Boston College Environmental Affairs Law Review

Volume 7 | Issue 2 Article 3

12-1-1978

# Land Claims Under the Indian Nonintercourse Act: 25 U.S.C. § 177

William E. Dwyer, Jr.

# LAND CLAIMS UNDER THE INDIAN NONINTERCOURSE ACT: 25 U.S.C. § 177

*William E. Dwyer, Jr.**

## I. INTRODUCTION

Recently, the field of property law has been convulsed by a series of legal actions initiated by Indian tribes[1]—or by the federal government on their behalf[2]—to recover lands last occupied by these tribes as long ago as the eighteenth century. Present occupants of affected lands, in possession under ostensibly valid deeds of title, are receiving abrupt introductions to the workings of the federal Indian Nonintercourse Act.[3] The Act, dating from 1790,[4] invalidates any alienation of tribal lands without Congressional consent. Pandemic failure to secure such consent in early dealings between Indians and settlers, coupled with contemporary Indian legal activism,[5] has raised this statute from obscurity to notoriety.

The 1977 decision of the Federal District Court in *Oneida Nation of New York v. County of Oneida*[6] highlights the profound implications of the Nonintercourse Act for supposedly settled title throughout the United States. There the court found the defendant County

* Staff Member, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

[1] *See, e.g.*, Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977); Schagticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976); Narragansett Tribe v. Southern R.I. Land Develop. Corp., 418 F. Supp. 798 (D.R.I. 1976).

[2] *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

[3] 25 U.S.C. § 177 (1970).

[4] By the Act of July 20, 1790, ch. 33, § 4, 1 Stat. 137, Congress first moved to protect Indians in the enjoyment of their lands. See text at notes 63-76, *infra*. Permanent enactment in 1834 followed a series of temporary enactments.

[5] "The Native American Rights Fund, the largest organization specializing in Indian law, opened headquarters in Boulder, Colorado, six years ago with ten cases; today it handles almost 400 cases in forty states." Pedowitz, *Congress Must Resolve Serious Problems Posed By Indian Land Claims*, N.Y.L.J., Nov. 16, 1977, at 38.

[6] 434 F. Supp. 527 (N.D.N.Y. 1977).

of Oneida liable for two years back rent on lands traced to an Indian sale without Congressional consent. The alienation occurred in 1795.

*Oneida* marks the first successful application of the Nonintercourse Act on a massive scale, but suits for recovery of Indian lands under the Act are not rare. Litigation is threatened or already under way in seven states,[7] while potential claims exist in at least four others.[8] In addition, the claims are not minor in scope: in both South Carolina and New York over 100,000 acres are affected,[9] while in Maine the Indian claims to 12.5 million acres encompass roughly 60% of the land in that state.[10]

The costs and consequences of these claims are only beginning to emerge. The municipal bond market was the first to suffer, as investors backed away from the suddenly risky obligations of affected communities.[11] The housing market has nearly collapsed where Indian land claims have arisen: construction has ceased, mortgages are unavailable, title insurance companies are refusing to issue policies where Indian claims may arise, and home purchasers are avoiding the threatened properties, thereby leaving present owners trapped and unable to sell.[12] Local economies have inevitably, and sometimes catastrophically, slumped.[13] The Justice Department categorizes these Indian land claim cases as "potentially the most complex litigation ever brought in the federal courts with social and economic impacts without precedent and incredible potential litigation costs to all parties."[14]

This article will review the historical relationship between the federal government and Indian tribes, especially in regard to the ownership of land. The effects of this relationship on current federal Indian policy will also be analyzed. Section III will specifically examine the Nonintercourse Act, with special emphasis on how it has

---

[7] Connecticut, Louisiana, Maine, Massachusetts, New York, Rhode Island and South Carolina. AM. TITLE INS. CO. REAL ESTATE REP., Nov. 1977, at 3.

[8] New Hampshire, New Jersey, Virginia and Tennessee. *Id.*

[9] In South Carolina, claims reach 144,000 acres. Marigotta, *Indian Claims*, 6 PROB. & PROP. 8, 9 (1977). In New York, litigation will affect over 100,000 acres. Oneida Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 530 (N.D.N.Y. 1977).

[10] Frechette, *The Wisdom of Solomon*, LAWYERS TITLE NEWS, Nov.-Dec. 1977, at 11.

[11] *Id.*

[12] *See generally* Marigotta, *Indian Claims*, 6 PROB. & PROP. 8, 10 (1977); Frechette, *The Wisdom of Solomon*, LAWYERS TITLE NEWS, Nov.-Dec. 1977, at 12-13.

[13] Address of George A. Benway, Jr., Selectman of the Town of Mashpee, Massachusetts, to the American Land Title Association, *reported in* N.Y.L.J., Nov. 16, 1977, at 38.

[14] AM. TITLE INS. CO. REAL ESTATE REP., Dec. 1977.

been interpreted and how it is currently being implemented. Finally, Section IV will consider the viability of the Act in light of more recent statutory approaches to Indian lands. It is the thesis of this article that current judicial interpretations of the Nonintercourse Act reflect policy considerations that are contrary to the Act's purpose as understood at the time of the now-challenged alienations and that the judicial directions are not a reflection of any Congressional reformulation of policy. Present judicial interpretations of the Act may, in fact, be at odds with modern statutory formulations of policy toward Indians.

## II. An Historical Overview—The Federal Government, The Indians, and the Land

### *A. Federal Government and the Indians*

American Indians, individually and in tribes, have always enjoyed a unique legal status in the United States, primarily as the result of a special relationship in existence between the federal government and the Indians. The Constitution vests Congress, through the Commerce Clause, with authority over the Indian tribes.[15] In the past 180 years, Congress has also exercised its authority to regulate Indian affairs through the use of the Necessary and Proper Clause,[16] its war powers[17] and its foreign relations/treaty-making powers.[18] This federal authority over Indian affairs is uniformly acknowledged to be plenary.[19] Consequently, courts generally consider the exercise of Congressional authority to be beyond scrutiny by the courts.[20]

The plenary federal authority, as well as the realities of relative power, have led courts to recognize from the beginning that Indians are not dealing with the government as equals, but rather as dependents.[21] As early as 1831, in *Cherokee Nation v. Georgia,*[22] the Su-

[15] U.S. Const. art. I, § 8, cl. 3.

[16] U.S. Const. art. I, § 8, cl. 18.

[17] U.S. Const. art. I, § 8, cl. 11.

[18] U.S. Const. art. II, § 2, cl. 2. Dealings with Indians by treaty were suspended in 1871, primarily because the House of Representatives wanted a role in Indian policy. 25 U.S.C. § 71 (1970). On the scope of federal authority over Indian affairs, *see generally* F. Cohen, Federal Indian Law 89-98 (1942).

[19] United States v. Hellard, 322 U.S. 363, 367 (1944); *see also* Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 141 n. 23 (1960); United States v. Sandoval, 231 U.S. 28, 45-46 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

[20] United States v. Sandoval, 231 U.S. 28, 46 (1913); *see also* United States v. Nice, 241 U.S. 591, 598 (1916); Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975).

[21] It should be noted that in many matters Indian tribes retain elements of the sovereignty

preme Court conclusively rejected an attempt by Cherokee Indians to invoke the original jurisdiction of the Court by denying the tribe's claim that it was a "foreign state." Chief Justice Marshall characterized Indians as "domestic dependent nations," and thus not "foreign states" within the meaning of the Constitution.[23] Marshall likened the Indian-government relationship to that which exists between a ward and his guardian.

Once having established the Indians' dependence, the Court was at pains to assert that this dependence ran solely to the federal government, and not to the individual states. Thus, in *Worcester v. Georgia,*[24] the Court held that a state penal statute was ineffective to bar actions on Indian land that were not contrary to the laws of the United States, but only to the laws of Georgia.[25] State jurisdiction over Indian affairs is only an issue if one of two pre-requisites is met: (1) there is an express delegation to the state, or recognition in the state, of some power over Indians;[26] or (2) matters affecting Indians involve non-Indians to such an extent as to warrant state involvement in the question.[27]

The recognition of plenary federal power has, however, been qualified in some respects. Since the courts have steadily built on Mar-

---

they enjoyed prior to the imposition of federal authority. As a general principle, "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." F. COHEN, FEDERAL INDIAN LAW 122 (1942). Cohen presents an extensive analysis of the sources of tribal authority in Chap. 7, and of the political and legal status of the tribes in Chap. 14.

[22] 30 U.S. (5 Pet.) 1 (1831).

[23] *Id.* at 16.

[24] 31 U.S. (6 Pet.) 515 (1832).

[25] Chief Justice Marshall based his holding on two principles. In addition to establishing that the Georgia law was an infringement upon federal power to regulate intercourse with the Indians, he also declared that Indian tribes are entitled to exercise their own inherent rights of sovereignty in a manner consistent with federal law. "[A] weaker power does not surrender its independence—its right to self-government—by associating with a stronger and taking its protection." *Id.* at 560.

