Aboriginal Title: The Special Case of California

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Recommended Citation
Bruce S. Flushman & Joe Barbieri, Aboriginal Title: The Special Case of California, 17 Pac. L. J. 391 (1986).
Available at: https://scholarlycommons.pacific.edu/mlr/vol17/iss2/4
Aboriginal Title: The Special Case Of California

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Joe Barbieri**

"... and then one day a white man came and he had the right paper so we had to go."

The land title system that has developed in California is unique to the United States in the treatment of what is known as the "Indian right of occupation" or aboriginal title. Continued, well-publicized and highly emotional Indian title litigation in Maine, other northeastern states, the plains states, and the West establishes both the widespread existence and currency of the potent effect of claims of unextinguished aboriginal title. In both the public and private sectors, landholding and land management entities are being forced to re-

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1. Helen Knopf, Memories, ATLANTIC MONTHLY.
2. The terms "Indian right of occupancy," "Indian title", and "aboriginal title" are used interchangeably herein.
examine their bases of title in anticipation of possible challenges based on claimed aboriginal title.

This article examines the question of whether any unextinguished aboriginal title remains in California. The article will explore first, the origin of the doctrine of aboriginal title and the protections devised to ensure the preservation of the doctrine. Second, the discussion will focus on the history of the relations of the United States with California Indians concerning land title and the development of the land title system in California as the system related to Indian title. Finally, the article will explore the means of extinguishing aboriginal title and discuss how the application of the different methods of extinguishing aboriginal title relate to aboriginal title in California.

**Origins of the Doctrine of Aboriginal Title and the Non-Intercourse Act**

Aboriginal or Indian title is a permissive right of occupancy recognized by the sovereign in the original possessors of the land.\(^7\) In *Johnson v. McIntosh*, the classic statement of this principle, Chief Justice Marshall explained the theory of aboriginal title:

> In the establishment of these relations [between the discoverer and natives], the rights of the original inhabitants were in no instance entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a 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 dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

> While different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed, and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy ...  

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Conquest gives a title which the courts of the Conqueror cannot deny.\(^8\)

As later described by the Court, Indian title means "mere possession not specifically recognized as ownership by Congress . . . This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."\(^9\)

In contrast to aboriginal title is the concept of "recognized" title. Recognized title exists where Congress, through statute or treaty, grants a right of permanent occupancy within a specifically defined territory.\(^10\)

The doctrine of recognized title requires demonstration of an affirming intention by Congress to set aside the particular lands for permanent occupancy by Indians.\(^11\)

Whether an assertion of Indian ownership of land is made under the guise of Indian title or recognized title is of critical importance in at least two respects. The first goes to the factual proof of ownership of the lands. When a claim is made that land is owned by virtue of recognized title, the crucial element of proof is a demonstration of the affirmative government intent to recognize title; proof of the actual metes and bounds of the specific land owned by Indians will be readily found in the statute, treaty or executive order recognizing title. In contrast, affirmative government recognition such as approval by statute or other formal governmental action is not a prerequisite to a claim under aboriginal title.\(^12\) Instead, the proof of an aboriginal file claim requires the difficult, lengthy and costly showing of immemorial possession of the land to which the claim is made.\(^13\) The

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11. Sac & Fox Tribe of Okla. v. United States, 315 F.2d at 897; Strong, 518 F.2d at 563.
claimant must show actual, exclusive and continuous possession of the land claimed.\textsuperscript{14}

The second critical distinction between recognized and aboriginal title involves whether there has been a "taking". Land owned by virtue of recognized title which is appropriated by the government has been taken under the fifth amendment, and compensation must be paid to Indians holding under a claim of recognized title.\textsuperscript{15} Crucially, since many years may have passed since the taking, payment for a taking made under the fifth amendment includes an award for interest.\textsuperscript{16} As noted above, however, the United States may terminate aboriginal title held by Indians without any legally enforceable obligation to compensate the Indians for the "taking."\textsuperscript{17} Any compensation paid for the appropriation of Indian occupancy rights is, in a sense, "gratuitous" and allowed only pursuant to a clear statutory directive.\textsuperscript{18}

