualized Indian landholding, as an aspect of assimilation, in

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170. Judge Canby wrote:

> Now that the Supreme Court has made it clear that the Western Shoshone claim has been paid, we cannot avoid the rule of *Gemmill* that payment for the taking of a aboriginal title establishes that that title has been extinguished. Even without *Gemmill*, however, we would be directed by the negative implications of the Supreme Court's closing instructions in *Dann*. The Court remanded the question of individual aboriginal title in response to the Danns' argument "that because only [tribal aboriginal rights] were before the Indian Claims Commission, the 'final discharge' of § 22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action."

Dann III, 873 F.2d 1189, at 1194–95.

171. *Id.* at 1195.

172. *Id.*

173. *See supra* notes 59–63.

174. *Dann III*, 873 F.2d 1189, 1196 (9th Cir. 1989).

175. *Id.* at 1196.

176. Cramer v. United States, 261 U.S. 219 (1923).

particular.[177] Both the assimilation policy and the land disposition patterns that underlay *Cramer* ended in 1934 with the passage of the Indian Reorganization Act (IRA) and the Taylor Grazing Act.[178] Thus, Canby reasoned that Congress' silent acquiescence or implied consent to land rights acquisition outside the letter of the law could no longer be inferred.[179] Canby thus concluded that the district court had been wrong to view the individual aboriginal rights as expanding with the Dann's usage after 1934; rather, any individual aboriginal rights of occupation or use were to be measured by acts preceding the TGA and the ensuing closure of homesteading and the open range.[180]

In short, the Ninth Circuit agreed with the district court that Dewey Dann had acquired an individual aboriginal right to graze a certain number of cattle and horses on land later incorporated into grazing districts managed by the BLM.[181] This right of user is distinguishable from the right of exclusive occupancy recognized in *Cramer*, but was deemed by the appellate

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177. *Dann III*, 873 F.2d at 1197.

178. The Indian Reorganization Act of 1934, 25 U.S.C. § 451 was designed to end allotment, preserve and expand the tribal land base, rejuvenate tribal government, and enable the tribes to interact economically with non-Indian society. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 9–10 (S. Ill. Univ. Press 2002) (1992). The Taylor Grazing Act, 43 U.S.C. § 315, was designed to stabilize the grazing industry, to enable the protection and management of the public domain and to greatly curtail the disposition of homestead lands. *See* COGGINS ET AL., *supra* note 84, at 129–37.

179. *Dann III*, 873 F.2d at 1198.

180. Judge Canby stated:

> We conclude that the district court was correct in ruling that Dewey and Sophie Dann could and did acquire individual aboriginal use rights to graze cattle and horses on open range lands later incorporated into grazing districts. Any such aboriginal right, however, must have been acquired prior to the withdrawal of the lands from open grazing and their subjection to the regime of the Taylor Grazing Act. The right also must have been continuously exercised since that time.
>
> The district court held that Dewey and Sophie Dann held an aboriginal right to graze 170 head of cattle, plus calves, and 10 horses, plus foals, upon the public domain. It also held that Mary and Carrie Dann had individual aboriginal rights to graze 598 head of cattle, plus calves, and 840 head of horses, plus foals, on public lands. Most of this livestock appears, however, to have been introduced onto public lands well after the lands were subjected to the administration of the Taylor Grazing Act. Dewey Dann's first application for a grazing permit in 1935 sought permission to graze 21 cattle and 79 horses in common with the livestock of other named ranches. To the extent that the district court recognized aboriginal grazing rights for numbers and types of animals beyond those grazed by the Danns at the time the lands were incorporated into grazing districts under the Taylor Grazing Act, it erred.

Id. at 1199–1200 (citations omitted).

181. *Id.*

court to be in accord with the same policy observed in *Cramer*—that of enabling individual Indians to pursue a domestic self-sufficient lifestyle and economy. The right of the user was likewise deemed limited by the change of policy in 1934 and the ending of allotment, homesteading, and the open range. Thus, the additional cattle and horses introduced after that date by Dewey, Mary, and Carrie Dann were not within the scope of the right and were subject to the conditions of the Taylor Grazing Act (TGA) as implemented by the BLM. Not only were these excessive numbers subject to federal regulation, the aboriginal right of user itself was deemed subject to regulation by the BLM, under the logic of *Puyallup Tribe v. Department of Game*,[182] which had found that the State of Washington could regulate Indian tribes' treaty share of the salmon harvest with nondiscriminatory conservation provisions.[183]

II. CONTOURS OF THE DOCTRINE

A. *The Continuing Saga of the Dann Sisters*

It might seem ironic that the Dann sisters, the driving force behind the modern conception of individual aboriginal rights, want nothing to do with the doctrine and have expressly disclaimed reliance on it in their ongoing confrontation with the Bureau of Land Management.[184] The Danns continue to proclaim the traditionalist rendition of events in the Great Basin: the extensive aboriginal range of the Western Shoshone, the confirmation of possession in the Treaty of Ruby Valley, the limited concessions made to the United States, the absence of any clear congressional intent to extinguish and the illegitimate, collusive actions of the ICC, the big-city lawyers, and the BLM.[185] The sisters refuse to accept the results flowing from the Supreme Court's reliance on literal procedure and inertia, and complete avoidance of the merits.

Non-Indians do not easily comprehended the Dann sisters uncomprising resolve, especially those living far from Crescent Valley and far from the intimate contact that traditional tribalists have with their sacred homelands.[186] The Danns reflect the deep bond that can exist between

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182. 391 U.S. 391 (1968).

183. *Dann III*, 873 F.2d at 1200.

184. *See* Dann Trespass, *Questions and Answers*, *at* http://www.nv.blm.gov/danns/horseimpoundment/QsandAs.htm (last visited Apr. 5, 2004).

185. *See* Jeffrey Mullins, *Dann Sisters Still Claim Right to Land*, *at* http://www.wysiwyg://8/http://www.angelfire.com/nv2/wells/danns.htm. (last visited Mar. 12, 2004).

186. Thomas Berry wrote: "The Indian now offers the Euroamerican a mystical sense of the place of the human and other living beings. This is a difficult teaching for us since we long ago lost our capacity for being present to the earth and its living forms in a mutually enhancing manner." THOMAS BERRY, THE DREAM OF THE EARTH 189–90 (1990).

people and particular land. They have been infused with the fundamental, enduring rhythm of their place and with the rhythm of countless generations of Shoshones who lived there, died there, were reborn, and marched through the present into the future. They believe in their very depth that such reciprocity cannot be shattered by the bloodless procedural renderings of an indifferent Supreme Court, sitting black-robed in a humid eastern city more than 2000 miles away. They feel to their core that the administrators, bureaucrats, judges, and legislators that would rupture the traditional ties of others to this place offer nothing to the land—no love, no feelings, no responsibility—that could replace the ancient links between a tribe and its sacred homeland. The sisters refuse to allow this relationship to be broken by sterile procedure and shallow words, and they refuse to accept what they regard as a pallid substitute in the form of individual aboriginal rights.[187]

Ancient patterns of internal culture set long before the events of the last 140 years, explain part of the Danns' intolerance toward individual rights. The Danns, as traditionalists, believe that individual rights in land cannot transcend the rights of the tribe or the collective welfare of the people.[188] In a related sense, they believe that the lands and rights of the tribe are never for sale by or distributable to an individual.[189]

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187. *See infra* notes 188–89.

188. Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 723 (1999); *see also* Kristin Chapin, *Indian Fishing Rights Activists In An Age of Controversy: The Case For an Individual Aboriginal Rights Defense*, 23 ENVT'L. LAW 971, 976 (1993). Professor Dussias argues:

> The Danns implicitly reject the idea, which was fundamental to the allotment program, that land can be cut into pieces and parceled out to individuals. The concept of individual land ownership is wholly incompatible with their understanding of the land. The Danns' fundamental objection to individual land ownership was manifested in their decision not to assert aboriginal title to a portion of the Western Shoshones' aboriginal lands as individuals, despite the federal courts' recognition that such individual title might exist. The Danns' Supreme Court brief explained that they have always considered the land they occupy to be the property of the Western Shoshones as a whole.

Dussias, *supra*, at 723.

189. According to Dussias:

> The Danns' rejection of the possibility of selling or dividing Western Shoshone land is intimately tied up with the role that the earth plays in their world-view. For the Danns, the earth is most properly understood as their mother. As Carrie Dann has put it, "[T]he earth is our mother. . . . Only a woman can give birth, nourish life. We can't own the earth because we are from the earth. Can you own your mother when she brought life to you?" As mother, the earth can be depended upon to nurture her children: "Our

Acknowledging the force, if not the logic or authority of legal precedent the Danns have sought different venues for presentation of their defense against the BLM and its efforts to stop their use of the land. They have raised the issues of aboriginal tribal title before the Interior Board of Land Appeals, as well as the issues of religious and cultural freedom.[190] The agency, following the lead of the Supreme Court, has unequivocally rejected these claims as they relate to the issue of trespass.[191]

The Danns have been extremely active in national and world opinion and have explored a variety of avenues at home and abroad to present the merits of their position and the failings of the United States. They have made extensive use of the Internet, the national news media, and have been featured in some widely circulated films by Joel Friedman.[192] They have emerged as national icons—tough, competent, unyielding heroines who have raised families, horses, hackles, and hell with an in-your-face, never-back-down vigor that has inspired some feminists, minority rights activists, anti-federalists, and environmentalists.[193]

> human mother can only take care of us for so long, then as we get older we must to our earth mother, who will take care of us for the rest of our lives." The preservation of the earth mother is essential not only to the physical but also the spiritual survival of the Danns; as Carrie Dann has explained: "If we lose our land, we have lost our mother. We're spiritually dead. To us, it is to be reduced down to nothingness."

Dussias, *supra* note 188, at 723–24. A split has emerged among the Western Shoshone regarding the selling of the land or, at least, regarding the receipt of the ICC cash award, which has been steadily growing in trust. In spite of the mounting internal opposition, the Danns remain firm. *See* Pauline Arrillaga, *The Nation Sisters, Tribe at Odds Over Treaty Western Shoshone Voted to Accept $137 Million From U.S. Government, But the Danns Refuse to Cede Historical Territory*, L.A. TIMES, Feb. 9, 2003, at A24.

190. *See* Carrie & Mary Dann et al., IBLA 98-372 (1998), *available at* 1998 WL 1745355.

191. *Id.*

192. *See* CRUM, *supra* note 60, at 179; *see also* Charles Le Duff, *Range War in Nevada Pits U.S. Against 2 Shoshone Sisters*, N.Y. TIMES, Oct. 31, 2002, at A18.