[26] *See, e.g.,* 25 U.S.C. § 348 (1970) which states that where lands are allotted to Indians, "the law of descent and partition in force in the State . . . shall apply thereto. . . ." *See also* 25 U.S.C. § 231 (1970) which authorizes states to enter on reservations to inspect health conditions and enforce sanitation regulations. 25 U.S.C. § 232 (1970) gives New York jurisdiction over offences committed by or against Indians or Indian reservations.

[27] *See* F. COHEN, FEDERAL INDIAN LAW (1942), where the author notes this pattern:

1) In matters only involving Indians on an Indian reservation, the state has no jurisdiction in the absence of specific legislation by Congress.

2) In all other cases the state has jurisdiction unless there is involved a subject matter of special federal concern.

*Id.* at 121.

shall's characterization of the Indian-government relationship as analogous to that existing between a ward and his guardian, they have also imposed certain duties upon the United States with respect to the Indians. Thus, in *Kagama v. United States*[28] the Supreme Court ratified the extension of federal jurisdiction over an Indian reservation, not on Constitutional grounds but on the basis of "the very weakness and helplessness" of the Indian, from which "arises the *duty* of protection, and with it the power."[29]

Since *Kagama*, courts have used fiduciary language freely to describe the Indian-government relationship. Although enforcement of fiduciary duties against the sovereign raises immunity problems, courts now generally apply fiduciary standards to Indian problems when the government is amenable to suit.[30] Juxtaposition of plenary power and fiduciary obligation may appear incongruous, but such incongruity is the keystone of Indian-government relations—the result of 140 years of intensive litigation covering periods of widely divergent public attitudes toward Indians.

### *B. The Federal Government and Indian Land*

The complexity of the Indian-government relationship is apparent in the area of Indian property rights, and especially in the context of problems raised by Indian tribal land claims under the Nonintercourse Act.[31] An Indian tribe derives its interest in land from one of three sources: (1) the dedication of land as an Indian reservation; (2) fee simple ownership by the tribal entity through purchase, gift, or otherwise; or, (3) Indian title, a judicially recognized property interest derived from occupancy.[32]

---

[28] 118 U.S. 375 (1886).

[29] *Id.* at 384.

[30] *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1942) ("judged by the most exacting fiduciary standards"); United States v. Oneida Nation of N.Y., 477 F.2d 939, 943 (Ct. Cl. 1973) ("a special relationship necessitating a special responsibility"); Menominee Tribe of Indians v. United States, 101 Ct. Cl. 10, 20 (1944) ("standards applicable to a trustee").

[31] 25 U.S.C. § 177 (1970). Unlawful sale of land owned by individual Indians may raise analogous problems, and in fact early versions of the Nonintercourse Act encompassed such sales. However, recent cases interpreting the Act have involved the alienation of large tracts of tribal lands. See Section III, *infra*. Problems of individual ownership are therefore not addressed here, except insofar as they tend to suggest solutions to problems created by tribal sales. See text at notes 161-163, *infra*.

[32] Lesser interests such as easements may also be acquired and held by Indians. *See generally* F. COHEN, FEDERAL INDIAN LAW 290 *et seq.* (1940).

The focus of current litigation, and thus of this analysis, is on the alienation of tribal property held in fee simple or by Indian title. See Section III, *infra*. Recent cases have not addressed the application of the Nonintercourse Act to tribal interests in reservation lands.

Where the tribal interest is defined by treaty, statute, deed or course of government behavior,[33] its extent and nature are readily ascertainable. The limits of the tribal interest derived from Indian title, however, are to be found in a particularly complicated facet of American legal history.[34]

1. Indian Title

The Supreme Court has been concerned with conceptual problems of Indian title since the early nineteenth century. The first case to address the foundations of the property right derived through Indian title, *Johnson v. McIntosh*,[35] established the principle that tribes did not hold, and thus could not convey, fee interests in the lands they occupied. The opinion by Chief Justice Marshall traced this result from the earlier European concept that the colonizing sovereign possessed "the sole right of acquiring soil from the natives, and establishing settlements upon it" to the exclusion of all other European powers.[36]

Marshall recognized that this approach, calculated to ensure peace among the colonizers, necessarily impaired the rights of the original inhabitants:

> They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dis-

---

For a discussion of the characteristics of the Indian reservation, and the nature of the Indian property interest therein, *see* F. COHEN, FEDERAL INDIAN LAW 294-302 (1942).

[33] As the Court in *Minnesota v. Hitchcock*, 185 U.S. 373 (1902) noted:

> [I]n order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

*Id.* at 389-90.

[34] *See generally* Note, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655 (1975).

[35] 21 U.S. (8 Wheat.) 543 (1823). In *Johnson v. McIntosh* the plaintiff claimed title by purchase from the Piankeshaw Tribe, while the defendant claimed through a government land patent. The government had acquired the Indian title subsequent to the purchase by plaintiff's predecessor in title. Consequently, the case raised two powerful considerations: preservation of Indian land rights, and protection of the integrity of federal land grants. By reducing the Indian interest to less than a fee, Marshall was able to simultaneously recognize a sovereign Indian interest in the lands, without compromising the right of preemption which could be independently disposed of by the government. Defendant's claim therefore prevailed. One commentator suggests that Johnson only makes sense when considered in the political context of the times, as an attempt to avoid confrontation by affirming both interests. *See* Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 48-49 (1948).

[36] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

> pose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.[37]

A concurring opinion in *Cherokee Nation v. Georgia*[38] reemphasized the limited perception of Indian rights:

> The Indians have rights of occupancy to their land as sacred as the fee-simple, absolute title of the whites; but they are only rights of occupancy, incapable of alienation or being held by any other than common right without permission of the government.[39]

The Court subsequently qualified its analysis regarding the limits of the sovereignty which the United States, as successor to Great Britain, assumed. In *Worcester v. Georgia*,[40] Chief Justice Marshall, again writing for the Court, acknowledged that the recognized right to acquire land from Indians, the right of preemption, did not of itself pass title to that land. Rather, "[t]his was the exclusive right of purchasing such lands as the natives were willing to sell."[41] Consequently, the case can be read as a specific recognition of certain tribal rights, as well as a limitation on state authority over Indians.[42]

Tenure by Indian title is commonly characterized as bifurcated title, reflecting the dual property interests of the Indians and the government. It is further categorized by degree of interest into Aboriginal title and Recognized title.

Aboriginal title is the purest expression of bifurcated title—exclusive possessory rights without concomitant rights of sale. Established by actual, continued and exclusive use of a defined territory for a long period of time,[43] it represents a property interest good against all but the government holding the right of preemption.

---

[37] *Id.* at 574.

[38] 30 U.S. (5 Pet.) 1 (1831).

[39] *Id.* at 48. (Baldwin, J., concurring).

[40] 31 U.S. (6 Pet.) 515 (1832).

[41] *Id.* at 545. The original thirteen states, as political successors to the colonies, retain the right of preemption over Indian lands within their boundaries. Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 670 (1974); Massachusetts v. New York, 271 U.S. 65, 85-86 (1926). The power of preemption over unincorporated or after-acquired lands subsequent to the establishment of the national government is vested in the United States. Exercise of the state power of preemption is subject to the Nonintercourse Act, however, effectively making federal approval a prerequisite for the alienation of all tribal lands, wherever located, to which the Act applies. Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666-67 (1974).

[42] See text at notes 24-25, *supra.*

[43] Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 491 (1967).

Recognized title, on the other hand, is characterized by a Congressional manifestation of intent, either by statute, treaty or general policy, to accord legal rights beyond mere permissive occupation.[44] By such recognition, Congress created property interests good against the United States to some degree, as well as against third parties.

In each variant of bifurcated title, Congress is broadly acknowledged to have the exclusive power to: (a) pass title subject to perpetual Indian occupancy,[45] thereby effectively transferring the right of preemption; or, (b) pass title free of all Indian interests, thereby exercising its power of extinguishment.[46] Courts recognize that the exercise of the power of extinguishment raises only political, not justiciable, questions.[47]

Despite its theoretical neatness, the judicial model of bifurcated title does not provide an entirely satisfactory explanation for the land aspects of the Indian-government relationship. In practical application, the model of Indian title is used as a descriptive tool but the decisions indicate an underlying presumption of a right by Indians to alienate lands, clearly contradicting the analysis in *Johnson v. McIntosh.*[48]

2. Indian Right to Alienate Lands

The first Nonintercourse Act, by restraining the Indian tribes' right to alienate their lands, necessarily implied the existence of that right.[49] The restraint on purchasers in subsequent versions of the Act has never been construed to derogate an alienable property interest in the Indian.

A qualified right to alienate tribal lands was explicitly recognized twelve years after *Johnson.* In *Mitchell v. United States,*[50] the Court addressed certain claims made by purchasers from Indians. In a unanimous opinion, joined by Chief Justice Marshall, Justice Baldwin noted:

---

[44] Minnesota Chippewa Tribe v. United States, 315 F.2d 906, 911 (Ct. Cl. 1963). *See also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-79 (1955).