As \textit{Johnson} and progeny demonstrate, once the United States asserted dominion over Indian lands, the future right of the Indians to occupancy was subject to the absolute control of the federal government. This absolute control is composed of two elements that are mirror images of one another.\textsuperscript{19} First, the United States has the obligation to protect the Indian right of occupancy against intrusion from 95-69, 91 Stat. 273.) An example of how an aboriginal claim is proved can be found in Thompson v. United States, 8 Ind. Cls. Comm. 1, 31-39 (1959) (claim of the Indians of California); see also Tee-Hit-Ton, 384 U.S. at 285-288.


17. \textit{See} Tee-Hit-Ton, 348 U.S. at 279; Sioux Nation, 448 U.S. at 415 n.29.

18. \textit{See} Tee-Hit-Ton, 348 U.S. at 284; Tlingit and Haida Indians, 389 F.2d at 789. The distinction that compensation for the "taking" of aboriginal title is required only where authorized by Congress was clarified by the Supreme Court in \textit{Tee-Hit-Ton}. In United States v. Alsea Band of Tillamooks, 329 U.S. 40 (1946), the Court had held that eleven Indian tribes suing under a jurisdictional act were entitled to compensation for loss of their aboriginal title lands. Denying a distinction existed between original Indian title and recognized Indian title, the Court noted that "admitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid." \textit{Id.} at 47. The \textit{Tillamooks} case was distinguished in \textit{Tee-Hit-Ton} because it arose under a jurisdictional act specifically authorizing payment and therefore the quoted language was treated as dicta. Tee-Hit-Ton, 348 U.S. at 282.

19. This duality has been described as follows:

[It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' pro-
third persons. Second, the United States has the absolute and un-
fettered right to extinguish aboriginal title without compensation.

The Indian Non-Intercourse Act has been part of the law of the
United States since the law was first enacted in 1790.20 The Non-
Intercourse Act gives statutory recognition to both elements of the
federal power of the federal government over Indian title. The Non-
Intercourse Act prohibits the unfair, improvident, or improper Indian
disposition of Indian-owned or possessed lands to parties other than
the United States without the consent of Congress, and authorizes
the federal government to vacate any such disposition made without
consent.21 The Non-Intercourse Act, however, does not apply to trans-
actions in which the United States is dealing with the Indians.22 This
is an acknowledgement of the absolute and complete control of the
United States over aboriginal title.23

The Maine litigation provides the most graphic example of the effect
of the Non-Intercourse Act. The plaintiff tribes in that litigation sought
to recover 12.5 million acres of aboriginal land given in exchange
for some 23,000 acres under the terms of a 1794 treaty executed with
Massachusetts, the predecessor state of Maine, some four years after
the passage of the Non-Intercourse Act.24

property within the meaning of the Fifth Amendment to the Constitution. In any given situation
in which Congress has acted with regard to Indian people, it must have acted either in one
capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.
Fort Berthold Reservation, 390 F.2d at 691.

20. Indian Non-Intercourse Act (1790) 1 Stat. 137, Ch. 33. For a history of the Act see
Passamaquoddy I, 388 F. Supp. at 652, n. 1. Now set forth in the United States Code, the
Act provides:

No purchase, grant, lease or other conveyance of lands, or of any title or claim
thereof, 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. Every person who, not being employed under the authority of
the United States, attempts to negotiate such treaty or convention, directly or
indirectly, or to treat with any such nation or tribe of Indians for the title or purchase
of any lands by them held or claimed, is liable to a penalty of $1,000. The agent
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
of the United States appointed to hold the same, may, however, propose to, and
adjust with, the Indians the compensation to be made for their claim to lands within
such State, which shall be extinguished by treaty.