193. *But see* William Booth & Eric Pianin, *Sisters Land Use Deplored*, MIAMI HERALD, Sept. 1, 2002, *available at* http://www.miami.com/mld/miamiherald/news/3979170.htm (last visited Mar. 27, 2004). According to Booth and Pianin:

> But seen another way, the Dann sisters are environmentally reckless, scofflaws who abuse public lands managed for all Americans by the Bureau of Land Management.
>
> The Dann sisters are now grazing about 1,500 head of cattle and horse on public lands that the BLM says should permit no more than 180 animals. The sisters say they've never paid a penny to the government to graze stock, though their late father, and then his estate, did make payments. The BLM says the Danns owe the government about $46,000 in grazing fees, and almost $3 million in fines for willful trespass.

In spite of international chastisement from the Inter-American Commission on Human Rights (IACHR),[194] the unmollified, tight-lipped officials from the BLM intensified their efforts to bring the Danns to heel.[195] Not only did they continue to assert that the Danns were in violation of grazing permit requirements, and in arrears on grazing fees but, beyond, they threatened to seize trespassing animals, sell them for pennies on the dollar, and apply the funds toward the estimated three million dol-

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> Members of a citizen's advisory panel, which works with the BLM to assess the health of the rangelands, recently visited the Dann ranch and wee disgusted by the overgrazing.
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> "On a scale of one to 10, with 10 being the worst, that land looked like an 11," said Vince Garcia, a Shoshone rancher and advisory board member.
>
> "It was just dirt," said Helen Hankins, field manager for the BLM in Elko.

Id. But see Le Duff, *supra* note 192 ("Carrie Dann admitted her land was overgrazed, but said she was not environmentally reckless. 'The rains will come again and the grass will grow back,' she said. 'But when the Shoshone people are gone from this land, we are dead.' ").

194. *See* Mary & Carrie Dann v. United States, IACHR Report No. 75/02, Case 11.140 (Dec. 27, 2002), *available at* http://www.indianlaw.org/Dann_PrRelease_Final_Report.pdf. The Indian Law Resource Center in Washington, D.C., said of the IACHR report:

> After an exhaustive review, the Inter-American Commission on Human Rights has affirmed that the United States has been violating international human rights laws in its handling of the longtime land dispute between the government and the Western Shoshone Indians of Nevada.
>
> It is the first time that the United States has been formally found in violation of international human rights laws in its treatment of indigenous peoples within its borders.

Id. Amnesty International, in commenting on the IACHR report, said:

> Amnesty takes no side in disputes over land but the organization is deeply concerned by IACHR's report that the human rights of the Western Shoshone are being violated by the United States. Amnesty is also concerned about the alleged violation against them, in particular their rights to equality before the law, to be free of discrimination, to fair trial and to property. The way in which the United States has handled the land claim has been found by the Inter-American Commission on Human Rights (IACHR) to be in violation of international law.

Amnesty International, Indigenous Rights Are Human Rights: Four Cases of Rights Violations in the Americas 31 (May 2003), *available at* http://www.amnestyusa.org/justearth/indigenous_people/indig_rights_report.html.

195. *See* Deborah Schaaf & Julie Fishel, *Mary and Carrie Dunn v. United States at the Inter-American Commission on Human Rights: Victory For Indian Land Rights and the Environment*, 16 TUL. ENVTL. L.J. 175, 186 (2002).

lars in fees that the agency claimed was owed.[196] The public network of support provided some help. Though it could not stop a federal agency on an example-setting mission, it could, at least, assure that the Danns' stock would not wind up in pet-food containers. Buyers interceded in sales and auctions of the confiscated stock to purchase the animals, find new homes for them, or hold them for return to the Danns.[197] Perhaps the land and the right to use it cannot, as yet, be secured to the Danns as tribalists, but the collateral damage to the innocents can be minimized and the story, with its passion and call for justice, can remain before the public.

Thus, the Danns soldier on with their indomitable spirit, in a war with bureaucracy and in a race with time and advancing age. Their great hope for a tribal renaissance and legal reunion with the beloved land depends in large part on politics and the feelings and energy of strangers. It could still happen. Lyda, Ida, and Helena Conley, Wyandotte Indian sisters from Kansas City, Kansas, undertook responsibility for the protection of

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196. *See* Le Duff, *supra* note 192; *see also* Lee Dazey, *Western Shoshone Dunn Sisters Face Imminent Threat to Livelihood*, CITIZEN ALERT NEWSLETTER (Winter 2003), *available at* http://www.citizenalert.org/newsltr/winter2003danns.html. According to Dazey:

> Only days after release of the Organization of American State's (OAS) Inter-American Commission on Human Rights final decision finding the U.S. in violation of Western Shoshone rights to property, due process, and equality under the law, the Western Shoshone face forced federal seizure of hundreds of horses owned by grandmothers Mary and Carrie Dann.
>
> Despite the call by the OAS to remedy the situation, the United States has stepped up its threats against them. In September, after the preliminary decision has been released, the federal government came to the Dann area with 40 armed agents, ATVs, rented cowboys, a helicopter and seized 227 head of cattle from Western Shoshone grandmothers Mary and Carrie Dann. Later they said they were coming for the Western Shoshone horses.

Id.

197. As Dazey notes:

> The wires have been buzzing among horse rescue organizations about the ethics of purchasing the Dann horses. Several organizations came forward to offer support. One organization led by a Missouri woman, Rainbow Farms, nominated Carrie Dann for Oprah's, "Use Your Life Award."
>
> In response to the imminent danger, a major effort is under way in Crescent Valley to safely round up and evacuate the horses to a safe haven. The Western Shoshone National Council (WSNC) announced on January 15th the creation of the Western Shoshone International Goodwill Horse Program to facilitate the horses passage to safety.

Dazy, *supra* note 196. Boone Tidwell from California returned three bulls to the Dann sisters after he had bought them at a Bureau of Land Management auction. *See Buyer Returns Three Bulls to Dann Sisters*, ELKO DAILY FREE PRESS, Oct. 7, 2002, at A1.

their sacred ancestral burial ground.[198] They fought all the way to the United States Supreme Court, lost,[199] and then fought some more—with their bodies, shotguns, and unflinching resolve.[200] They ultimately won[201]—and therefore so may the Danns. In the meantime, the abstraction of individual aboriginal rights, though not complete, is not without significance. The question remains: what is the scope and potential of the concept?

B. *Case Law Discussions of Individual Aboriginal Rights*

While the Dann sisters continued to present their individual defenses against federal trespass charges on the basis of tribal title, the tribe itself, represented by the Western Shoshone National Council, began an action in 1997 against the BLM and Oro Nevada Resources.[202] The tribe alleged harassment of tribal members, including the Danns, and invalid approval of mining operations in the Crescent Valley area that threatened traditional lands and sacred springs near the Dann ranch.[203] Part of the tribe's action to enjoin Oro and the BLM was premised on the individual aboriginal rights of the tribal members.[204] Though the complaints have been dismissed without prejudice and the dismissal is on appeal,[205] the tribe's second amended complaint and surreply present an expansive listing of individual aboriginal usages that could be raised by individuals or by a tribe seeking to assert and protect the rights of its members.[206] In

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198. *See* Kim Dayton, *Trespassers, Beware, Lyda Burton Conely and the Battle for Huron Place Cemetery*, 8 YALE J.L. & FEMINISM 1, 26–28 (1996).

199. *See* Conley v. Ballinger, 216 U.S. 84, 90 (1910) (holding that treaty rights in the cemetery were tribal and could not be invoked by an individual).

200. Dayton, *supra* note 198, at 19–26.

201. *Id.* at 26–28.

202. *See* Plaintiff's Complaint, W. Shoshone Nat'l Council v. United States, No. S-327-HDM (RHL), (D. Nev. 1997), *available at* www.nativeweb.org/pages/legal/shoshone/ (last visited Apr. 5, 2004) [hereinafter Complaint].

203. *Id.* at ¶ 12–13; *see also* Second Amended Complaint, W. Shoshone Nat'l Council v. United States, No. S-327-HDM (RHL), (D. Nev. 1997), *available at* www.nativeweb.org/pages/legal/shoshone/ (last visited Apr. 5, 2004).

204. *Id.* at ¶ 18–21.

205. *See* Western Shoshone Land and Sovereignty Official Website, *at* http://www.nativeweb.org/pages/legal/shoshone (providing a chronology of the court actions in W. *Shoshone Nat'l Council v. United States*, No. S-327-HDM (RHL), (D. Nev. 1997), *available at* www.nativeweb.org/pages/legal/shoshone/ (last visited Apr. 5, 2004).

206. Plaintiff's Surreply, W. Shoshone Nat'l Council v. United States, No. S-327-HDM (RHL), (D. Nev. 1997), *available at* www.nativeweb.org/pages/legal/shoshone/ (last visited Apr. 5, 2004). The Surreply states:

> The controlling cases have thus never restricted individual aboriginal rights to the terms of a quiet title action, which would require and be lim-

ited to articulation of specific land title claims. The cases cited in this Court's Order of September 10, 1998, allowing Plaintiff's to amend their Complaint to state individual rights with more particularity, are in accord with this principle.

By way of example, and to put the matter in context, the uses and occupations listed in Plaintiffs' Complaint could be expanded as follows to show what is meant by "Indian purposes," as these continue to be exercised, from time immemorial to the present:

Hunting: the right to hunt the following species, but not limited to these species:

> Jackrabbits, all forms of squirrels, rock chucks, coots, chuckawallas, black birds, crows, porcupines, etc. in keeping with Western Shoshone law, the only factor for consideration is that they are available to hunt and not to hunt the species into extinction, but always to leave an abundant amount to keep the species for future generations.
>
> Fishing: The right to fish for the following, including but not limited to: carp, minnows, crawdads, white fish, shiners, chubs, etc.
>
> Foods: The right to gather traditional foods, including but not limited to the following: pine nuts, yomba, wild onions, wild garlic, sego, choke cherries, elder berries, buck berries, wild currants, tule roots, hawthorn berries, juniper berries, rose bush berries, service berries, and all forms of wild grass seeds, etc.
>
> Herbs and medicines: The right to gather all forms of herbs and medicinal plants and roots, including but not limited to: doza, pah-de-via, aanda-vich-quanah, greasewood, Indian tea, pine pitch, sagebrush, lesser sage, willows, etc.
>
> Religion and Sacred Rights: The right to assembly and perform sacred and religious rites on Western Shoshone territory, including but not limited to the following: to visit, bathe, and pray at all hot springs; to pray and prepare on all high places; to get avi-vee, bishop, lesser sage, juniper, rabbit brush; to visit and hold religious ceremonies at Western Shoshone burials throughout the territory, etc.
>
> Crafts: The right to gather all forms of material for crafts, including but not limited to the following: willows, tules, pine pitch, red willows, jackrabbit fur, rocks for grinding, sagebrush bark, buck brush bark, juniper bark, white chert, porcupine quills, etc.
>
> Wood for Burning: The right to gather all forms of dead wood, including but not limited to dead juniper, dead pine, dead mahogany, dead sagebrush, dead rabbit brush, dead buck brush, dead aspen.
>
> Water: the right to use water, including rainwater, for religious rites, cleansing, drinking to sustain life, and for any other purpose.
>
> Air: The right to breathe air to keep one's self alive.
>
> Sun: The right to be in the rays of the sun for warmth and other purposes.
>
> Space: The right to occupy space for one's body.
>
> Customs: The right to engage in commerce with foreign nations and sharing all resources with other Western Shoshone is good and bad years.