[45] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

[46] *See* Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 670 (1974); United States v. Sante Fe Pac. R.R., 314 U.S. 339, 347 (1941); Buttz v. Northern Pac. R.R., 119 U.S. 55, 66 (1886).

[47] United States v. Sante Fe Pac. R.R., 314 U.S. 339, 347 (1941).

[48] 21 U.S. (8 Wheat.) 543 (1823).

[49] See text at notes 50-51, 63-76 and 79, *infra.*

[50] 34 U.S. (9 Pet.) 711 (1835).

> The Indian right to the lands as property was not merely of possession; that of alienation was concomitant; both were equally secured, protected, and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by . . . [the sovereign]. Such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them, to provide for their wants; while they were available to the purchasers as payment of the consideration which, at their expense, had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which by their laws . . . was necessary to vest a title.[51]

The judicial language of sovereign title and right of preemption fails to adequately explain the prevalence of completely legitimate land transfers. One leading commentator traces this inadequacy to a confusion of concepts, arguing that commercial doctrines are superior to property doctrines in this context.[52] On a fundamental

---

[51] *Id.* at 758-59.

[52] F. COHEN, FEDERAL INDIAN LAW (1942). Cohen suggests:

> (1) If the inalienability of tribal land is caused by the peculiarity that tribal land is not held in fee simple, then an Indian tribe which does hold land in fee simple should be able to alienate it. But the decisions are uniform that a tribe holding land in fee simple is subject to exactly the same restraints on alienation as any other tribe.
>
> (2) If "Indian title" is something less than a fee simple, then an Indian conveyance of tribal land to private parties should convey something less than a fee simple. But the cases uniformly hold that a conveyee of tribal property under a valid conveyance acquires a complete title.
>
> (3) If title by aboriginal occupancy is simple equivalent to a tenancy at will, the land cannot be sold to the sovereign. Yet the practice of the United States and of the British Crown, before 1776, of purchasing land from Indians, and the validity of conveyances thus effectuated, has never been questioned. As Marshall, C.J., observed, when sovereigns claimed "the exclusive right to purchase" they "did not found that right on a denial of the right of the possessor to sell."
>
> > The King purchased their lands, when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them.
> >
> > *** the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent.
>
> (4) If "Indian title" is something substantially less than a fee simple, then in cases of involuntary alienation damages should be based on something less than the value of the land itself. Yet the courts hold that in such cases the value of the land is the measure of damages.
>
> (5) If "Indian title" is something less that a fee simple subject to restraint on alienation, then when the sovereign grants a right of preemption to a third party, there should be a fee left in the sovereign. But the cases hold that this is not the case and that all interest in the land outside of the right of preemption rests with the Indian tribe.

*Id.* at 320-21 (cites omitted).

level, while all sovereigns have sought to control the alienation of Indian lands, "none of these sovereigns forbade such alienation, but each sought to regulate it and, generally, to profit from it."[53] Such a pattern established in the thirteen colonies prior to independence, was carried over as national policy when the United States assumed the sole role of sovereign.[54]

3. Extinguishment of Indian Title by the Government.

The variants of Indian title, for all their failure to adequately describe the property aspects of the Indian-government relationship, are nevertheless significant in the context of extinguishment and the resulting obligation of the government to pay compensation. Only Recognized title constitutes a property interest under the Fifth Amendment, requiring compensation (and interest) for its extinguishment.[55] Aboriginal title, on the other hand, is not compensable at common law as it is not a property interest within the meaning of the Fifth Amendment.[56]

Prior to 1946, the only claims allowed by the government were based on special jurisdictional statutes in which Congress consented to suit by a specific tribe seeking compensation for extinguishment of a specific claim.[57] Where suit was allowed to all on Aboriginal title, compensation was strictly limited to the statutorily authorized amount without interest, the recovery being a matter of Congressional generosity and not of right.[58] In 1946, the Indian Claims Commission Act introduced a short period of general consent to suit against the government for compensation.[59] The grant of jurisdiction for claims based on a lack of fair and honorable dealings on the part of the government, as well as specific treaty violations by the government,[60] was interpreted to allow compensation plus interest for extinguishment of Aboriginal as well as Recognized title.[61]

4. Sale of Indian Lands to Individuals

Bifurcated title is effective primarily to describe relations and

[53] *Id.* at 321.
[54] *Id.* at 322.
[55] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-78 (1955).
[56] *Id.* at 279, 281-82, 284-85, 288-89.
[57] *See, e.g.*, United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951).
[58] *Id.* at 49.
[59] 25 U.S.C. §§ 70-70w (1970). See text at notes 62 and 153-54, *infra*.
[60] 25 U.S.C. § 70a (1970).
[61] Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 500 (1967).

obligations *vis-a-vis* the government. When considering the vast tracts alienated directly from the Indians to the settlers, with or without government consent, the bifurcated title model only serves to explain the origin and limits of the tribal property interest. The model does not, in and of itself, establish rights against and liabilities of individual purchasers from Indians. The Indian Claims Commission is now barred from hearing new cases brought to it by Indians which claim that the government is liable for failure to supervise or be present at transfers from Indian tribes to private individuals.[62] However, there is no such restraint to suit against individual purchasers under the Nonintercourse Act which controls the alienation of Indian lands, thus raising serious questions of intended relief and limits on private liability for the government's prior failure to discharge its duties. Where the government has made its consent a prerequisite to alienation, whether because of its sovereign title interests or its economic interests, the effect of failure to secure that consent becomes critically important to the current occupants of the vast tracts subsumed by this category. As the Indian claims to these alienated lands presently exist only because of the Nonintercourse Act, an analysis of the purpose and effect of the Act is in order.

## III. A Statutory Manifestation of Federal Solicitude

### *A. The Nonintercourse Act*

The Indian Nonintercourse Act[63] is the major tool of federal control over the alienation of Indian lands. Its earliest version, the Act of July 20, 1790,[64] provided:

> Sec. 4. And be it enacted and declared, that no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.[65]

Three areas of the statute are significant as a basis of comparison with later versions: (1) the prohibition; (2) the parties under the prohibition; and (3) the procedure for accomplishing that which is

[62] 25 U.S.C. § 70k (1970). The Commission received claims until 1951, and all claims against the government arising before 1946 were barred after 1951.

[63] 25 U.S.C. § 177 (1970).

[64] Ch. 33, § 4, 1 Stat. 137, 138.

[65] *Id.*

otherwise prohibited. The first Act focused its prohibition on sales of land only, burdening the Indian and not the purchaser. It was thus the narrowest expression of prohibition. The ban extended to sales by Indians or tribes of Indians, and did not distinguish between the interest held—covering alienation of fees as well as of rights of occupancy. Both individuals and states are listed as prohibited vendees, a distinction not carried through in subsequent Acts. The extension in the Act to states holding the right of preemption referred to the fact that the thirteen original colonies never surrendered that sovereign power of preemption to the federal government.[66] Only a sale executed at a treaty held under the auspices of the United States was to be excused from the operation of the Act.

The temporary Act of 1790 was renewed by the Act of March 1, 1793,[67] with some key changes:

> Sec. 8. And be it further enacted, that no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held or claimed: Provided nevertheless, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.[68]

The character of the prohibition changed in this Act, shifting from a ban on sales to a ban on purchases not made in conformity with its terms, and adding a penal sanction for violation. This version also marked the extension of the prohibition to equitable defenses. Although the direct prohibition on sales to individuals or states disappeared, the general prohibition was construed to have the same effect.[69] The most significant addition was the expansion of the

---

[66] See note 41, *supra*.

[67] Ch. 19, § 8, 1 Stat. 329, 330.

[68] *Id.*

[69] United States v. Oneida Nation of N.Y., 477 F.2d 939, 943 (Ct. Cl. 1973).

procedure by which valid conveyances could be accomplished.

The 1793 temporary Act was in turn renewed by the Act of May 19, 1796,[70] which provided:

> Sec. 12. And be it further enacted that no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, . . . shall be of any validity, in law or equity, unless the same be made by treaty, or convention, entered into pursuant to the Constitution . . . .[71]

This version introduced the enumeration of prohibited transactions, explicitly extending the Act to non-fee transactions such as leases.

The 1796 temporary Act was renewed in 1799,[72] and permanently enacted in 1802.[73] In each case the wording went unchanged. In 1834, the Act was re-enacted in its present form.[74] It now provides:

> Sec. 12. And be it further enacted, that no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . .[75]

Thus, the prohibition continued unabated, and no changes were made in the procedure for satisfying the Act. The major change incorporated in this version was to release the individual Indian from the operation of the Act—though his powers of alienation may be otherwise restricted.[76]

Because of the variations in wording of versions of the Act, it is important to determine which enactment was controlling at the time of alleged violation. However, the general tenor of the Act is constant—Indian land cannot legally be acquired by non-Indians without involving the government.

### *B. The Purpose of the Act*

#### 1. General Purpose

Congressional interest in regulating the alienation of Indian fees and Indian title, as reflected through the Act, waned after the 1842

---

[70] Ch. 30, § 12, 1 Stat. 469, 472.

[71] *Id.* (enacted without other relevant changes).