S.Ct. at 1250; Oneida Indian Nation, 414 U.S. at 667; Joint Trib. Coun. of Passamaquoddy
Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975) (hereinafter Passamaquoddy II); Nar-

22. See F.P.C. v. Tuscarora Indian Nation, 362 U.S. at 120.

23. Id.

24. See McLaughlin, Giving It Back To The Indians, 239 ATLANTIC MONTHLY 70 (Feb.,
1977).
The simple but powerful argument made by the tribes was that the purchase of the lands by the state was invalid since the purchase was not made by treaty or convention entered into pursuant to the Constitution.\(^\text{25}\) The real issue in the Maine cases, however, was whether the United States had any obligation to the Indians by virtue of the Non-Intercourse Act. Both the District Court and First Circuit held that the United States had a trust responsibility with respect to the protection of aboriginal title.\(^\text{26}\) Thus, the United States was obliged to do whatever was necessary to protect Indian land whenever the government became aware Indian rights had been violated.\(^\text{27}\) Moreover, the United States was in a fiduciary capacity with respect to protection of aboriginal title and this fiduciary capacity included a duty to investigate and take such action as may be warranted.\(^\text{28}\) The First Circuit did not reach the question of whether the trust relationship required the United States to sue in behalf of the tribes,\(^\text{29}\) nor did the court reach the substantive issue of whether Congress had acquired or ratified the land acquisitions of the state from the Indians.\(^\text{30}\) The action that the United States subsequently filed on behalf of the Indians was eventually settled\(^\text{31}\) and some $81,500,000 was appropriated to implement the settlement.\(^\text{32}\)

The typical legal and equitable defenses such as statute of limitations, laches, adverse possession, estoppel by sale, operation of state law and public policy are not available\(^\text{33}\) in actions brought to redress violations of the Non-Intercourse Act.\(^\text{34}\) The Non-Intercourse Act

\(^{25}\) See Passamaquoddy I, 388 F. Supp. at 652.
\(^{26}\) Id. at 652; Passamaquoddy II, 528 F.2d at 379.
\(^{27}\) See Passamaquoddy I, 388 F. Supp. at 662.
\(^{28}\) See Passamaquoddy II, 528 F.2d at 380.
\(^{29}\) Id. at 370.
\(^{30}\) Id. at 380-81.
\(^{33}\) See County of Oneida, 105 S. Ct. at 1252; Schaghticoke Tribe, 423 F.Supp. at 784-85; Narragansett Tribe of Indians, 418 F. Supp. at 803-06; Oneida Indian Nation of New York v. Oneida County, 719 F.2d 525, 537 (2nd Cir. 1983) aff'd, County of Oneida, 105 S. Ct. at 1245. In the Oneida County case the also unsuccessful contention was made that no private right of action was available to enforce the provisions of the Non-Intercourse Act. Oneida Indian Nation of New York v. Oneida County, 719 F.2d at 532-537. Although it did not reach that issue, the Supreme Court narrowly (5-4) held that the Indians had a federal common law right to sue to protect their aboriginal land rights. County of Oneida, 105 S. Ct. at 1252.
\(^{34}\) To establish a prima facie violation of the Non-Intercourse Act, it must be shown that the plaintiff is or represents an Indian "tribe" within the meaning of Act; the parcels of land at issue are covered by the Act as tribal land; the United States has never consented to the alienation of the tribal land; and the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandon-
simply restrains acquisition of Indian land by third parties other than in the manner prescribed in the Act.33 Furthermore, the argument that aboriginal title alone does not mean a “title” having the protection of the Non-Intercourse Act is “without merit”.36 Therefore, the most likely defenses available in Non-Intercourse Act litigation will be attempts to show either that the Indian tribe or Congress acquiesced in the alienation of aboriginal lands, that the Non-Intercourse Act was not intended to cover the particular land in dispute, or that the United States itself terminated Indian title.37

As will be seen, California land titles have been rendered immune from the kind of ancient Indian land claims that have created such consternation in the Eastern United States. Critically, unlike the history of Indian title transactions in the eastern states, the extinction of Indian title in California is directly traceable to the conduct and dealings by the United States with California Indians and their land title.