Id.

general, these potential usages are of a non-exclusive, usufructuary nature that would permit proponents to avoid the difficulties of proceeding under the Federal Quiet Title Act.[207]

The case law emergent between *Dann III*[208] and the current Western Shoshone conflict does not seem to bode well for the expanded application of individual aboriginal rights. However, the general lack of depth in the discussions should not preclude reconsideration of the issue, especially if the future actions are combined with certain parallel theories, which will be discussed shortly.

1. Hunting and Fishing Rights

If an individual seeks to assert usufructuary hunting or fishing rights as a member of a tribe, the initial question is whether or not a treaty or unextinguished tribal aboriginal rights would include such individual exercise.[209] Hunting and fishing rights have been held to be aspects of a tribe's aboriginal possession, or a part of its treaty rights, even when not expressly mentioned.[210] If a treaty of cession or a statutory extinguishment

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207. The Western Shoshone proceeded on the theory that an action to assert aboriginal use rights or usufruct in federal land does not constitute an action to quiet title to real property, which must proceed under the Quiet Title Act, 28 U.S.C. § 2409(a). The tribe might also have asserted that the Quiet Title Act does not apply to Indian interest held in trust by the United States. *See* 28 U.S.C. § 2409(a); *see also* Devils Lake Sioux Tribe v. North Dakota, 714 F. Supp. 1019, 1020 (D.N.D. 1989), *rev'd on other grounds*, 917 F.2d 1049 (8th Cir. 1990). It has been held that aboriginal titles are, because of the operation of 25 U.S.C. § 177, held in a limited trust by the United States. *See* Joint Tribal Council of the Pasamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975).

208. *See* 873 F.2d 1189, 1193 (9th Cir. 1989).

209. *See generally* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 214–38 (3d ed. 2002).

210. *See* United States v. Winans, 198 U.S. 371, 381 (1905). According to the Court:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.

Id. at 381; *see also* Whiterock v. Nevada, 918 P.2d 1309 (Nev. 1996), where the Court stated:

> Native Americans who occupied the land in this country before the arrival of European settlers acquired legal rights to the land under a theory of aboriginal title. Aboriginal title is tantamount to fee simple except that it does not grant tribes or individual Indians the power to transfer title. Aboriginal

is clear enough, however, then not only may tribal title pass, but the rights of individual usufruct may as well.[211] A similar result may occur under the effect of an ICC judgment and award. In *Western Shoshone National Council v. Molini*,[212] the tribe argued that aboriginal hunting and fishing rights, and similar rights under the Treaty of Ruby Valley had survived the ICC judgment and were assertable against the State of Nevada.[213] The Ninth Circuit, however, felt that the ICC award conclusively established the extinguishment of the Western Shoshone title both possessory and usufructuary, and precluded further assertion, in both federal and state cases.[214]

Victor Whitlock, a Western Shoshone accused of hunting without a license in the aftermath of the *Molini* decision, made direct use of the individual aboriginal rights defense[215]—and the Nevada Supreme Court made short work of it. The court first reiterated the *Molini* position that Whiterock and other tribal members can no longer claim the ability to exercise tribal aboriginal rights to hunt and fish, because these were subsumed in the ICC judgment.[216] Then, relying in part on the *Molini* conclusion that there was no tribal right of hunting and fishing and in part on the principle that states traditionally have been accorded the power to regulate those usufructs, the Nevada Supreme Court reasoned that there was no basis in federal common law for the individual aboriginal rights defense.[217] The court distinguished *Dann III* and its individual right of occupation and grazing on the basis that it stemmed from federal policies of settlement, whereas, the federal policy with respect to wildlife, has been to defer to the state.[218]

> title basically guarantees the right to occupy the land and exercise the attendant rights of hunting, fishing, and gathering on the land.

Id. at 1310 (citations omitted); *see also* Chapin, *supra* note 188, at 975.

211. Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 756 (1985). *But see* Minnesota v. Mille Lacs Band of Chippewa Indians, 56 U.S. 172, 200–02 (1999).

212. 951 F.2d 200 (9th Cir. 1991).

213. *Id.* at 201–02.

214. Chief Judge Wallace stated:

> The Shoshone argue that *Oregon Dept. of Fish* should be limited to cases involving treaties, and does not have any relevance to our interpretation of the Commission's findings. But how can this be so? Both cases involve a general transfer of title. This unqualified transfer of title includes a transfer of hunting and fishing rights.

Id. at 203 (citations omitted).

215. *Whiterock*, 918 P.2d at 1310.

216. *Id.* at 1311.

217. *Id.* at 1313.

218. The Supreme Court, in a per curiam opinion, declared:

It is arguable that the Nevada Court was wrong to assume that individual aboriginal rights stem from, and are limited by, an association with United States policy. In *Dann III*, Canby observed that individual rights in grazing might accord with federal policy observed in *Cramer*, but that these rights arose from long-standing usage that preceded specific congressional withdrawal.[219] If rights are created by aboriginal usage and constrained by overarching federal policy, then individual aboriginal rights in hunting and fishing could arise through intergenerational usage and custom, thus leaving the question of whether a policy to defer to the states on hunting regulation was an express extinguishment of those rights. The Supreme Court's recent holding in *Minnesota v. Mille Lacs Band of Chippewa Indians*[220] makes this proposition questionable.[221]

> In view of the long-standing federal policy of allowing states to regulate wildlife within their borders, and in light of the absence of tribal rights to hunt and fish, we conclude that there is no basis in federal law which would grant Whiterock an individual aboriginal right to hunt in the Humboldt National Forest free from regulation by the State of Nevada. *Dann* is distinguishable on the ground that it involved grazing rights, which were based on federal policies. In contrast, the federal policy with respect to wildlife is to defer to the state—there is no overriding federal policy.
>
> Even if Whiterock were able to establish that he or his ancestors had continuously hunted in the forest for their subsistence since 1906 (the date that President Theodore Roosevelt reserved the land which became the Humboldt National Forest from settlement), there is no federal policy which would mandate recognition of special rights for individual tribal members in the absence of any such tribal rights. The State's interest in preserving and regulating the wildlife within its boundaries is therefore the overriding valid interest. Whiterock has a right to hunt in Nevada, but he must comply with the reasonable non-discriminatory regulations of the State.

Id. at 1313.

219. *See Dann III*, 873 F.2d 1189, 1199 (9th Cir. 1989) ("The rule of *Cramer* is not inconsistent with recognition of a grazing right in individual Indians, acquired prior to subjection of the lands in question to the regime of the Tailor Grazing Act.").

220. 526 U.S. 172 (1999).

221. Justice O'Connor stated for the majority:

> As this Court's subsequent cases have made clear, an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. Rather, Indian treaty rights can coexist with state management of natural resources. Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making. Here, the 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory free of territorial, and later state, regulation, a privilege that others did not enjoy. Today, this freedom from state regulation curtails the State's ability to regulate

2. Possessory Rights

Dann III, as noted, found two types of individual aboriginal rights—those in exclusive possession, and those in nonexclusive usufruct, which are held in common and subject to regulation.[222] Both types are dependent on establishment before the United States Congress makes a withdrawal such as that affected by the Taylor Grazing Act and its limitations on homesteading and free, open range grazing.[223] Even if aboriginal title is established prior to a withdrawal, a reservation, beyond a withdrawal, to a specific federal purpose such as a national park or forest, may be deemed to extinguish the aboriginal title without the constitutional necessity of compensation.[224]

In *United States v. Kent*,[225] a defendant in a trespass case asserted that individual aboriginal rights warranted her residential occupation of land in a national forest. The Ninth Circuit, led by Canby, dismissed the availability of a *Dann III* defense.[226] Even though Kent had ancestral ties to the particular site, she herself had not undertaken possession until 1984, long after the land had been included in a national forest and closed to public entry and settlement.[227]

> hunting, fishing, and gathering by the Chippewa in the ceded lands. But this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians "absolute freedom" from state regulation. We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation. This "conservation necessity" standard accommodates both the State's interest in management of its natural resources and the Chippewa's federally guaranteed treaty rights. Thus, because treaty rights are reconcilable with state sovereignty over natural resources, statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries.

Id. at 204–05 (citations omitted).

222. *Dann III*, 873 F.3d at 1200.

223. *Id.*

224. *See* Havasupai Tribe v. United States, 752 F. Supp. 1471, 1478 (D. Ariz. 1990); *see also* United States v. Gemmill, 535 F.2d 1145, 1149 (9th Cir. 1976); United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1386, 1391–92 (Ct. Cl. 1975).

225. 945 F.2d 1441 (9th Cir. 1991).

226. *Id.* at 1444.

227. *Id.* Judge Canby focused on the defendant's failure to establish individual aboriginal rights before the land withdrawal and did not assert the possibility that the reservation of the land as a national forest would operate to extinguish aboriginal title.

> Kent's claim fails to meet the requirements established in *Dann*. She began her occupancy of this parcel of land in 1984, long after her tribe's title to the land had been extinguished, and long after the land had been established as a National Forest, closed to public entry and settlement. No lineal ancestors immediately preceded her in occupancy. We are acutely aware of, and respect, the strong attachment that Kent has by virtue of family, culture, and tradition

Pai Ohana brought a quiet title action against the United States and used an argument similar to the arguments used in *Kent*: actual possession and residence of ancestral lands lying within Hawaii's KaloKo-Honokohau National Historical Park.[228] Unlike Kent, the Pai family had resided on and utilized the land for generations. When the park was created in 1988, ten families, including the Pai, were in occupation. The United States, seeking to clear title, offered the residents a choice of relocation benefits up to $5000 per household or special use permits allowing them to remain on the property for a term of five years and renewable by agreement.[229] The Pai family held a special use permit, but failed to renew it on expiration. In late 1992, some of the Pai family attempted to deny access to park personnel and to visitors. In 1994, park efforts to compel the Pai to clean up abandoned property were treated as a threat of eviction.[230] The Pai family filed suit in 1994 under the Quiet Title Act,[231] claiming the right to exclusively occupy and use a five acre tract, and asserting in part an individual aboriginal title.[232]

The federal district court held that the family did not have a right to exclusive use or occupancy, either under patent, Hawaiian law, or the federal doctrine of individual aboriginal title. With regard to the latter, the court felt that the Pai family had never held the land exclusively, which the court viewed as part of the *Cramer-Dann III* test for an individual aboriginal right of title.[233] The court also stated that although the Pai family had undertaken a non-exclusive possession before the establishment of

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> to this parcel of land on Sandy Bar Creek. *Cramer*, however, permits us to protect such ties in the form of legal title only for those Indians who have *maintained* a presence on that land. We cannot, under *Cramer* and *Dann*, find such title in all Indians who attempt to *return* to their ancestral lands.