[72] Act of March 3, 1799, ch. 46, § 12, 1 Stat. 743, 746.

[73] Act of March 30, 1802, ch. 13, § 12, 2 Stat. 139, 143.

[74] Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730-31, formerly codified at Rev. Stat. 2116, and now codified at 25 U.S.C. § 177 (1970).

[75] *Id.* (enacted without other relevant changes).

[76] Allotments of public lands to individual Indians are usually subject to certain restrictions

re-enactment. Congress was apparently satisfied with this expression of its solicitude, and this area of Indian relations was not addressed again. The finer points of Indian property interests were not raised in the later phase of westward expansion and the explicit establishment of Indian reservations in the territories. Although occasionally mentioned as a manifestation of federal interest, the Act did not draw significant judicial attention as a basis of court decisions until the middle of the twentieth century.

The almost 100 year gap between the final enactment and the initial applications of the Act presents some significant problems in interpreting and determining the statutory purpose. Not unexpectedly, changing times and values are reflected in a series of judicial decisions that reach diametrically opposite results based on a fair reading of the statute. Courts initially viewed the Act as affording the government a supervisory role in the land dealings of the Indian tribes—a check on alienation that ensured fairness.[77] More recently, the supervisory role analysis has been supplanted by a judicial interpretation of the Act that draws heavily on the fiduciary aspects of the Indian-government relationship, and which requires the United States to exercise its duty of protection, not merely of supervision, over Indian land sales.[78] By the latter view, the Act is not just a tool used to insure fair alienation, rather it becomes an outright bar on transfers, a bar which the government must explicitly lift.

Of the scant non-judicial sources on the purpose of the Act, the most direct official comment is an address by President Washington. Speaking to a tribe of New York Indians, he set out the government's perception of Indian needs and reviewed the legislative response to that perception:

> The General Government will never consent to your being defrauded, but it will protect you in all your rights. . . . But your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in future, you cannot be defrauded of your lands; that you possess the right to sell and the right of refusing to sell, your lands; that, therefore, the sale of your lands in future, will depend entirely upon yourselves. But that, when you may find it for your interest to sell any part of your lands, the United States must be present, by their agent, and will be your security that you shall not be defrauded in the bargain you may

on alienation. The allotment program is set out at 25 U.S.C. §§ 321-58 (1970), and see text at notes 161-163, *infra*.

[77] See text at notes 80-86, *infra*.

[78] See text at notes 87-104, *infra*.

> make. . . . That, besides the before mentioned security for your land, you will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians.[79]

The ambiguity is apparent: a supervisory role is set out, but it is then linked to the assumption of special duties of fatherly care. However, the address is amply clear in one important area: it specifically recognizes the right of the Indians to sell land at their discretion under the protection of the United States. Only the extent of the protection is unclear, and subsequent judicial decisions have done little to establish a more comprehensive understanding of the Act's purpose.

2. The Supervisory Role

The earlier supervisory role interpretation of the Act embraces a traditional view of the Indians as "a simple uninformed people ill-prepared to cope with the intelligence and greed of other races."[80] Without challenging the right of Indians to alienate their land, courts focused on the capability of Indians to alienate wisely.

Fears of Indian improvidence, aggravated by "overreaching by members of other races,"[81] permeate this branch of cases. Decisions are not phrased in terms of protecting the Indians in the enjoyment of their lands, but rather in terms of protecting the Indians from their own weaknesses. As the Supreme Court stated, the Act is one of many provisions enacted "to prevent the government's Indian wards from *improvidently* disposing of their lands, and becoming homeless public charges."[82] By construing the Act as a response to a perceived threat to Indian land stemming from an inherent lack of capability, the courts posited a limited purpose for the Act. Thus, the court in *United States v. Franklin County*,[83] by reading the Act "with due regard to the situation in which [it was] to be applied" found the Act to be "at most regulatory, designed to prevent fraud. . . ."[84]

---

[79] American State Papers (Indian Affairs, Vol. I) 142 (1832), *as cited in* United States v. Oneida Nation of N.Y., 477 F.2d 939, 942 (Ct. Cl. 1973).

[80] United States v. Candeleria, 271 U.S. 432, 442 (1926).

[81] Alonzo v. United States, 249 F.2d 189, 196 (10th Cir. 1957). *See also* Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885, 888 (2d Cir. 1958) ("to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain").

[82] United States v. Candeleria, 271 U.S. 432, 441 (1926) (emphasis added).

[83] 50 F. Supp. 152 (1943).

[84] *Id.* at 156. *But see* Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527

The most recent analysis of the Act by the Supreme Court, in *Federal Power Commission v. Tuscarora Indian Nation,*[85] also suggested that the Act was intended to serve only a limited purpose. As the Court stated: "[t]he obvious purpose of [the act] is to prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress."[86] The supervisory intent is clearly expressed in the enumeration of conditions that concerned the Court. There was no suggestion that the Act be invoked except where a disposition fell into such a category.

3. The Emerging Protective Role

Use of the increasingly popular fiduciary analysis of the Indian-government relationship has produced another interpretation of the Act, with lower courts going beyond the general trust relationship analysis to imply fiduciary duties flowing directly from the Act. The shift in emphasis is pronounced in *Seneca Nation of Indians v. United States.*[87] There, Seneca Nation sued the government for additional compensation for lands the tribe had sold to third parties in 1797, claiming that the consideration paid at the time was unconscionably low.[88] The Court of Claims found that if the original compensation was indeed unconscionable the Senecas had a claim against the government, for the Act "created a special relationship between the federal government and [tribal Indians],"[89] a relationship by which "the United States assumed a special responsibility to protect and guard against unfair treatment."[90]

This decision broke new ground in two areas. First, it expanded the scope of federal responsibility under the Act—"[the government] was not merely to be present at the negotiations or to prevent actual fruad, deception, or duress alone; improvidence, unfairness, the receipt of an unconscionable consideration would likewise be a federal concern."[91] Secondly, imposition of additional intangible

(N.D.N.Y. 1977), where the court severely criticized the holding in *Franklin County* for failure to strictly apply the "without any validity" language of the 1802 version of the Act. *Id.* at 540.

[85] 362 U.S. 99 (1960).

[86] *Id.* at 119.

[87] 173 Ct. Cl. 917 (1965).

[88] This action was brought against the government under the Indian Claims Commission Act, 25 U.S.C. §§ 70-70w (1970). The form of action is no longer available. See text at note 62, *supra,* and at notes 153-54, *infra.*

[89] 173 Ct. Cl. 917, 925 (1965).

[90] *Id.*

[91] *Id.*

duties on a finding of fiduciary relationship was to become a characteristic of succeeding cases.

The pattern is fully developed in the recent case of *United States v. Oneida Nation of New York,*[92] where the court found that a fiduciary relationship was established by the Nonintercourse Act of 1790[93] when the government, by imposition of legislative restriction, thereby assumed an obligation to protect the Indian in all land transactions.[94] The court held further that the fiduciary duty was breached when, "with knowledge of the transactions, the government failed to protect the rights of the Indians."[95]

The protective interpretation of the purpose of the Act rests on underlying premises quite different from those perceived by the courts embracing a supervisory interpretation. The right of alienation was always assumed in the earlier supervisory power cases, and the very existence of the Act, as well as such cases as *Mitchell v. United States,*[96] amply support such an assumption. The more recent cases, on the other hand, place an increasing stress on the rights of Indians to be secure in the possession of their lands. The proposition is advanced that "the purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy."[97] By implication, failure of the United States to execute its fiduciary duties should result in a breach of that guarantee, enti-

[92] 477 F.2d 939 (Ct. Cl. 1973).

[93] Act of July 20, 1790, ch. 33, § 4, 1 Stat. 137, 138.

[94] 477 F.2d 939, 943-44 (Ct. Cl. 1973). For the proposition that by legislating on behalf of an Indian tribe the government commits itself to a guardian-ward relationship, *see* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975).

[95] 477 F.2d 939, 944 (Ct. Cl. 1973).

[96] 34 U.S. (9 Pet.) 711, 758-59 (1835), and see text at notes 49-54, *supra.*

[97] Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975), *citing* United States v. Sante Fe Pac. R.R., 314 U.S. 339, 348 (1941) *which in turn quotes* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See also* Narragansett Tribe of Indians v. Southern R.I. Land Develop. Corp., 418 F. Supp. 798 (D.R.I. 1976), *citing Passamaquoddy* and *Sante Fe* for the proposition that the "Act . . . embodies the policy of the United States to acknowledge and guarantee the Indian tribes' rights of occupancy." *Id.* at 803. Courts espousing the protective model frequently rely on *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832) to buttress their position. There, the Court said:

> All these Acts . . . manifestly consider the several Indian Nations as distinct political communities, having territorial boundaries . . . and having a right to all those lands within those boundaries, which is not only acknowledged but guaranteed by the United States.