THE UNITED STATES AND CALIFORNIA INDIAN TITLES

Prior to the arrival of the first Spanish expeditions in 1766, approximately 100,000 to 300,000 Indians lived in the area that was to become the State of California.38 The Indians, who lived in a “primitive and aboriginal condition,” were divided into about 500

35. See United States v. Ahtanum Irrigation Dist., 236 F.2d. 321, 334, (9th Cir. 1956) cert. den. 352 U.S. 988 (1957); United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422 (4th Cir. 1938).
37. For example, Maine’s defenses to the claims by the Indian tribes were, first, that the Act was never intended to apply to Maine; second, whether the Act is applicable or not, the aboriginal possession of the Maine Tribes was extinguished before 1790; third, in any event, Congress, in admitting Maine to the Union in 1820 with knowledge of treaties between Maine’s parent state, Massachusetts, and the tribes, approved those treaties as a matter of law. Letter of Joseph E. Brennan, Attorney General of Maine, June 20, 1977, pp. 1-2. See Oneida Indian Nation of New York v. County of Oneida, 719 F.2d 539 (claim of subsequent federal ratification). Given the narrowness of recent rulings in this area, County of Oneida, 105 S. Ct. at 1245, a time bar may be successfully asserted in an appropriate case. Id. at 1266 (Stevens, J., dissenting). The Supreme Court recently agreed to hear a case in which the Fourth Circuit upheld a Non-Intercourse Act claim despite the claim that Congress, by later action, had ratified the action of the State. Catawba Indian Tribe of S.C. v. State of S.C., 718 F.2d 1291 (4th Cir. 1983), aff’d (4th Cir. 1984) (en banc) 740 F.2d 305, cert. granted (1985) 44 S. Ct. Bull. 3023.
38. Claims of California Indians: Hearings on H.R. 491 Before the Committee on Indian Affairs, 70th Cong., 1st Sess. 23 (1928) (Statement of Congressman Lea) (hereinafter 1928 Hearings) (200,000 estimated population); Castillo, The Impact of Euro-American Exploration and Settlement in 8 HANDBOOK OF NORTH AMERICAN INDIANS 99 (R. Heizer, ed., Smithsonian, 1978) (nearly 300,000 unconquered natives); Cook, Historical Demography in Id. at 91 (310,000, although estimates range from 133,000 to 260,000).
separate and distinct bands, tribes and rancherias, and enjoyed the sole use, occupancy and possession of all the lands in the state, undisturbed by any European power. While many of the Indian groups were nomadic, estimates show that between 45 and 500 tribes or tribelets60 lived in defined (albeit de facto) areas of the state.41 These more or less definite boundaries were known and respected by other Indians.42

As part of the conquest of the New World, Spain exerted dominion over the California territory, and directed the establishment of twenty-one missions on the western coast of the territory.43 Some Indians, loosely called Mission Indians,44 became “civilized” and lived and worked under the protection of the missionaries.45 However, the greater part of the state was left to the undisturbed occupancy of the Indian inhabitants, comprising about four-fifths of the Indians then living in the state.46

After Mexico revolted and established independence from Spain in 1824, the California Indians became subject to Mexican rule.47 The missions were secularized in 1834, and the Mexican government supervised the formation of communal villages on mission lands.48 Some of the Indians received land grants from the Mexican government.49

In 1848, under the terms of the Treaty of Guadalupe Hidalgo that concluded the Mexican-American War, the Mexican government ceded

41. See 1928 Hearings, supra note 38, at 19; Castillo, supra note 38, at 101.
42. See Thompson, 8 Ind. Cls. Comm. at 6.
43. See Castillo, supra note 38, at 100-102.
46. See Castillo, supra note 38, at 107; Hoopes, Domesticate or Exterminate 18 (Redwood Coast Public 1975) (hereinafter Hoopes); Hornbeck, supra note 44, at 35.
47. See Castillo, supra note 38, at 104.
to the United States a great area of land including the land which would later comprise the State of California.\textsuperscript{50}