Id.

228. Pai Ohana v. United States, 875 F. Supp. 680 (D. Haw. 1995). The word 'ohana' means family in Hawaiian. *Id.* at 682 n.1.

229. *Id.* at 683.

230. *Id.* at 684.

231. 28 U.S.C. § 2409a (2000).

232. *Pai Ohana*, 875 F. Supp. at 695.

233. Judge Ezra declared:

> The essential elements of individual aboriginal title are established if an Indian can show: "[1] that she or her lineal ancestors continuously occupied a parcel of land, as individuals, and [2] that the period of continuous occupancy commenced before the land was withdrawn for purposes of settlement." The Ninth Circuit stated that to establish individual aboriginal title, one must show actual possession by occupancy, enclosure, or other actions, to the exclusion of all others and that the aboriginal title had never been extinguished.

Id. at 697 (citations omitted).

the national historical park, the establishment of the park by Congress, accompanied by compensatory options and disclaimers, clearly and effectively extinguished any aboriginal title the Pai family may have had.[234]

The district court's apparent suggestion that a non-exclusive right might have been established is significant. It means that the *Pai Ohana* case, implicitly, and the *Dann III* case, explicitly, have found that non-exclusive aboriginal usage, though not a basis for an exclusive right or title, may still be a basis for a lesser, non-exclusive—but still protected—interest. This may be of importance in the sacred site access cases.

3. Sacred Sites and Customs

A significant aspect of individual aboriginal rights, noted in the Western Shoshone surreply,[235] is access to and use of off-reservation sacred sites. Such rights involve easements rather than exclusive occupation. Recognition and protection of such interests are highly important in the protection of tribal culture from the substantial impacts of off-reservation transformative activities.[236] Despite the results and reasoning in *Dann III*, the direct consideration of the issue has not been particularly encouraging.

The Havasupai Tribe and individual members sought a declaratory judgment and an injunction against the United States Forest Service approval of a uranium mining operation in the Kaibab National Forest, near the Grand Canyon National Park.[237] The tribe and individual members alleged that the site of the proposed mine was sacred to the tribe, whose reservation lies thirty-five miles away. The mine development threatened access to the site and destruction of "the very essence of their religious and cultural system."[238] At oral argument the plaintiffs asserted the tribal

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234. *Id.* at 698. The assertion of non-exclusive practices of subsistence, culture, or religion may have fared better due to Hawaii's unique constitutional provision, which obligates the state to preserve and enforce such rights. *See* HAW. CONST. art. XII § 7 (amended 1985(c)); *see also* M. Casey Jarman Robert & R. M. Verchick, *Beyond the Courts of the Conqueror: Balancing Private and Cultural Property Rights Under Hawaii Law*, 5 SCHOLAR 201, 206–07 (2003).

235. *See supra* note 206.

236. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447–54 (1988) (curtailing the use of the Free Exercise Clause and the doctrine of strict judicial scrutiny which calls for a government showing of a compelling state interest and an absence of less restrictive alternative in the sacred sites cases).

237. Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990).

238. *Id.* at 1476. The case relied on *Lyng*, for the rejection of strict scrutiny under the First Amendment:

> Plaintiffs here, as in *Lyng*, assert that their religious and cultural belief systems are intimately bound up with the Canyon Mine site. Plaintiffs assert their belief that EFN's operations will destroy their religion. The Supreme Court, in *Lyng*, made the same assumption in reaching its conclusion of no First

members' individual aboriginal rights of access to the site for religious and cultural purposes.[239] The district court rejected the contention in part on its misperception that a protectable individual aboriginal right requires a showing of exclusive possession.[240] In fact, usufructuary individual aboriginal rights can be based on non-exclusive uses and can be held in common with the rights of others, under the *Dann III* test.[241] The Ninth Circuit affirmed based on a different rationale.[242] The court found instead that the ICC judgment for the taking of the land in 1880, and the ensuing congressional payment, extinguished all aboriginal title in the area.[243] The terse per curiam opinion seems to recognize the distinction between

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> Amendment violation. Accordingly, the court finds and concludes that no First Amendment violation is present in this case.

Id. at 1485.

239. *Id.* at 1479.

240. Judge Strand further stated that:

> An Indian cannot gain a right of occupancy simply by occupying public lands. *Id.* Even accepting the religious significance and use of the site by the individual Indians (as set forth in the Record and the Offer of Proof), the court finds that this does not amount to actual possession of the Canyon Mine site to the exclusion of all others.

Id. at 1480.

241. *See Dann III*, 873 F.2d 1189, 1199 (9th Cir. 1989).

242. Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991). According to the Court:

> The Tribe also claims a right of access, essentially amounting to an easement, to the area that includes the mine site. This claim is based on an argument that until the 1970s, when the Grand Canyon National Park Enlargement Act was passed, the Tribe retained aboriginal title to that land. The GCEA includes a provision that states that it is not to be construed as depriving the Tribe of access to its religious sites. Since the GCEA is what extinguished aboriginal title, the Tribe claims, this provision works as a condition upon the Tribe's relinquishment, and pursuant to it the Tribe retained part of the "bundle of rights"—namely, an easement to any religious site included within the land it gave up.
>
> If the GCEA were the legislative action through which the Havasupais' aboriginal title to the area was extinguished, the Tribe's argument on this issue would have significant merit. Such, however, is not the case. In 1969, the Indian Claims Commission ordered Congress to pay, and Congress did pay, compensation to the Havasupai for this land, based on the Commission's finding that Congress had taken the land in 1880. This finding, in turn, was made after a hearing in which the Havasupai presented evidence that such a taking had occurred at that time. Once Congress compensated the Tribe, aboriginal title was extinguished.

Id. at 34 (citations omitted).

243. *Id.*

an aboriginal right of exclusive possession and one amounting to an easement of access.[244] The opinion can also be read as disposing only of tribal aboriginal rights, and ignoring those of individuals.[245]

The Dann sisters again raised the religious and cultural access issue before the Interior Board of Land Appeals in 1998,[246] but their claims were dismissed without any real discussion.[247] Therefore, the issue remains: can an individual aboriginal right for non-exclusive usage, usufructuary or spiritual, be established outside the formal legal mechanisms and receive judicial protection from subsequent, non-congressional interference? *Dann III* clearly says yes, but the subsequent case law, with its confusion between possessory and non-exclusive usage and between tribal and individual interests, has made the waters murky. However, there are some additional doctrines related to individual aboriginal rights that may strengthen and clarify the concept.

III. SOME ASSOCIATED CONCEPTS

A. *Custom*

Customary law, as a basis for individual and collective rights in private lands, has some foundation in American jurisprudence, despite the relative newness of American society. *State ex rel Thornton v. Hay*[248] established, as a matter of state common law, the customary right of public access along the privately owned dry sand beaches of Oregon.[249] The Oregon Supreme Court's definition of legally protectable custom parallels

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244. *Id.* ("The tribe also claims a right of access, essentially amounted to an easement . . . .").

245. *Id.* (All references are to tribal claims of right).

246. *See* Carrie & Mary Dann et al., IBLA 98-372 (1998), *available at* 1998 WL 1745355.

247. The Board stated:

> The Danns have once again raised these same issues on appeal. We find they have been finally determined by the Supreme Court in United States v. Dann, *supra*. Moreover, under 43 C.F.R. § 2910.1–2(a), any use, occupancy or development of the public lands, other than casual use, without authorization, shall be considered a trespass. "Casual use" includes only short-term noncommercial activity. 43 C.F.R. § 2920.0–5(k). Where the record shows that unauthorized use included long-term grazing and the erection of buildings, it was not casual use. Even though the parties may have used the land under the belief that this was Western Shoshone land and not public land, their good faith is irrelevant to liability for trespass, but may be considered only as to whether the trespass was intentional.

Id.

248. 462 P.2d 671 (Or. 1969).

249. *Id.* at 673–74.

the definitions of individual aboriginal rights. The court said that the requisites of custom included ancient usage that was uninterrupted, peaceable, reasonable, certain, and not inconsistent with other customs or laws.[250] The court felt that this definition was met with respect to the public usage of the dry sand. The court stated that the ancient use requirement, seemingly problematic in an area populated by European immigrants for just over a century, was met because the Indian peoples had used the dry sand since long before the White arrival.[251] It is perhaps

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250. The Court stated:

> Paraphrasing Blackstone, the first requirement of a custom, to be recognized as law, is that it must be ancient. It must have been used so long "that the memory of man runneth not to the contrary." Professor Cooley footnotes his edition of Blackstone with the comment that "long and general" usage is sufficient. In any event, the record in the case at bar satisfies the requirement of antiquity. So long as there has been an institutionalized system of land tenure in Oregon, the public has freely exercised the right to use the dry-sand area up and down the Oregon coast for the recreational purposes noted earlier in this opinion.
>
> The second requirement is that the right be exercised without interruption. A customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right. . . .
>
> Blackstone's third requirement[s] that the customary use be peaceable and free from dispute . . . .
>
> The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community. . . .
>
> The fifth requirement, certainty, is satisfied by the visible boundaries of the dry-sand area and by the character of the land, which limits the use thereof to recreational uses connected with the foreshore.
>
> The sixth requirement is that a custom must be obligatory; that is, in the case at bar, not left to the option of each landowner whether or not he will recognize the public's right to go upon the dry-sand area for recreational purposes. . . .
>
> Finally, a custom must not be repugnant, or inconsistent, with other customs or with other law. The custom under consideration violates no law, and is not repugnant.

Id. at 677.

251. Judge Goodwin, speaking for the majority, said:

> On the score of the brevity of our political history, it is true that the Anglo-American legal system on this continent is relatively new. Its newness has made it possible for government to provide for many of our institutions by written law rather than by customary law. This truism does not, however, militate against the validity of a custom when the custom does in fact exist.

ironic that aboriginal usage thus serves as a basis for the customary rights of non-Indians.

The federal common law has been held to include some customary individual rights of access as well. The Supreme Court has linked these rights to the general principle of free access to the public domain,[252] but they extend to passage across adjacent and interlocked private lands to the extent that such lands are not enclosed by fencing.[253] The more recent case of *Leo Sheep Company v. United States*[254] decided that the federal government itself, in contrast to private citizens, did not, as grantor, retain an express or implied easement of passage across the private lands of its grantees.[255] The Court was careful, however, to distinguish, and thus preserve, the rule of customary private access set forth in *Buford v. Houtz*.[256]

> If antiquity were the sole test of validity of a custom, Oregonians could satisfy that requirement by recalling that the European settlers were not the first people to use the dry-sand area as public land.

Id. at 677–78.