*Id.* at 557. These courts ignore the decision in *Mitchell v. United States,* 34 U.S. (9 Pet.) 711, 758-59 (1835) in which substantially the same Court specifically recognized the right of Indians to alienate their lands. See text at notes 49-54, *supra. See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543 (1832) for language that also appears to specifically recognize a right of alienation.

tling the Indian tribes to compensation,[98] or return of the land,[99] at their election. The court in *Oneida Nation of New York v. County of Oneida*[100] rejected the supervisory role approach of *United States v. Franklin County,*[101] emphasizing the Act's provision that "no purchase . . . from any Indian . . . tribe . . . shall be of *any* validity . . . [unless made with government permission]."[102]

> The language of Congress is plain. The statute makes no reference to overreaching or fraud or inadequate consideration. By prohibiting all unauthorized dealings with Indians, it cuts off any inquiry into the fairness of such dealings insofar as the validity of the resulting transfer is concerned. . . . The result in the present case may seem . . . harsh. Nevertheless, it is the result mandated by the Non-Intercourse Act.[103]

Thus, the basic distinction between the supervisory and protective role turns on the freedom of the Indians to alienate their land, or conversely, on how closely the federal government should control Indian alienation. As the government is now immune from suit in claims arising out of transactions prior to 1946,[104] the brunt of the judicial debate falls on the individual landowner who is liable both for his predecessors' possibly inadequate compensation, and for his own continued occupancy.

4. The Conflict of Roles

The conflict between the supervisory role and protective role judicial approaches is not strictly a problem of statutory interpretation for a fair reading of the Act supports the arguments of both. On the one hand, the availability of a process for alienation clearly modifies the classic model of Indian title, and suggests that Congress never intended to bar land sales. On the other hand, the Act is clearly a restraint on those who would purchase land from Indians without Congressional consent.

To the courts, the seriousness of the violation of the Act has turned on what elements of the nonconsensual alienation will be determinative. Under a supervisory view, adequacy of past compensation will, in large part, excuse a technical violation of the Act.

---

[98] Seneca Nation of Indians v. United States, 173 Ct. Cl. 917 (1965).

[99] *See* United States v. Southern Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976).

[100] 434 F. Supp. 527 (N.D.N.Y. 1977).

[101] 50 F. Supp. 152 (N.D.N.Y. 1943).

[102] 25 U.S.C. § 177 (1970) (emphasis added).

[103] Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 541 (N.D.N.Y. 1977).

[104] 25 U.S.C. § 70k (1970). See text at note 62, *supra,* and at notes 153-54, *infra.*

Even where compensation was inadequate, presumably the wrong can be righted by supplying the balance due. In either case, the fact of alienation can be noted and ignored, for such is the right of the Indian to alienate his land. But, under the protective model the mere fact of alienation, without consent, is an infringement upon the federally protected rights of the Indian.

For the remote successors of original purchasers who are being held fully liable to remote successors of the vendor-tribe for dealings in which neither participated, the protective model is especially frightening. First, the protective interpretation is a comparatively recent approach that is being applied long after the fact of violation. The courts embracing this model are trying to make the Act conform to a recently-constructed framework of Indian-government relations, while ignoring the fact that the Act was drafted long before current attitudes toward Indian relations were fashioned. Secondly, it should be noted that the evolving protective model represents a complete reversal in judicial interpretation of the underlying intent of the Act, a reversal that has received absolutely no Congressional impetus. The direction and magnitude of this shift, when coupled with Congressional silence, obviously suggest serious questions as to whether Congress ever intended the Act to be so applied.

### *C. Application of the Act*

When the Nonintercourse Act is found to apply to a transaction, a well-defined sequence of events is initiated.

#### 1. Parties

From both a practical and a legal perspective, the federal government is the preferred plaintiff in suits brought under the Act. On the practical side, the government obviously has the resources to successfully prosecute the action. From the legal perspective, there is a government interest in having the Act enforced so long as it is on the books, as well as the arguable responsibility that the government owes to its Indian wards.[105] As the Supreme Court noted, the purpose of the Act was, in part, "to enable the government, acting as *parens patriae* for the Indians, to vacate any dispositions of their

[105] The federal government has appeared as the defendant in suits seeking damages for its alleged failure to exercise due care in supervising alienations. However, with the Indian Claims Commission Act now barring suit on claims against the government arising before 1946, this route is permanently closed to tribal plaintiffs. See text at note 62, *supra*, and at notes 153-54, *infra*.

lands made without [Congressional] consent."[106]

The power to intervene does not come from the federal property interest in Indian lands alone, and for that reason it can extend beyond protection of Aboriginal title. By drawing on the underlying policy of protecting all Indian land rights, the court in *United States v. Boylan*[107] found that:

> [Even where] . . . the United States does not own the fee to the lands in question, and never did, the United States has such an interest as enables it to maintain this action and restore to these wards of the nation . . . the possession of the lands from which they were wrongfully ejected and removed in violation of the laws of . . . the United States.[108]

However, the power to bring suit under the Act is not limited to the federal government. An Indian tribe covered by the Act may invoke federal jurisdiction to bring suit on its own behalf for recovery of lands alienated contrary to the Act.[109] In such an action, the tribe may assert the sovereign interests of the federal government.[110]

Independent assertion of claims by Indians presents special problems for the defendant. By established law, no transfer in violation of statutory restrictions can be validated by any proceeding to which the United States is not a party.[111] This raises the danger of multiplicity of suits on the same claims if the Indians should fail to make their case. Nevertheless, courts faced with such a situation have declined to make the United States an indispensible party. Indeed,

---

[106] Federal Power Comm. v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960). *See also* United States v. Hellard, 322 U.S. 363 (1944); United States v. Candeleria, 271 U.S. 432, 441-42 (1926).

[107] 256 F. 468 (N.D.N.Y. 1919).

[108] *Id.* at 492.

[109] Schagticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 785 (D. Conn. 1976); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 903 (D. Mass. 1977). *See also* Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 473 (1976).

There is also the concern that administrative burdens upon the United States will make it impossible to assure that the government will pursue claims in a timely fashion, thereby jeopardizing Indian rights. *See* Capitan Grande Band of Mission Indians v. Helix Irrigation Dist., 514 F.2d 465, 470-71 (9th Cir. 1975).

In an important variation, some cases involve tribal suits to compel the government to discharge its fiduciary duty by bringing an action on behalf of the tribe. *See, e.g.*, Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

[110] Narragansett Tribe of Indians v. Southern R.I. Land Develop. Corp., 418 F. Supp. 798, 805 (D.R.I. 1976) and cases cited therein.

[111] United States v. Candeleria, 271 U.S. 432, 444 (1926). This principle is controlling even if the failure of the United States to assert its rights and interests was due to the negligence of its own officials. United States v. Southern Pac. Transp. Co., 543 F.2d 676, 697 (9th Cir. 1976).

some hold that compelling reasons point to a contrary result:

> If we hold that the United States is an indispensible party, the [Indian] Nations will be unable to assert their longstanding claims to the land; and if we hold that the United States is not an indispensible party, the defendants will run the risk of the burden and expense of defending two law suits, even though they succeed in obtaining a judgment in their favor in the instant action.
>
> We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder of the United States, weigh heavily in favor of the Nations.[112]

2. The *Prima Facie* Case

To invoke the protection of the Act, a plaintiff must demonstrate that the parties and transactions at issue are cognizable. The elements of a *prima facie* case adequate to establish coverage are set out in *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*[113] To make its case, the plaintiff must show that:

> 1. it is or represents an Indian "tribe" within the meaning of the Act;
> 2. the parcels of land at issue . . . are covered by the Act as tribal land;
> 3. the United States has never consented to the alienation of the tribal lands; and
> 4. the trust relationship between the United States and the tribe, which is established by the coverage of the Act, has never been terminated or abandoned.[114]

Although the four issues of fact are not easily satisfied, the Oneida Indians established this *prima facie* case in *Oneida Indian Nation of New York v. County of Oneida.*[115] The suit involved a claim for two years' rent on lands purchased from the Tribe by the State of New York in 1795, and currently claimed and occupied by the defen-

[112] Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456, 461 (10th Cir. 1951), *cert. denied* 343 U.S. 919 (1952).

[113] 418 F. Supp. 798 (D.R.I. 1976).

[114] *Id.* at 803. This test was adopted in *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902 (D. Mass. 1977), and in *Oneida Indian Nation of N.Y. v. County of Oneida*, 434 F. Supp. 527, 537 (N.D.N.Y. 1977). *See generally* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376-80 (1st Cir. 1975). The effect of termination of the trust relationship after alienation, but before bringing of suit, has not been adjudicated.

[115] 434 F. Supp. 527 (N.D.N.Y. 1977).

dant County for highways and other public purposes. The first phase of the litigation was limited to the issue of the County's liability.[116]

The burden of establishing the *prima facie* case was considerably eased by a longstanding history of federal recognition.[117] Consequently, the court readily determined that the Oneidas were a tribe within the meaning of the Act, and entitled to its protection.[118] This finding was not strictly necessary, for the 1795 transaction fell under the 1793 Act which extended to individual Indians as well as to tribes.