During the period of Spanish and Mexican sovereignty, numerous grants of large areas of land in the ceded territory were made to private citizens by those governments; several hundred such grants were for lands within the present boundaries of California.\textsuperscript{51} Under the eighth article of the Treaty of Guadalupe Hidalgo, the United States expressly recognized the land grants made by the prior sovereigns and agreed to legitimate title to such lands.\textsuperscript{52}

Pursuant to the terms of Articles VIII and IX of the Treaty, the United States agreed to maintain Mexican citizens\textsuperscript{53} residing in the ceded territories in the previous enjoyment of their liberty and property.\textsuperscript{54} To effectuate the intent of the Treaty to honor the land laws of the prior sovereign, the United States established procedures to review the legitimacy of the grants to private persons made by the prior sovereign.\textsuperscript{55}

In practice, however, the rush of events in California started by the discovery of gold in 1848 spelled the doom of any attempt to

\textsuperscript{50} See 9 Stat. 922. A map attached to the treaty depicted the area ceded. 5 MILLER, \textit{TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES} (Dept. of State Pub. No. 1017, 1937).

\textsuperscript{51} Jones Report, \textit{supra} note 45, at 95-114 (Exhibit 33); \textit{Thompson}, 8 Ind. Cls. Comm. at 6. 553 Spanish and Mexican land grants, aggregating 8,859,135.60 acres were validated and confirmed by the United States pursuant to the Private Land Claims Act, discussed \textit{Id.} at 7. An additional 23 grants, totalling 42,469.73 acres, were confirmed and granted to the California Mission Indians. \textit{Id.} The total land encompassed in the State of California is about 100,000,000 acres. \textit{Hornbeck, supra} note 45, at 98.


\textsuperscript{53} The Treaty distinguished between "Mexicans" and "Indians." For instance, the sacredness of the obligation to the Mexicans would "not be lost sight of" by the United States "when providing the removal of the Indians" from the territories. 9 Stat. 932. And "special care was to be taken not to place Indian occupants under the necessity of seeking new homes." \textit{Id.} Therefore the Treaty arguably did not guarantee the Indians the same broad protections received by the Mexican citizens resident in the State. But United States v. Ritchie, 58 U.S. (17 How.) 525, 539-40 (1854), held that Indians were citizens of Mexico. The Treaty of Guadalupe Hidalgo and the acts passed to implement the provisions of the Treaty have been construed to extend the protection of previous enjoyment of liberty and property to Indians and Mexicans alike. See \textit{id.; Armijo}, 72 U.S. at 448-49; Barker v. Harvey, 181 U.S. 481, 492 (1901); see \textit{Kenney, supra} note 45 at 9; \textit{Indians of California}, 98 Ct. Cls. at 586; United States v. Dann, 706 F.2d 919, 928 (9th Cir. 1983) (\textit{Dann II}), rev'd on other grounds (1985), 105 S. Ct. 1058.


\textsuperscript{55} E.g., \textit{Barker}, 181 U.S. at 492-99; \textit{Hope}, \textit{supra} note 46, at 8.
treat California Indian titles with the consideration that was accorded Indian titles in other parts of the United States. Not only did the population of California increase dramatically, but this increased population, hungry for easy wealth, immediately clashed with the Indians.  

Uncertain about the nature and state of land title in the newly acquired territory, and recognizing the need for secure land titles, the federal government commissioned several reports to be prepared on the subject. Although written from an ill-concealed bias against Indians, these reports concluded, based on their investigation of Spanish and Mexican authorities, that the Spanish and Mexican governments did not attribute any value to Indian title. The laws enacted by the Spanish and Mexican governments recognized the rights of the Indians only to the lands they possessed. This was not a