252. Buford v. Houtz, 133 U.S. 320, 326 (1890).

253. Justice Miller, writing for a unanimous Court, declared:

> [T]he instances became numerous in which persons purchasing land from the United States put only a small part of it in cultivation, and permitted the balance to remain unenclosed, and in no way separated from the lands owned by the United States. All the neighbors who had settled near one of these prairies or on it, and all the people who had cattle that they wished to graze upon the public lands, permitted them to run at large over the whole region, fattening upon the public lands of the United States and upon the unenclosed lands of the private individual without let or hindrance. The owner of a piece of land, who had built a house or enclosed 20 or 40 acres of it, had the benefit of this universal custom, as well as the party who owned no land. Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs and sheep could run and graze.

Id. at 327–28.

254. 440 U.S. 668 (1979).

255. *Id.* at 678–82.

256. Justice Rehnquist preserved the essence of *Buford* by noting:

> The appellants there were a group of cattle ranchers seeking, *inter alia*, an injunction against sheep ranchers who moved their herds across odd-numbered lots held by the appellants in order to graze their sheep on even-numbered public lots. This Court denied the requested relief because it was contrary to a century-old grazing custom. The Court also was influenced by the sheep ranchers' lack of any alternative.
>
> "Upon the whole, we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run at large over the lands of the United States and feed upon the grasses found in them, while under pretence of owning a small proportion of the land which is the subject of controversy, they themselves obtain the monopoly of this valuable privilege."

The alliance between individual aboriginal rights and custom was attempted in *Pai Ohana v. United States*,[257] without marked success. The failure stemmed in part from the plaintiff's effort to establish an exclusive right based on custom and the concept of individual aboriginal rights, rather than a more limited and non-exclusive servitude.[258] The Ninth Circuit felt that the plaintiff had failed to prove that custom included "the right to remain upon and exclude others from the land."[259] Still, the concept of custom may have vitality if employed in the more limited context of usufructuary or non-exclusive use.

B. *Prescription*

While customary usage by aboriginal people, originating in the past and continuing into the present, may induce a generous court to discern a non-exclusive public servitude on private fee patents, a more accepted, but decidedly more limited approach exists. Even a court not inclined or called upon to find aboriginal rights or customary rights may find contemporary usage of an open, notorious, and continuous nature, sufficient to trigger the running of the statute of limitations. After a set time, this can result in a prescriptive easement to be held by the particular individuals or class of individuals making the use.[260]

A recent example of a presumptive easement for a pilgrimage of aboriginal origin involved the Zuni Indians of western New Mexico and a mountain called Kohlu/wala:wa, located fifty miles to the west of their reservation in Arizona. Kohlu/wala:wa is a sacred mountain to the Zuni; it is considered to be the place of origin and the home of the dead.[261] Since time immemorial, Zuni pilgrims have made a quadrennial journey, at the time of the summer solstice, along a prescribed route from the Zuni Pueblo to the summit. The pilgrimage, approximately 110 miles in length,

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Here neither custom nor necessity supports the Government.

Id. at 688 n. 24 (citations omitted). The fact that such servitudes can be discerned on federal grants to private parties adds force to the argument that land disposal by administrators does not amount to the extinguishment of tribal or individual aboriginal rights. *See* U. S. v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).

257. 76 F.3d 280 (9th Cir. 1995).

258. *Id.* at 282.

259. *Id.* Under the Hawaii Constitution, custom might be employed to protect non-exclusive rights of subsistence, culture, and religion. *See* Pai Ohana v. United States, 875 F. Supp. 680, 697; *see also* Ka Pa'akal O Ka'ina v. Land Use Comm'n, State of Hawaii, 7 P.3d 1068, 1082 (Haw. 2000).

260. Courts are generally unwilling to find that prescriptive easements are held by the general public unless a governmental body facilitated the adverse user. *See* State *ex rel.* Meek v. Hays, 785 P.2d 1356, 1363 (Kan. 1990).

261. United States v. Platt, 730 F. Supp. 318, 319 (D. Ariz. 1990).

crosses public and private land in an area taken by the United States in the nineteenth century, and subsequently checker-boarded by railroad and homestead grants.[262] In 1985, Earl Platt, an intervening land owner hostile to the Zunis and their passage, sought to bar the Zunis from crossing his land.[263] In 1985, the United States filed suit on behalf of the Zuni claiming a prescriptive easement across Platt's land.[264] The Zuni intervened in 1988 and asserted a free exercise of religion rights claim under international law and the U.S. Constitution.[265]

The hardest issues for the Zuni prescription were the requirements under Arizona state law of openness and continuity of possession.[266] The court found that the Zuni usage was "open, visible, and known to the community,"[267] even though there was evidence that Platt, who owned or controlled about 400,000 acres did not, in fact, know of the pilgrimage during much of the asserted running of the statute of limitations.[268] The court also found that the quadrennial pilgrimage was continuous, in the sense that the Indians had actual possession of the route they used on a regular basis, even though that possession was for but a short time every four years. The regularity, the uncompromising nature, and the aboriginal origins convinced the court that this was actual and continuous use of a limited easement.[269]

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262. Public Law 98-408 allowed the Zunis to acquire over 11,000 acres surrounding Kohlu/wala:wa and place it in trust status. *See* E. Richard Hart, *Protection of Kohlu/wala:wa (Zuni Heaven): Litigation and Legislation, in* ZUNI AND THE COURTS 199, 202 (E. Richard Hart ed., 1995). The Zuni did not attempt to purchase land along the entire route from the reservation to the summit. *See Platt*, 730 F. Supp. at 319 n.1.

263. *See* Hank Meshorer, *The Sacred Trail to Zuni Heaven: A Study in the Law of Prescriptive Easements, in* ZUNI AND THE COURTS, 208, 210 (E. Richard Hart ed., 1990).

264. *Platt*, 730 F. Supp. at 319.

265. The international and federal constitutional issues were severed from the issues of prescriptions. *Id.*

266. *Id.* at 322.

267. *Id.* at 321.

268. Platt apparently missed the opportunity to contest actual knowledge and chose to focus on less forceful or effective legal arguments. MESHORER, *supra* note 263, at 216–17.

269. Judge Carroll declared:

> The Zuni tribe has had actual possession of the route used for the religious pilgrimage for a short period of time every four years. They have had actual possession of the land in the sense that they have not recognized any other claim to the land at the time of the pilgrimage, as evidenced by their lack of deviation from the established route and disregard for fences or any other man made obstacle that blocks their course of travel. This Court also finds that the Zuni Tribe continually used a portion of the defendant's land for a short period of time every four years at least since 1924 and very probably for a period of time spanning many hundreds of years prior to that year.
>
> Therefore, the plaintiffs have established the "actual" and "continuous" possession elements of their claim for adverse possession. Furthermore, this

The extent of the prescriptive interest acquired was in precise accord with the dictates and necessities of the religious practice. It afforded a limited group of Zunis a non-exclusive right of passage along the traditional route for two days every four years. There was a slight modification from the undeviating aboriginal practice in that the Zuni were required to use existing gates and refrain from cutting the fences, and would be liable for damages to Platt's property.[270]

In sum, the Zuni case presents the possibility that an aboriginal usage requiring the crossing of non-Indian lands may support a claim under state law for prescriptive easement—without necessary recourse to either the Free Exercise Clause[271] or the particularized requirements of individual or tribal aboriginal rights. Prescription or adverse possession under state law will not however control the effect of long-standing usage of federal lands. The acquisition of personal rights of use or passage on BLM or national forest lands demands accordance with the common law of individual aboriginal rights or compliance with the federal land management statutes.[272] One slim possibility in this regard is that Indian tribes or individuals may arguably have acquired, prior to 1976, vested rights of

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"actual" possession has been continuous for over ten years which is required for a claim of a prescriptive right.

. . . .

. . . The Zuni Tribe has not attempted to hide their pilgrimage or the route they were taking, although they do regard it as a personal and private activity. It was known generally throughout the community that the Zuni Indians took a pilgrimage every few years. It was also common knowledge in the community, generally, what route or over which lands the pilgrimage took place. Mrs. Hinkson, a resident of the St. John's area since 1938 and an owner of a ranch which the Zuni Indians cross on their pilgrimage, testified it was generally understood that the Zuni Tribe had set a precedent of crossing the land of ranchers that could not be changed even if owners of the lands objected to such crossings or use of their property. The Zuni tribe also cut, tore down or placed gates in, or fences on the property owned or leased by defendant and others.

This Court draws the reasonable inference, from all the facts and circumstances, that Earl Platt, the defendant in this case, was aware that a pilgrimage occurred, that it occurred approximately every four years and that the pilgrimage went across his property.

Platt, 730 F. Supp. at 322–23.

270. *Id.* at 324.

271. Meshorer, *supra* note 263, at 217; *see* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

272. Rights of way on the unreserved public lands controlled by the BLM must, since 1976, be acquired under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1761–1771. *See generally* Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988).

way across the public domain under a nineteenth century statute called R.S. 2477.[273]

C. *R.S. 2477*

Immediately following the Civil War and after a debate on the possible nationalizing of the California goldmines in order to pay the war debt,[274] Congress deferred to the strident western interests and passed the Mining Act of 1866.[275] The Act was designed to validate uses initiated by trespass on the western public domain, and to facilitate future mining, homesteading, and water use.[276] Section Eight of the Act provided "that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[277] This simple sentence referred to as Revised Statute 2477, or R.S. 2477, was later codified[278] and remained operative until 1976, when it was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA).[279] FLPMA, though substituting a complex procedure for future rights-of-way on public lands,[280] preserved rights-of-way that had vested under R.S. 2477 prior to 1976.[281] Management and regulation of the federal lands is thus limited—but not precluded—by the existence of these grand-fathered rights.[282] Given the potentially disruptive impact of R.S. 2477, rights-of-way on federal land management, especially for land set aside for preservation purposes, have become controversial weapons or political tools in the power struggles between the federal government and state and local interests.[283] The state,

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273. *See* discussion *infra* Part III.C.

274. JOHN D. LESHY, THE MINING LAW 9–16 (1987).

275. An Act Granting the Right of Way to Ditch and Canal Owners Over the Public Lands and for Other Purposes, ch. 262, 14 Stat. 251 (1866) [hereinafter The Mining Act of 1866].

276. *See* Robert H. Hughes, *That Was Then, But That's What Counts: Freezing the Law of R.S. 2477*, 2002 UTAH L. REV. 679 (2002).

277. The Mining Act of 1866, § 8 at 253.

278. 43 U.S.C. § 932 (repealed 1976).

279. 43 U.S.C. §§ 1701–1785 (2000).

280. 43 U.S.C. §§ 1761–1771 (2000).

281. 43 U.S.C. § 1769(a) (2000); *see* W. Aggregates v. County of Yuba, 101 Cal. App. 4th 278, 295 (Cal. Ct. App. 2002).

282. *See* Sierra Club v. Hodel, 848 F.2d 1068, 1087–88 (10th Cir. 1988), *rev'd. on other grounds by* Village of Los Ranchos de Albuquerque v. Merch, 956 F.2d 970 (10th Cir. 1992).