Treaty recognition of Oneida rights in the lands subsequently purchased by New York established the tribal status of the land. The court, therefore, found that the fiduciary relationship arising under the Act extended to cover the land in question.[119]

Two facts established that the United States never consented to the alienation. The evidence never indicated the presence of a United States commissioner at the treaty, and more importantly, there was no evidence of subsequent ratification by Congress.[120]

The final element of the *prima facie* case was established by the finding that there was no plain and unambiguous withdrawal of the trust obligation.[121] Obviously, this fourth element of the *prima facie* case is proved easily under a protective interpretation of statutory purpose.[122] In *Oneida,* the factual issues were not complex. Under the protective interpretation, federal recognition of the tribe and treaties respecting its land easily satisfied three elements of the *prima facie* case. The non-consent element presented a simple factual question—if there was consent there was no case; if there was

[116] The action was trifurcated for purposes of this trial. The issues reserved involved the measure of the County's liability to the Tribe, and the liability of New York State to the County. *Id* at 532.

[117] Had the Tribe been unrecognized, the case would have proceeded under a line of authority permitting independent judicial determination of tribal existence and status. *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377-78 (1st Cir. 1975); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977). The Mashpee Indians recently failed to establish their tribal status before a federal jury, and thus failed to establish their *prima facie* case. Boston Globe, January 6, 1978. Appeal is likely.

[118] Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 538 (N.D.N.Y. 1977).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 540.

[122] Under a supervisory-role interpretation the first three elements would be similar, but the fourth element would presumably by rephrased to require plaintiffs to show some element of unfairness or overreaching to establish the *prima facie* case.

no consent, there was liability. In other cases, the factor of federal recognition of the tribe will be equally important to the ease with which the case will be made. Where there is recognition, establishing the *prima facie* case will be almost automatic.

3. The Act in Operation

The actual effect of satisfying the *prima facie* case in a suit for recovery of land, and thus establishing violation of the Act, is unclear. Title litigation under the Act has been singularly unsuccessful to date, as most recent cases have been decided or delayed on procedural grounds.[123] This pattern is unlikely to continue, however, and the magnitude of the problem mandates the consideration of solutions.

The *Oneida* case did not seek title, but only back rent. Other lands traceable back to the same 1795 transfer are in private hands. The court estimated that any attempt to settle title to the balance of the 100,000 acres at issue would involve 10,000 defendants.[124] Moreover, though the court did not void the Oneida County title, its determination of rental liability is tantamount to a finding that title to county land, and by implication, title to private land, is in the tribe.

In similar contexts under different Acts, courts have held the private title invalid. *United States v. Brewer*[125] involved non-Indians who claimed title to certain Indian lands through a grant from members of the Pueblo of Santa Rosa. The Pueblo had a communal fee title to the land, confirmed by the United States and protected by a statute[126] with the same operative provisions as the Nonintercourse Act. The United States, on behalf of the Pueblo, was granted a decree requiring the defendants to surrender possession of the land. The court was not impressed with the defendants'

[123] *See, e.g.*, Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977); Narrgansett Tribe of Indians v. Murphy, 426 F. Supp. 132 (D.R.I. 1976); Schagticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976).

[124] Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 531 (N.D.N.Y. 1977).

[125] 184 F. Supp. 377 (D.N.M. 1960).

[126] Act of June 7, 1924, ch. 331, § 17, 43 Stat. 636; it provided in part:

> Sec. 17. . . . no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, *shall be of any validity in law or equity unless the same be first approved by the Secretary of the Interior.*

(emphasis added).

good faith, nor with the fact that they stood to lose over $9,000 worth of improvements.[127]

Where land has been allotted to individual Indians in fee, restraints on alienation are common.[128] The courts have neither doubted their power to enforce these restrictions, nor hesitated to exercise it. As a result, transfers contrary to the imposed restraints, such as alienations within twenty-five years of the date of allotment, are regularly set aside.[129]

The Nonintercourse Act has not yet been applied to invalidate a sale of land, but it has been applied to invalidate other interests in property acquired without government approval. In *United States v. Southern Pacific Transportation Co.*[130] the defendant attempted to purchase an easement across a reservation without Congressional approval. The court found no easement existed, and was of the opinion that it would undermine the purpose of the Act to attempt to give any effect to the invalid conveyance by finding a license.[131] The court concluded: "Although it may appear harsh to condemn an apparently good faith use as a trespass after ninety years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result."[132]

These decisions clearly indicate that a suit for return of lands under the Act, if proven, could result in widespread voiding of titles challenged by Indians.

4. The Absence of Affirmative Defenses

The conclusion reached in *Southern Pacific* is characteristic of the aggressive application of the Act. The provision that no transfer "shall be of any validity in law or equity" is viewed as a mandate for strict construction.

Ordinarily, a number of defenses would be available against title claims based on the invalidity of long-past transactions. Because of the Act, however, the time factor is disregarded in suits to recover Indian land. Consequently, the delay-based defenses of statutes of limitation, adverse possession, laches and estoppel are unavaila-

[127] United States v. Brewer, 184 F. Supp. 377, 380 (D.N.M. 1960).

[128] *See, e.g.*, 25 U.S.C. §§ 321-58, 391, 392 (1970).

[129] *See* Franklin v. Lynch, 233 U.S. 269 (1914) (no alienation of allotment contrary to imposed restrictions is allowed); Bowling & Miami Investment Co. v. United States, 233 U.S. 528 (1914) (where conveyance of allotment is contrary to law, the government may intervene to set it aside).

[130] 543 F.2d 676 (9th Cir. 1976).

[131] *Id.* at 698.

[132] *Id.* at 699.

ble.[133] As indicated in *Southern Pacific*, and amplified in *Oneida*, "good faith will not render good a title otherwise not valid for failure to comply with the [Act]."[134]

Two considerations compel this result—the functional limitation of sovereign immunity and judicial perceptions of the Act. The affirmative defenses available in property actions are usually a matter of state law. These state law concepts of limitations and determination of title are powerless to affect the interests of the United States. Thus, the federal interest in Indian lands is immune.[135] Indians suing on their own behalf "assert not merely their own rights of occupancy, but the sovereign claims of the United States as well."[136] Consequently, they are likewise immune to state law defenses. Courts also refer to the fundamental difficulty of giving "force and effect to [agreements] which a valid enactment of Congress declares shall be of . . . no effect."[137] Thus, state enactments are ignored where they would interfere with the Act.

The operation of the Act, as an issue distinct from the propriety of invoking it, raises few questions. After the statutory purpose is determined through the premise-selection process, two questions of fact remain: (1) What version of the Act controls? (2) Is the prima facie case made? The nature and extent of federal authority over the Indian tribes recognized by ancient and honorable precedent, is an adequate basis for the results attendant upon successful assertion of the Act by government or tribe. However, the potential for disruption inherent in the Act as presently construed suggests that the propriety of invoking the Act now should be re-examined carefully.

## IV. Toward a Unified Federal Policy Regarding Indian Land

*Oneida* marks a new phase in the history of the Nonintercourse Act. For the first time a court has held that Indians have established their claim to a substantial area long thought to be owned by others. *Oneida* also serves to emphasize the consequences that result from

---

[133] *See* Schagticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 783-84 (D. Conn. 1976) and cases cited therein. *Accord,* Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 542 (N.D.N.Y. 1977); United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied* 352 U.S. 988 (1957).

[134] Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 530 (N.D.N.Y. 1977).

[135] United States v. 7,405.3 Acres of Land, 97 F.2d 417, 423 (4th Cir. 1938). *Accord,* Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 542 (N.D.N.Y. 1977); Schagticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 784 (D. Conn. 1976).

[136] Schagticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 784 (D. Conn. 1976).

[137] United States v. Southern Pac. Transp. Co., 543 F.2d 676, 698 (9th Cir. 1976).

the prevalent judicial confusion over the purpose of the Act. Only Congress, with plenary power over Indians and their lands, can definitively resolve the rampant confusion by indicating what role, if any, the Act is to fulfill in the contemporary scheme of Indian-government relations.

### *A. Toward a Policy Favoring Indian Claims*

If widespread application of the Act as currently interpreted is acceptable to Congress, few issues are presented. The major unanswered question is whether the present occupants are entitled to compensation for improvements upon the land which they are to lose. *United States v. Brewer*[138] suggests that the present occupants, as voluntary intruders, have no compensable property interest under the Fifth Amendment.[139]

The direct costs of compensation would be immense, but the indirect costs of denying compensation in economic, social and political senses, would hardly be any less. If the costs in either situation are acceptable, the Act is an effective, albeit crude, tool to advance currently perceived policy goals.

### *B. Toward a Policy of Stability*

Several factors suggest that the strict judicial interpretation of the Act is, however, inconsistent with the general tenor of statutory policy.[140] Several schemes affecting Indian lands extinguish or qualify otherwise protected rights and incidents of Indian ownership and occupancy. With one notable exception, Congress has evidenced more concern with providing compensation to Indians for lands taken or title extinguished, than it has for securing the return of land to the Indians.[141]

---

[138] 184 F. Supp. 377, 380 (D.N.M. 1960).

[139] *Id.* at 380.