283. *See* Hughes, *supra* note 276, at 679–81. He notes:

> During the last decade, perhaps no public lands issue has been more controversial than the debate over wilderness designations on Bureau of Land Management (BLM) lands. By the terms of the Federal Lands Policy and Management Act (FLPMA), wilderness areas can only be created on BLM lands if those lands are "roadless." As a result, much of the fight over

local, and private leverage stems from the fact that a R.S. 2477 right-of-way, if improved, can preclude a wilderness designation for a federal tract.[284] Moreover, a right-of-way, as vested property, cannot be taken or destroyed without the payment of just compensation.[285]

R.S. 2477's usefulness as a tool for the protection of aboriginal access routes to sacred sites or of Indian trails sacred in their own essence[286] will depend in part on how state law defines the statute's "construction of highways" requirement. Some states view the construction necessary for vesting the right as continuous usage, including foot or horse travel.[287] Other states would require mechanical construction.[288] If the latter view is operative, then one would be hard pressed to find evidence of aboriginal roadways—with the exception, perhaps, of the famed Anasazi roadways

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> wilderness designations has focused on roads. Wilderness advocates argue for a strict definition of roads—one that would not include old wagon trails, and would thereby open up more land for potential wilderness designation. Wilderness opponents, on the other hand—often states and rural counties—argue for a definition of roads that includes wagon trails and jeep tracks, and would therefore preclude wilderness designations on a great deal of the western landscape.

Id. at 679 (citations omitted).

284. *See id.* at 679–82.

285. *See, e.g.*, Block v. North Dakota, 461 U.S. 273, 291 (1983).

286. *See* Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800, 806–09 (9th Cir. 1999) (discussing the Huckleberry Divide Trail).

287. *See* Wilkenson v. Dep't of Interior, 634 F. Supp. 1265 (D. Colo. 1986).

> The parties are in agreement that the right of way statute is applied by reference to state law to determine when the offer of grant has been accepted by the "construction of highways."
>
> In Colorado, the term "highways" includes footpaths. "Highways" under 43 U.S.C. § 932 can also be roads "formed by the passage of wagons, etc., over the natural soil." The trails and wagon roads over the lands which became part of the Colorado National Monument were sufficient to be "highways" under 43 U.S.C. § 932.

Id. at 1271 (citations omitted).

288. S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 147 F. Supp. 2d 1130 (D. Utah 2001), *appeal dismissed*, 69 Fed. Appx. 927 (10th Cir. 2003). The court stated:

> Some form of mechanical construction must have occurred to construct or improve the highway. A highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. For example, the mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted.

Id. at 1138.

leading out of Chaco Canyon, New Mexico and extending hundreds of miles in all directions:

> The Chacoan roads are almost obsessively straight linear segments that tend to go directly across terrain changes rather than around them. The Chacoans made cuts through hills, occasionally built causeways or bridges across low spots or small washes, and constructed ramps and platforms to aid in passage out of the canyon. The roads were of extraordinary width, considering the lack of vehicles and animals. Main segments within the canyon were a consistent nine meters in width, while spur routes were half that. Roads outside the canyon ranged from eight to twelve meters wide, with the width constant along a particular linear segment. The undeviating straightness of the direction and the uniformity of the width indicate the probability that the Chacoans used some effective form of surveying to chart the dimensions. Any redirection of the roads tended to be abrupt and angled rather than gradual and rounded, and tended to occur on high points in the terrain, thus bolstering the supposition of route surveyal.
>
> The sides of the roadways were marked by rock berms [sic] and occasionally by walls, and the stones used in building the bordering were apparently cleared from the road's surface. Indeed, a road's bed was often excavated to a depth of thirty centimeters or more, down to rock or hard soil. The depth of the excavation misled some archaeologists into an initial speculation that the segments were canals.[289]

The problem of applying R.S. 2477 to the Chacoan roads is less an engineering issue and more a question of abandonment. Vested property rights can be abandoned, although the presumption is against it.[290] Even if the burden of proof is on the party contending a highway was abandoned, such party would undoubtedly be aided by the fact that the Anasazi left the area almost 900 years ago.[291] There is, however, the possibility that modern usage of the roadway, before 1976, by area Indian tribes, Rio Grande Pueblo, or new-age believers[292] could rekindle the right, assuming no federal withdrawal or reliance would preclude this. The custom

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289. John W. Ragsdale, Jr., *The Rise and Fall of the Chacoan State*, 64 UMKC L. REV. 485, 515 (1996) [hereinafter Ragsdale, *The Rise and Fall*].

290. W. Aggregates v. County of Yuba, 101 Cal. App. 4th 278, 304–05 (Cal. Ct. App. 2002).

291. Ragsdale, *The Rise and Fall*, *supra* note 289, at 544.

292. *See* Alan Augustson, *Chaco Canyon: An Illustration of Cultures in Conflict*, *at* http://www2.uic.edu/~aaugus2/documents/writing%20sample%20II.doc (last visited Feb. 15, 2004).

decision in Oregon[293] and the assertions of several states that R.S. 2977 vested rights began with Indian usage and were continued into the present serve as precedent for this cross-culture tacking.[294]

D. *Regulation*

The aboriginal land uses of tribes and individuals can be protected best through the conferral or recognition of fee title or fee title in trust, which fits seamlessly into the American legal and constitutional scheme of property rights.[295] Unrecognized aboriginal rights, though subject to congressional extinguishment without the right to just compensation,[296] are at least protected against all but the federal government[297] and are, in a practical sense, a basis for federal compensation that is politically, if not constitutionally, mandated.[298] Aboriginal use of federal land may be protected in the regulatory arena, although not with the certainty or completeness of protection afforded by ownership of property.

Aboriginal usage of federal land that is associated with religious belief or cultural centrality is more likely to receive regulatory protection than ordinary gain-seeking. Thus, traditional subsistence hunting by Alaska natives received special regulatory treatment,[299] while the Danns' unlicensed cattle and horse ranching did not.[300] The element of central religious belief, however, poses constitutional issues beyond politics. On

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293. *See* State *ex rel.* Thornton v. Hay, 462 P.2d 671, 676–78 (1969).

294. *See Colorado Environmental Coalition Alleged Highway Claims Threaten Dinosaur National Park*, *at* http://www.ourcolorado.org/alerts/061703_rs2477_dinosaur.htm (last visited Feb. 4, 2004). This notes:

> Moffat County claims the Yampa River Canyon for more than 20 miles as a "constructed highway." County data gathered to support the assertion claims that the right-of-way was "built by Indians" in the 1800s and that it was used in winter to feed cattle when users of this alleged route "drove on ice."

Id.

295. *See, e.g.*, Timbisha Shoshone Homeland Act, 16 U.S.C. § 410aaa (2000). The Act provided title to the tribe for over 7000 acres within Death Valley National Park. The lands, part of the Timbisha Shoshone's aboriginal range, are to be held in trust for the tribe by the federal government. *Id.*

296. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

297. *See* Johnson v. McIntosh, 21 U.S. 543 (1823).

298. *See* 25 U.S.C §§ 70–70a(4) (1946); *see also* Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629(h) (1971). In return for the extinguishment of aboriginal title to over 365 million acres, the United States promised forty-four million acres, and almost a billion dollars to the Alaska Natives.

299. Alaska National Interest Lands Conservation Act, 16 U.S.C §§ 3101–3233 (2000).

300. *See supra* notes 195–97.

the one hand, protective regulation may be necessary to avoid interference with the free exercise of religion. For awhile, the constitutional law seemed to say that facially neutral legislation, falling on religious usage or practice with substantial impact, necessitated strict judicial scrutiny, or the demonstration of a compelling governmental interest and lack of less restrictive alternatives.[301]

On the other hand, there are potential problems with the regulatory protections of aboriginal religious uses on federal land, some practical and some, perhaps, constitutional. On the practicality side, there is the issue of quantity. Aboriginal use of and relation to the land is, almost inevitably, imbued with a sense of the sacred.[302] To traditional Indians, the relationship with the land is a spiritual reciprocating bond and is never self-serving or purely secular.[303] If the entire landscape becomes charged with belief and sacredness, then the possibilities of inertia or a blockage of transformative federal action arise. In a constitutional sense, the regulatory protection of tribalists' usage of federal land, though avoiding the Scylla of free exercise impact, may fall into the Charybdis trap of the Establishment Clause[304] or, possibly, the prohibition against race-based preferences.[305]

The mundane and the theoretical came to the fore in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[306] and the result was a reconfiguration of the constitutional law. After *Lyng*, an incidental or indirect impact on Indian religious usage of federal land did not require strict scrutiny analysis unless the impact was intentional, coercive, or discriminatory.[307] The Court's concern was with the practical problem of a potential Indian veto over federal management of "what is, after all, *its* land."[308] From the side of constitutional theory, the court said, somewhat disingenuously, that incidental effects, even if devastating, cannot be deemed the presumptive prohibition of the free exercise of religion.[309] The court soothingly suggested, however, that there might be room within the Establishment Clause for a certain amount of administrative accommodation.[310]

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301. Sherbert v. Verner, 374 U.S. 398, 404–09 (1963).

302. *See* PEGGY V. BECK ET AL., THE SACRED: WAYS OF KNOWLEDGE, SOURCES OF LIFE 3–22 (1992).

303. *See* COLLIER, *supra* note 4, at 15–28.

304. *See* Badoni v. Higgenson, 638 F.2d 172, 178–79 (10th Cir. 1980).

305. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235–36 (1995). The issues of equal protection and race-based legislation have been avoided, somewhat uneasily, by *Morton v. Mancari*, 417 U.S. 535, 553–55 (1974), which holds that legislation involving Indian tribes is political in nature rather than racial, and thus strict scrutiny is not warranted.

306. 485 U.S. 439 (1988).

307. *Id.* at 450–53.

308. *Id.* at 453.

309. *Id.* at 450–51.

310. *Id.* at 454.

Lyng involved what was, to many, an arcane or quaint concern: the aboriginal religious use of federal land by traditional Indians. The force of *Lyng*, however, was taken beyond the Indians' use of the land into the regulatory mainstream by *Employment Divison v. Smith.*[311] *Smith* held that land management statutes, as well as general regulation, were immune from strict scrutiny regarding the incidental impact on religion.[312] Congress, like a mule hit between the ears by a log, was galvanized. The Religious Freedom Restoration Act of 1993[313] (RFRA) sought to overturn the effect of *Smith* and restore the compelling interest test of *Sherbert v. Verner*[314] as a statutory rather than constitutional matter.

But Congress had stepped into the breach too hard and too far for the Supreme Court, which struck down RFRA's application to the states as an unauthorized exercise of power in *City of Boerne v. Flores.*[315] The Court held that RFRA was an attempt to enlarge a constitutional right rather than protect it, and was thus in excess of Congress' enforcement power under Section Five of the Fourteenth Amendment.[316]

Despite the holding in *Boerne*, RFRA remained applicable to the federal government.[317] Theoretically, and literally, the compelling interest test could apply to federal land regulations that impacted aboriginal Indian religious practices on federal land. The legislative history to RFRA, however, has defused this potential as a matter of congressional intent if not actual statutory language.[318]

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311. 494 U.S. 872 (1990).

312. *Id.* at 883.

313. 42 U.S.C. §§ 2000bb–2000bb-4 (2000).

314. *See* Sherbert v. Verner, 374 U.S. 398, 404–09 (1963).

315. 521 U.S. 507 (1997).

316. *Id.* at 516–36.

317. *See, e.g.*, United States v. Antoine, 318 F.3d 919, 924 (9th Cir. 2003); Gibson v. Babbitt, 223 F.3d 1256, 1258 (11th Cir. 2000).

318. *See* S. Rep. No. 103-111, at 3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892. This indicates:

> Pre-*Smith* case law makes it clear that only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act. The act thus would not require such a justification for every government action that may have some incidental effect on religious institutions. And, while the committee expresses neither approval nor disapproval of that case law, pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources.

Id. at 1898 (citing *Lyng*). *But see* Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996) (applying RFRA to a government property case). The *Thiry* court stated: "The Court's analysis in *Lyng* did not rest on property ownership. Rather it focused on the nature and extent of the intrusion on religious beliefs and practices as such." *Id.* at 1495 n.2.

Congress recently overhauled the engine of RFRA and retrofitted it for state service. Congress attempted to sidestep the concern with authority in *Boerne* by re-passing the compelling state interest test under a variety of authority sources. The Religious Land Use and Institutionalized Persons Act of 2000[319] (RLUIPA) invokes the taxing and spending powers, the interstate commerce power, and the individualized assessments aspects of *Sherbert v. Verner* that remained in the aftermath of *Lyng*.[320] Though the RLUIPA has survived early challenges to authority,[321] at least one case raised the possibility of Establishment Clause problems under this statute, at least in the context of institutionalized persons.[322]

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319. 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

320. *See* 42 U.S.C. §§ 2000cc(a)(2)(A)–(C).

321. *See, e.g.*, Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (holding that the RLUIPA's land use provisions are constitutionally authorized, both facially and as applied); *see also* United States v. Maui County, 298 F. Supp. 2d 1010 (D. Haw. 2003) (holding that the RLUIPA was not facially unconstitutional under the Commerce Clause, did not violate the Tenth Amendment, and was a valid exercise of Congress's enforcement power under Section Five of the Fourteenth Amendment). *But see* Elsinore Christian Center v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1102, 1104 (C.D. Cal. 2003) (holding that Congress exceeded its powers under Section Five and under the Commerce Clause).

322. Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003). According to the district court:

> It is often difficult to determine the lines of demarcation between free exercise and establishment, and accommodation and promotion, but RLUIPA does not appear to be a close case. The Act, as it relates to the constitutional claims of religious inmates, raises the level of protection of religious rights only, leaving other, equally fundamental rights languishing under the pressure of judicial deference to the decisions of prison officials. When applied to prison inmates, to whom privileges and exceptions to prison regulations are few, the different standards of review have the effect of establishing two tiers of inmates in the prison system: the favored believer and the disadvantaged non-believer. It is this precise result that the Lemon test and the Supreme Court's Establishment Clause jurisprudence seek to prevent, and it is therefore the obligation of this Court to declare the section of RLUIPA that pertains to prison inmates UNCONSTITUTIONAL.

Id. at 582 (citations omitted). In accord is *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003). The district court was overruled in *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003), which held that RLUIPA, in contrast to the holdings in the district court and in the *Cutter* opinion did not violate the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test states that, to avoid the Establishment Clause, legislation must have a secular purpose, it must not have the impermissible effect of advancing religion, and it must not create excessive government entanglement with religion. *Lemon*, 403 U.S. at 612–13. The Fourth Circuit Court of Appeals held that:

> Section 3 of RLUIPA thus satisfies the three-prongs of the *Lemon* test. The opposite conclusion, we believe would work a profound change in the Supreme Court's Establishment Clause jurisprudence and in the ability of

Given the limiting language in RFRA's legislative history and the Establishment Clause issues recently emergent in RLUIPA,[323] a less problematic hope for the statutory protection of aboriginal religious uses on federal lands may be in the context of procedural statutes such as the National Historic Preservation Act[324] (NHPA). Section 106 of the NHPA requires federal agencies such as the Forest Service and the BLM to take into account the effect of any federal undertaking on structures or sites that are included or may be eligible for inclusion on the National Register.[325] Though Section 106 may not afford a complete substantive protection for aboriginal usage of federal land, it does afford Indians the right to consult and the right to demand that agencies attempt to identify traditional cultural properties that may be affected and find ways to avoid or reduce the impact.[326]

E. *Administrative Accommodation*

In *Lyng*, the Supreme Court expressed that solicitude for land-based aboriginal religious practices was in accord with the policies of the United States.[327] The Court did not, however, define the limits of that policy or accommodative efforts. President Clinton confirmed the policy, if not the boundaries, of accommodation with a 1996 executive order.[328] The executive order made accommodation the responsibility of the federal executive to the extent practical, legally permissible, and consistent with essential agency function.[329] Federal land managers responded in a number of situations involving sacred sites or aboriginal religious usage in national parks or monuments. Administrative management plans sought,

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> Congress to facilitate the free exercise of religion in this country. It would throw into question a wide variety of religious accommodation laws.

Madison, 355 F.3d at 320.

323. *See, e.g.*, Cutter v. Wilkinson, 349 F.3d 257, 269 (6th Cir. 2003) (holding that the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 violates the Establishment Clause). Though the mandate of the case was recalled on December 16, 2003, a rehearing was denied en banc on March 3, 2004.

324. 16 U.S.C. §§ 470–470x-6 (2000).

325. 16 U.S.C. § 470f.

326. *See* Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer*, 35 NAT. RESOURCES J. 133, 144–54 (1995); *see also* Attakai v. United States, 746 F. Supp. 1395, 1405–09 (D. Ariz. 1990); Pueblo of Sandia v. United States, 50 F.3d 856, 859–63 (10th Cir. 1995).

327. *See* Lyng v. Northwest Indian Cemetry Protective Ass'n, 485 U.S. 439, 454–55 (1988) (citing the American Indian Religious Freedom Act, 42 U.S.C. §§ 1996–1996b (2000)).

328. Exec. Order No. 13,007, 61 Fed. Reg. 26, 771 (May 24, 1996).

329. *Id.*

generally on a voluntary basis, to dissuade the public from actions that would substantially interfere with traditional religious practices.[330] The administrative efforts were in general carefully limited as to time, place, and impact on non-Indians. For example, the Climbing Management Plan at Devil's Tower National Monument sought to discourage (but not prohibit) rock climbing on the Tower, a sacred site to area tribes, during the month of June, which is a time of high cultural significance.[331] In another case, visitors to Rainbow Bridge National Monument, a holy site to the Navajo, but a compelling natural bridge to others, were requested (but not ordered) to refrain from walking on or under the arch.[332]

Litigation by the Mountain States Legal Foundation, a conservative strike force, challenged these and other administrative efforts as violative of the Establishment Clause. The claims have been ineffective to date, largely because of the voluntary nature of the restraints. Climbers, affected only by a request to refrain from climbing in June, were deemed not to have suffered an injury in fact and not to have standing to raise First Amendment establishment claims.[333]

The policy of requesting voluntary forbearance from walking under Rainbow Bridge was, in contrast to *Bear Lodge*,[334] sufficient to confer standing in *Natural Arch and Bridge Society v. Alston*.[335] Such a policy was not, however, found violative of the Establishment Clause. The court found that the policy promoted a secular cultural purpose and did not have the principal effect of advancing religious doctrine or communicating a governmental endorsement of religion.[336] Furthermore, the court found that the policy does not lead to the excessive entanglement of church and state.[337]

It seems clear from the case law that a mandatory closure is more questionable from the constitutional standpoint than a request to refrain. It is still not entirely clear, however, whether a temporary closure would offend the Establishment Clause or whether a violation would necessitate either the showing of an illicit federal motive or the demonstration that at

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330. *See* Chris Smith & Elizabeth Manning, *The Sacred and Profane Collide in the West*, HIGH COUNTRY NEWS, May 26, 1997, at *5, *available at* http://www.hcn.org/servlets/hcn.URLRemapper/1997/may26/dir/Feature_The_sacred.html.

331. *Id.*

332. *Id.*

333. Bear Lodge Multiple Use Ass'n. v. Babbitt, 175 F.3d 814, 822 (10th Cir. 1999).

334. *Id.*

335. Natural Arch & Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207, 1218–19 (D. Utah 2002), *aff'd*, 2004 WL 569888 (10th Cir. 2004).

336. *Id.* at 1223–25.

337. *Id.* at 1225–26 (citing Lemon v. Kurtzman, 403 U.S. 602, 615 (1971)).

least some members of the excluded public were offended by the symbolism protected.[338]

CONCLUSIONS—WITH A WARY EYE TOWARD EMERGING CONCEPTS OF EQUAL PROTECTION

The concept of individual aboriginal rights is a property-based attempt to ameliorate part of the shattering impact of dispossession, growth economics, and politics on the indigenous natives' relation with the land. Individual aboriginal rights and the related concepts of custom, prescription, and preemptory action under statute may permit and protect the core residuum of central uses and cultural practices that have emerged out of the past, continued into the present, and in reality, pose relatively little economic difficulty for the federal government or nation.

There is a storm cloud emerging on the legal horizon that may compromise even these partial accommodations. The threat is generated by conservative judicial wolves wrapped in liberal lamb's fleece—ostensibly professing homage to fundamental human dignity, but in actual service to free market economics and bloodless efficiency. That threat, which was first thrust upon the Indian tribes in their previous dark hours of assimilation and termination, is the relentless concept of colorblind equal protection. It is the idea that no legal distinctions drawn among people on the basis of race or national origin should escape strict judicial scrutiny—even if the targeted groups have endured centuries of injustice and unfulfilled promises of recompense.[339]

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338. *See* Wyoming Sawmills v. United States Forest Service, 179 F. Supp. 2d 1279, 1293–94 (D. Wyo. 2001).

> *[S]awmills* alleges that a plaintiff has standing to bring an establishment clause claim if a regulation prevents a plaintiff from freely using public areas. This proposition is correct, in part. The Tenth Circuit requires the regulation to prevent a plaintiff from freely using public areas *because the plaintiff is offended by the religious symbolism that the regulation advances.*

Id. at 1293–94.