[140] Congressional attempts to define Indian rights in general are no less prone to confusion and contradiction than are the judicial efforts. Some fluctuation has resulted from Congressional approaches to policy questions. As of 1953, Indian land policy was expressed with two coordinate aims: "First, withdrawal of federal responsibility for Indian affairs wherever practicable, and second, termination of the subjection of Indians to federal laws applicable to Indians as such." [1953] U.S. CODE CONG. & AD. NEWS 2409. Allotment of public lands to individual Indians was a product of this policy. *See* 25 U.S.C. §§ 321-58 (1970). However, in 1970 President Nixon reaffirmed a policy of continuing government involvement with Indian affairs. *See* Comment, *State Jurisdiction Over Indian Land Use: An Interpretation of the "Encumbrance" Savings Clause of Public Law 280*, 9 LAND & WATER L. REV. 421, 428-29 (1974). The general trend with regard to Indian property interests nevertheless seems to be away from direct supervision.

[141] The Blue Lake area of New Mexico, central to the religious beliefs of the Taos Indians,

Congressional approaches affect Indian occupancy title and fee title.[142] The Congressional approaches to occupancy title questions fall into three patterns: (1) extinguishments, accompanied by settlements; (2) retroactive compensation procedures; and (3) statutes of limitation.

The Alaska Native Claims Settlement Act[143] is a comprehensive approach to resolution of title uncertainty by massive extinguishment of Indian claims. The operative section provides:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law . . . shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use or occupancy . . . are hereby extinguished.[144]

The Alaska Act simultaneously compensated the Natives for title extinguishment by providing $962.5 million and 40 million acres of land in total settlement of claims.[145]

The Alaska Act reflected Congressional recognition of an immediate need for a fair and just settlement of Native claims, without extensive litigation and without creating wardships or trusteeships.[146] An extinguishment to be read broadly, linked with an arbi-

---

had passed under the exclusive control of the United States. In 1951 the Indians challenged the government's action, and petitioned the Indian Claims Commission for return of the land. The Commission agreed that the Indians were entitled to the land, but it lacked jurisdiction to order a return. Pueblo of Taos v. United States, 15 Ind. Cl. Comm. 666 (1965). *See generally* 25 U.S.C. §§ 70-70w (1970). An Act of Congress, passed over strong objection to the precedent thus set, was required to return the land to Indian control. Act of Dec. 15, 1970, Pub. L. No. 91-550. Two factors distinguish this case: (1) the government held all the land at issue, no private landholders being involved, and (2) the return was the product of voluntary Congressional action. For analysis of the case, and legislative history of the enactment, *see* Note, *American Indian Land Claims: Land Versus Money as a Remedy,* 25 U. FLA. L. REV. 308, 320-24 (1973).

[142] For background on this distinction, see text at notes 43-47, and 55-56, *supra.*

[143] 43 U.S.C. §§ 1601-27 (Supp. IV 1974). For a detailed appraisal of the Alaska Act in operation, from a Canadian viewpoint, *see* Lysyk, *Approaches to Settlement of Indian Title Claims: The Alaskan Model,* 8 U. BRIT. COLUM. L. REV. 321 (1973).

[144] 43 U.S.C. §§ 1603(a), (b) (Supp. IV 1974).

[145] Conceptually similar approaches are currently under consideration. In Rhode Island, a transfer of 1800 acres to the Narrangansett Indians has been proposed to settle their claims to 3500 acres. Title to the balance of land claimed will be extinguished, if Congress agrees to the proposal of the parties. Boston Globe, March 3, 1978, at 7. A more massive settlement is proposed for Maine title claims. The proposal will settle Indian claims to 9.2 million acres for a payment of $25 million. Claims to another three million acres will be dropped in return for a donation of 800,000 acres with an option to purchase another 200,000 acres. Boston Globe, Feb. 10, 1978. Private landowners in the three million acre parcel, predominantly paper companies, express strong opposition to the plan. Boston Globe, Feb. 11, 1978.

[146] 43 U.S.C. §§ 1601(a), (b) (Supp. IV 1974).

trary, though generous, land and money settlement appeared the best solution.[147] The Alaska Act was designed to reach claims against the United States and private citizens alike.[148] It extinguished claims both retroactively and prospectively. Retroactive validation of extinguishment has also been accomplished by Congressional recognition of the validity, as against the United States, of individual claims to Indian title land.[149]

The Indian Claims Commission Act[150] is a model for the retroactive compensation approach, by which the government provided for payments to tribes inadequately compensated for the original extinguishment of their title, but excluded return of land as a remedy.

In a third approach, Congress has often imposed statutes of limitation to foreclose Indian claims after a reasonable time. An early statutory scheme provided that all California land claims not presented to certain commissioners in a certain time would be forever barred.[151] The Supreme Court felt that the extension to "all claims" created the machinery for extinguishing Indian claims based on the right of occupancy.[152]

Similarly, the Indian Claims Commission Act, by barring claims not brought within five years,[153] clearly expressed an intent to limit the government's liability for all claims for inadequate consideration.[154] The abrupt termination of all claims, pending as well as future, in the Alaska Act is still another example of a federal policy limiting the duration of Indian claims.[155]

Both *Oneida*[156] and *Southern Pacific*[157] involved a statutory bar on suits *by* the government which parallels other statutory bars on suits *against* the government.[158] Legislative history indicates an intent to promote greater fairness by affording "protection against an

---

[147] [1971] U.S. CODE CONG. & AD. NEWS 2198.

[148] 43 U.S.C. § 1603(c) (Supp. IV 1974).

[149] Act of Feb. 27, 1865, ch. 64, § 9, 13 Stat. 440; Act of May 5, 1866, ch. 73, § 2, 14 Stat. 43.

[150] 25 U.S.C. §§ 70-70w (1970).

[151] Act of March 3, 1851, ch. 41, § 13, 9 Stat. 631, 633 provided:

> Sec. 13. . . . all lands, . . . the claims to which shall not have been presented to the Commissioner within two years after the date of this Act shall be deemed, held, and considered as part of the public domain of the United States.

[152] Baker v. Harvey, 181 U.S. 481, 489 (1901).

[153] 25 U.S.C. § 70k (1970).

[154] 28 U.S.C. § 1505 (1970).

[155] 43 U.S.C. §§ 1603(a), (b) (Supp. IV 1974). See text at notes 143-148, *supra*.

[156] Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977).

[157] United States v. Southern Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976).

[158] 28 U.S.C. § 2415 (1970).

action by the government when the act occurred many years previously."[159] The statute presently limits actions in tort and contract, and specifically excludes suits to establish title or right of possession to real property.[160] However, the background of the statute provides no rationale for this exclusion, suggesting that it is a remnant of sovereign immunity that is clearly contrary to the spirit of the rest of the enactment. The statute, in fact, controls as to some protected Indian interests to the exclusion of the Nonintercourse Act, *e.g.* the easement in *Southern Pacific* and the rental claims in *Oneida.*

In the concurrent area of fee allotments to individual Indians, government exercise of direct control over public land transferred to Indians in fee has always been qualified by machinery for the eventual elimination of that control. As part of the statutory expression of the allotment policy,[161] Congress has specifically provided that at the end of the trust period[162] the land will pass to the allottee in fee, free of restraints on alienation and subject to the laws of the state of residence.[163]

Statutory approaches to land and claims clearly suggest that Congress has no aversion to terminating Indian tenure. In addition, the United States, through Congress, has not been willing to submit itself to a policy of unending liability for breach of its alleged duty to protect Indian land holdings, a liability now being charged against the land itself in the hands of the current occupants. Thus, judicial provision for the return of alienated tribal lands is a distinct contrast to the prevailing statutory policy.

### C. Toward a Federal Solution

The pattern of judicial confusion matched by legislative silence accentuates the difficulty of coping with laws long on the books, but unresponsive to present day conditions.[164] Legislatures are notoriously slow to review existing law, preferring to direct their attention to more pressing issues.[165]

---

[159] [1966] U.S. Code Cong. & Ad. News 2508. The provision extends to Indian tribes asserting the governments claims on their own behalf. Capitan Grande Band of Mission Indians v. Helix Irrigation Dist., 514 F.2d 465 (9th Cir. 1975).

[160] 28 U.S.C. § 2415(c) (1970).

[161] 25 U.S.C. §§ 331-71 (1970).

[162] Restraints commonly run for twenty-five years. 25 U.S.C. § 348 (1970).

[163] 25 U.S.C. § 349 (1970).

[164] For a discussion of the general problem of obsolete laws, *see* Berry, *Spirits of the Past—Coping with Old Laws,* 19 U. Fla. L. Rev. 24 (1966).

[165] As one commentator explains:

> One of the facts of legislative life, at least in this country in this century, is that getting a

The surge in interest in the Act suggests that its purpose and application have now become more pressing issues. However, any reconsiderations or revision of the Act by Congress should recognize and take into consideration certain judicially imposed constraints which may limit the effectiveness of any Congressional action. Historically, courts have been extremely reluctant to infer a decision to terminate Indian rights absent a clear expression of such a Congressional intent. Thus, legislation directed to Indians in general, and Indian land in particular, must be examined in light of recognized principles of construction.

The general standards adopted by the courts draw from a history of solicitude toward Indians, and of favorable interpretation of enactments affecting them.[166] In practice, the standards can be expressed in terms of three broad rules:

1. Doubtful statutory expressions are to be resolved in favor of "a weak and defenseless people who are wards of the nation."[167]
2. Language affecting Indians is not to be construed to their prejudice.[168]
3. A purpose to make a radical departure is "not lightly to be inferred."[169]

Thus, the standards controlling enactments purporting to adversely affect Indian property interests, and which would encompass any efforts to ameliorate the operation of the Act, pose special problems.

In *United States as Guardian of the Indians of the Tribe of Hual-*

---

statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of revised conditions. On the federal level, it is difficult to the point of impossibility to draw the attention of a crisis ridden Congress to to any area of law reform which, although it may be urgent, has not erupted in political controversy. And the more tightly the statute was drafted originally, the more difficult it becomes to adjust the statute to changing conditions without legislative revision.

G. GILMORE, THE AGES OF AMERICAN LAW 95-96 (1977).

[166] Choctaw Nation v. United States, 119 U.S. 1, 27-28 (1886). *See also* Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902). For an excellent review of related standards as they bear on purported abrogation of treaties with Indians, *see* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?* 63 CAL. L. REV. 601 (1975).

[167] Choate v. Trapp, 224 U.S. 665, 675 (1912). *See also* United States v. Southern Pac. Transp. Co., 543 F.2d 676, 687 (9th Cir. 1976); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975); United States v. 2,005.32 Acres of Land, 160 F. Supp. 193, 201 (D.S.D. 1951). *Accord,* Morton v. Ruiz, 415 U.S. 199, 236 (1974).

[168] Antoine v. Washington, 420 U.S. 194, 199 (1975) and cases cited therein. *See also* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975); Narragansett Tribe of Indians v. Southern R.I. Land Develop. Corp., 418 F. Supp. 798, 806 (D.R.I. 1976).

[169] United States v. Nice, 241 US. 591, 599 (1916).

*pai (Walapai) v. Sante Fe Pacific Railroad Co.*[170] the United States sued to enjoin interference with Indian possession and occupancy of certain lands. The defendant claimed title by a statutory grant of Indian lands to which the government promised to extinguish all claims. The lower court[171] found for the defendant, reasoning that a grant for the express purpose of financing construction of a transcontinental railroad would be meaningless if it only passed "the fee in a section of land in which a tribe of Indians had a legal right of exclusive occupation," for the resulting title "would obviously be worth nothing to the railroad or its purchasers."[172]

The Supreme Court rejected the reasoning of the lower court;[173] it recognized the power of the United States to extinguish Aboriginal title, but insisted that "an extinguishment cannot be lightly implied in view of the avowed solicitude of the federal government for the welfare of its Indian wards."[174] Only "plain and unambiguous action" would suffice to deprive the tribe of the benefits of the federal policy protecting Aboriginal title.[175]

Modern courts evaluating federal action have relied heavily on *Sante Fe* and its "plain and unambiguous action" test.[176] Yet, this broad language obscures the narrow point actually decided—the sufficiency of certain government actions to impliedly repeal the statutory grant of land in which the government undertook to secure voluntary relinquishment of Aboriginal title. The Court held only that the United States by its actions had not clearly manifested its intent to extinguish title contrary to the terms of the statute, and that the Indian claim to the lands consequently survived.[177]

---

[170] 314 U.S. 339 (1941). For several views of *Sante Fe, see* Note, 10 GEO. WASH. L. REV. 753 (1942); Cohen, *Original Indian Title,* 32 MINN. L. REV. 28, 31-33, 55 (1947); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?* 63 CAL. L. REV. 601 (1975).

[171] 114 F.2d 420 (9th Cir. 1940).

[172] *Id.* at 424.

[173] The defendant Railroad quitclaimed its interests within the Walapai Reservation to the United States, mooting the controversy in part. United States v. Sante Fe Pac. R.R., 314 U.S. 339, 358-59 (1941).

[174] *Id.* at 354.

[175] *Id.* at 346.

[176] *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975); Bennett County, S.D. v. United States, 394 F.2d 8, 12 (8th Cir. 1968); Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 539 (N.D.N.Y. 1977); United States v. Northern Paiute Nation, 393 F.2d 786, 793 (Ct. Cl. 1968).

[177] United States v. Sante Fe Pac. R.R., 314 U.S. 339, 355-56 (1941). The Act of July 27, 1866, ch. 278, § 2, 14 Stat. 294 provided in relevant part:

> Sec. 2. The United States shall extingush, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title

A subsequent series of cases brought by the Tuscarora Indians of New York, though not widely cited, are in fact the most recent authoritative pronouncements on the adequacy of Congressional actions purporting to affect Indian land interests, and show that a clear, specific expression of Congressional intent is not always required. The land in question, purchased by the Tribe shortly after the Revolutionary War, had been condemned for a federally-licensed hydroelectric project.

In the first challenge, the New York District Court was able to infer that Congress had authorized the taking from:

1. The nature of the project.
2. The proximity of the project to the reservation—a fact known to Congress.
3. The impracticability of proceeding without taking a portion of the reservation.[178]

The second case, and the basis of the appeal to the Supreme Court, challenged the authority of the Federal Power Commission to issue a license for the project.[179] That court determined that Congress was unaware of the impact upon Indian land, and that the FPC was required to determine independently whether it had the power to authorize a taking of Indian lands.[180] The court felt that Congressional authorization to issue a license was not an adequate expression of its consent to the taking of Indian land.[181]

The Supreme Court reversed, looking to the purpose of the entire Power Act and finding in it "a complete and comprehensive plan for development."[182] The Court stated:

> The [Federal Power] Act gives every indication that within its comprehensive plan Congress intended to include lands owned or occupied by any person or persons, including Indians . . . . [Sec. 21] does not

---

to all lands falling under the operation of this Act and acquired in the donation to the road named in this Act.

[178] Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885, 893-94 (2d Cir. 1958). The action was dismissed without prejudice on other grounds. The tribe subsequently brought an action in the District of Columbia Circuit. See text at notes 179-183, *infra.*

In a similar situation, the court in *Seneca Nation v. Bruckner,* 262 F.2d 26 (D.C. Cir. 1958), found clear and specific intent from: (1) Congressional authority to prepare a comprehensive plan; and (2) appropriations for implementing that plan with the knowledge (a) that Seneca land would be affected, (b) that the Senecas were uncooperative, and (c) that the lands could be taken by eminent domain. *Id.* at 28.

[179] Tuscarora Indian Nation v. Federal Power Authority, 256 F.2d 338 (D.C. Cir. 1958), *rev'd,* 362 U.S. 99 (1960).

[180] 256 F.2d 338, 341-42 (D.C. Cir. 1958).

[181] *Id.*

[182] Tuscarora Indian Nation v. Federal Power Authority, 362 U.S. 99, 118 (1960).

> exclude lands or property owned by Indians, and, . . . we must hold that it applies to these lands owned in fee simple by the Tuscarora . . . .[183]

The widespread confusion over the impact of *Sante Fe* is another reflection of the broader judicial confusion over Indian-government relations in general. It serves to emphasize the need for definitive and explicit Congressional action on two levels—to clarify the policy of the government, and to avert unnecessary challenges to that expression of policy. *Tuscarora* represents the limits to which the Supreme Court will go to uphold a less-than-explicit manifestation of intent to affect Indian interests, but it should also be read as a reminder that clear drafting will avoid the need for litigation.

## V. Conclusion

There is sufficient doubt attached to the appropriateness of the current judicial interpretation and application of the Act to warrant Congressional review on that basis alone. When the interpretive issue is considered along with more recent manifestations of federal Indian land policy, the incongruity of the Act becomes more apparent. Congress possesses the sole authority to effect change, should it determine that change is in order.

Thus, Congress is faced with, and is under an obligation to answer, the policy question currently posed by Indian land claims under the Act. In light of divergent judicial and Congressional approaches to Indian lands, will Congress sanction the eviction of an untold number of landholders solely because their predecessors in title technically violated the Act? Regardless of fairness of dealing or adequacy or compensation at the time of the violation, will Congress acquiesce in an arguably incorrect judicial interpretation of a statute that is itself arguably inconsistent with current federal policy?

Congress will eventually bear the cost of either course—of recovering lands for Indians, or of compensating them for extinguishments[184]—but for the time being an opportunity to actually choose the desired course still exists. Through approaches such as the Alaska Native Claims Settlement Act, Congress has demonstrated both its understanding of Indian land issues and its capability to

---

[183] *Id.*

[184] Note that any contemporary Congressional taking of Indian lands, as contrasted with a retroactive taking, would create a cause of action for damages that would not be barred by any statute of limitations. See text at notes 62, and 153-55, *supra.*

resolve those issues. Under these circumstances, and absent a positive intention to accept the consequences of current applications of the Act on a massive scale, Congressional inaction will be unconscionable.