339. The case of *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) confirms the constitutional command that all race-based classifications must be analyzed under the strict scrutiny test of compelling governmental interest and a lack of less restrictive alternatives. *Id.* at 235–36. Justice Rehnquist, an adherent of the *Adarand* position, has shown a particular willingness to oppose special remedial treatment for the tribes in favor of a formal modern equality that paves over injustices in the past. In *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985), he joined in dissent against a majority holding that confirmed a common law right in tribes to seek the return of lands taken by the states without federal authorization. *Id.* at 255–73. The dissenters stated that "the Framers recognized that no one ought to be condemned for his forefathers misdeeds-even when the crime is a most grave offense against the Republic." *Id.* at 273. In *United States v. Sioux Nation of*

The war-dogs of equality have, in the Indian law arena, been kept shakily at bay by *Morton v. Mancari*,[340] which sustained the use of an Indian preference for employment in the Bureau of Indian Affairs and simultaneously shielded Indian legislation in general from the harsh glare of strict scrutiny.[341] A growing body of case law is nipping at the flanks of *Morton*[342] and although the core of the case remains intact[343] it is worthwhile to examine the strength of its underpinnings.

Morton holds, somewhat parenthetically, that classifications dealing with Indian tribes are political in nature and thus not subject to strict scrutiny.[344] Political aspects are undeniable at least in the cases involving federally recognized tribes,[345] but some recent decisions state that an overlap between a political class or an ancestral group and a racial characteristic may not be sufficient to avoid strict scrutiny. In *Cayetaro v. Rice*,[346] the Supreme Court applied strict scrutiny to and ultimately invalidated a class of native Hawaiians, composed of present day descendants of ancestors living in Hawaii at the first European visitation. The court said that ancestry, even if allied with precedent politics, can be a proxy for race.[347] Thus, the political rationale, though relevant, may not be complete in the context of the Fifteenth Amendment[348] in the case of unrecognized

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Indians, 448 U.S. 371 (1980), Justice Rehnquist dissented from an award for compensation for the 1877 seizure of the treaty-protected Black Hills. He stated:

> that there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300 year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied. But in a court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: 'Judge not, ye be not judged.'

Id. at 437.

340. *See supra* note 305.

341. Morton v. Mancari, 471 U.S. 535, 552–55 (1974).

342. *See* Rice v. Cayetano, 528 U.S. 495, 519–20 (2000); Arakaki v. Hawaii, 314 F.3d 1091, 1094–95 (9th Cir. 2002); Williams v. Babbitt, 115 F.3d 657, 665 (9th Cir. 1997); Malabed v. North Slope Borough, 42 F. Supp. 2d 927, 937–38 (D. Alaska 1999), *aff'd*, 335 F.3d 864 (9th Cir. 2003); Tafoya v. City of Albuquerque, 751 F. Supp. 1527, 1531 (D. N.M. 1990).

343. American Fed'n of Gov't Employees, AFL-CIO v. United States, 330 F.3d 513, 521–22 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 957 (2003); Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1128–32 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003).

344. *Morton*, 417 U.S. at 553 n.24.

345. *Id.*

346. *See Cayetano*, 528 U.S. at 519–20; *Arakaki*, 314 F.3d at 1094–95; *Malabed*, 42 F. Supp. 2d at 937–38, *aff'd*, 335 F.3d 864; *Babbitt*, 115 F.3d at 665; *City of Albuquerque*, 751 F. Supp. at 1531.

347. *Cayetano*, 528 U.S. at 514.

348. *Id.* at 520; *Arakaki*, 314 F.3d at 1095.

tribes[349] and with respect to Indian individuals living outside the tribal context.[350]

There is also a constitutional rationale for *Morton* and its progeny. The Commerce Clause delegates power to Congress to regulate commerce with the Indian tribes.[351] Classes based on or relating to Indian tribes are thus authorized directly under the Constitution. They can thus be deemed inherently non-arbitrary in nature and not subject to the presumptive invalidity implicit in the strict scrutiny approach.[352] It could be argued, however, that the Fourteenth Amendment, as incorporated by the Fifth,[353] has qualified this power or limited it more precisely to the contours of politics or commerce.

A third rationale is reflected in the *Morton* admonition that to escape strict scrutiny, a law must be a rational fulfillment of Congress' unique obligation.[354] This is a narrower statement of the traditional rational basis test for equal protection which requires only debatably reasonable means to any legitimate governmental objective.[355] *Morton* would sustain the use of such judicial deference only so long as Congress is in pursuit of its unique trust obligation to the Indian tribes. Thus, trust responsibility is a

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349. *Cayetano*, 528 U.S. at 519–20.

350. *Malabed*, 42 F. Supp. 2d at 928, 941–42.

351. U.S. CONST. art I, § 8, cl. 3.

352. American Fed'n of Gov't Employees, AFL-CIO v. United States, 330 F.3d 513, 520–22 (2003), *cert. denied*, 124 S. Ct. 957 (2003). The Court stated that:

> The critical consideration is Congress' power to regulate commerce "with the Indian Tribes." While Congress may use this power to regulate tribal members, *see United States v. Holliday*, regulation of commerce with tribes is at the heart of the Clause, particularly when the tribal commerce is with the federal government, as it is here. When Congress exercises this constitutional power it necessarily must engage in classifications that deal with Indian tribes. Justice Scalia, when he was on our court, put the matter this way: "in a sense the Constitution itself establishes the rationality of the . . . classification, by providing a separate federal power that reaches only the present group." *United States v. Cohen*. He then quoted the following passage from *United States v. Antelope*: the "Constitution itself provides support for legislation directed specifically at Indian tribes."

Id. at 521–22 (citations omitted).

353. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

354. Justice Blackmun stated:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

Morton v. Mancari, 417 U.S. 535, 555 (1974).

355. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 490 (1955).

basis for the holding on Indian classification in *Morton*—and is also a limit. When Congress is in the arena of trust fulfillment, an arena demarked by objective, rather than presumptive, good faith,[356] it is given a wide range of discretion as to means. Outside the parameters of the trust responsibility, the rigors of the Constitution and strict scrutiny will predominate.[357]

None of these rationales and justifications work particularly well when legislation or judicial decisions focus on Indians unrelated to a federally recognized tribe. If law takes a separate path due solely to race and not tribal status, then the suspect class's equal protection issues are directly joined—even more so if the law has discernibly negative impacts either within or without the affected class.[358]

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356. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). The Court stated that:

> In determining whether Congress has made a good faith effort to give the Indians the full value of their lands when the government acquired [them], we therefore look to the objective facts as revealed by Acts of Congress, Congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition.
>
> The "good faith effort" and "transmutation of property" concepts referred to in *Fort Berthold* are opposite sides of the same coin. They reflect the traditional rule that a trustee may change the form of trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence. On the other hand, if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property of the ward. In other words, an essential element of the inquiry under the *Fort Berthold* guideline is determining the adequacy of the consideration the government gave for the Indian lands it acquired. That inquiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians."

449 U.S. at 416 (quoting with approval the test used in *Three Tribes of Fort Berthod Reservation v. United States*, 220 Ct.Cl. 442 (1979)).

357. The Court held that:

> In sum, we conclude that the legal analysis and factual findings of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not effect "a mere change in the form of investment of Indian tribal property." *Lone Wolf v. Hitchcock*. Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.

Id. at 423–24 (citation omitted).

358. *See* Malabed v. N. Slope Borough, 42 F. Supp. 2d 927, 937–38 (1999), *aff'd*, 335 F.3d 864 (9th Cir. 2003). The Court stated that:

It is a tricky area and likely to grow more so in the future. This might inspire aboriginal right claimants to adhere to the purely property-based approaches such as custom, prescription, and preemption.[359] If the racial element is unavoidable, and this may be the case with individual aboriginal rights involving culture or religion, then it would seem prudent to assert membership in a federally recognized tribe even though the decisions on individual aboriginal rights seem to stand apart from the logic and limits of *Morton*.[360]

The protection of aboriginal usage is, in the end, more than a matter of property, regulation, administration, or constitutional limitation. It is a matter of value and commitment. If society, after education and reflection, finds worth in the ancient antecedents, it can and will preserve them.[361]

> North Slope Transit contends NSB's employment preference is merely a preference favoring a political classification (tribal membership) and thus subject to a low level of scrutiny. The distinction related to a tribe's political nature finds its source in the sovereign nature of Native American tribes. Morton v. Mancari, is based on the relationship between sovereign governments; that is, Indian tribes and the federal government. *Mancari* upheld an employment preference used by the Bureau of Indian Affairs because the court concluded the preference served the federal government's goal of promoting Indian self-government. The Ninth Circuit interprets *Mancari* "as shielding only those statutes that affect uniquely Indian interests." This interpretation is consistent with long-recognized principles. NSB's employment preference is in no way related to Native land or tribal or cultural affairs. Public employment with NSB is not part of some uniquely Indian interest, or time-honored, tribal tradition. *Mancari's* rationale would seem inapplicable here. However, this court need not decide whether NSB's preference is based on a political or racial classification. Characterization of the preferences as a political rather than a racial classification does not automatically result in a lower level of scrutiny being employed.

Id. at 937–38.

359. *See* Meshorer, *supra* note 263, at 209–10.

360. *See, e.g.*, Cramer v. United States, 261 U.S. 219 (1923). In *Cramer*, the Court stated that:

> Unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life.

Id. at 227 (citations omitted).

361. *See* Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375 (1991). Wilkinson stated that:

America, despite its tortured, troubled Indian past, remains, in the present and future, a steward and beneficiary of the living remnants of the tribal cultures.[362] As a final rationale for the protection of aboriginal usages such as those of the Western Shoshone, the Danns, and the Zunis, we can consider the fundamental Indian principle of reciprocity.[363] As a society, we gain from the preservation of these living modern facets of the continent's past. They give us perspective and coherence. To respect and maintain them enhances our own integrity and sense of place.

> But there is a last, and truest, reason why Chippewa rights should be institutionalized in a tribal-state compact and why they should endure forever in Wisconsin. That reason—which goes beyond the wise use of public funds, good conservation practices, the community good will that flows from cooperation and even the fact that the air will no longer be tinged with racism—is that these rights are organic and grew out of a context that has dignity and deserves to be honored. This transcends the pervasive principle of our legal system that promises ought to be kept. Even more than that, on their merits these were fair promises, fair when made, even fairer today given that most of their companion promises have been torn away.
>
> Indian people have an ability to stretch their minds, to search far back and far ahead. The Chippewa were thinking in those terms at treaty time—thinking of the long procession back ten thousand years or more, thinking of an equally long procession out ahead. Those treaties were signed amid the din of a collision of cultures, but the Chippewa held firm to their world view, as best as they could.
>
> That world view was lodged in federal treaties—it became law. It matters that the world view is now law. But it matters, too, that this law is a wise law, a just law, with roots deep in history, minority rights, land title, sovereign prerogatives and a historical trust obligation. The Chippewa negotiators did the right thing, they looked across the prairie and felt the summer in the spring, and we should honor that view by reaffirming our promise that it may continue, with the full and welcoming support of the state and federal governments, forever.

Id. at 413–14.

362. *See* John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. REV. 503 (1991).

363. BARRY LOPEZ, THE REDISCOVERY OF NORTH AMERICA 23–27 (1990).