56. See Hornbeck, supra note 44 at 64-65.
57. "As adventurers from every state and a dozen nations scrambled to reap the golden harvest, law and order broke down. The white and Mexican Californians watched with anguish as the newcomers seized their lands, murdered and hanged one another, and trod over the local Indians in the race for gold." J.M. Burns, The Vineyard of Liberty 471-472 (1982). While there were few white people in California, gold was discovered in 1848, followed by invading waves of gold seekers. Few, if any, rights of the Indians that interfered or stood in the way of gold seekers were respected. The Indians at peace in the land of their fathers suddenly found themselves without any security or life or respected rights of property or any place that they could with confidence call home." 1928 Hearings, supra note 38, at 23; Castillo, supra note 38, at 107-108; Letter Brig. Gen. B. Riley to Lt. Col. J. Hooker (1849) 31st Cong., 1st Sess., Ser. 573, Doc. 17, p. 925-926; Letter, Brig. Gen. B. Riley to Maj. Gen. R. Jones (1849) at Id. p. 790.
58. See Peralta v. United States, 70 U.S. (3 Wall.) 434, 439 (1885); Botiller, 130 U.S. at 244.
59. Id.

The permanent prosperity of any new country is identified with the perfect security of its land titles. Indeed, there can be no greater drawback to the prosperity of a country than disputed land titles. Prudent men will be deterred from emigrating to a State where they cannot obtain indisputable title, and must consequently be exposed to the danger of strife and litigation in respect to the soil on which they dwell. Any uncertainty respecting the security of land titles arrests all valuable improvement, because no prudent man will expend his means for this purpose while there is a danger that another may deprive him of the fruit of his labors.

Letter, James Buchanan to William V. Vorhies (1848) 31st Cong. 1st Sess., Ser. 573, Doc. No. 17, pp. 8-9. This letter conveyed the views of President Taylor to be made known to the inhabitants of California. Id. at 6; Cong. Globe, 31st Cong., 1st Sess. 1908 (1850).
62. E.g., Jones Report, supra note 45, at 41-42 (Exhibit No. 3), 77-78 (Exhibit No. 21);
possessory right to the whole territory, but only to so much land as the Indians actually used.63 In fact, the reports found that the Spanish and Mexican governments recognized Indian title only to the extent that, once settled in communities, the Indians needed land to live on. The former governments did not recognize any title to the soil in the wild or wandering tribes.64 The reports recommended that the United States honor these restricted Indian title rights:

The continued observance of this law, and the exercise of public authority to protect the Indians in their rights under it, cannot . . . produce any great inconvenience, while a proper regard for long recognized rights and a proper sympathy for an unfortunate and unhappy class would seem to forbid that it should be abrogated unless for a better. The number of subjugated Indians is now too small, and the lands they occupy too insignificant in amount for their protection, to extent of the law, to cause any considerable inconvenience. Besides, there are causes at work by which even their present small number is rapidly diminishing, so that any questions concerning them can be but temporary . . . ’65

Although California was in desperate need of a government, national political considerations concerning the free-state/slave-state balance delayed admission into statehood.66 Finally, as the result of the Great Compromise,67 California was admitted into statehood on September 9, 1850.68 Unlike some other enabling acts, no mention was made of protecting Indian rights in land reserved for the public domain.69

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63. See id.; Robinson, supra note 60, at 11.
They [the Spanish newcomers] brought with them to California the Laws of the Indies, controlling Spanish colonization and governing colonial ownership and use of land. These laws were full of pious recognition of the rights of Indians to their possession, the right to as much land as they needed for their habitations, for tillage, and for the pasturage of their flocks. So far as the California Indians were concerned, this meant, practically, that when they were reduced, that is, converted to Christianity and established within or around a mission area, they would have these theoretical property rights. There was, of course, no recognition of Indian rights to land not actually occupied or necessary for their use, nor was there any policy of purchasing Indian titles. Obviously only Christianized California Indians could share in any of the provisions of Spanish law.

64. See Jones Report, supra note 45, at 32-34; Byrne, 74 Cal. at 634, 637.
65. See Jones Report, supra note 45, at 33.
66. See Burns, supra note 57, at 472.
67. Id. at 473-75.
69. For instance, by the Act of February 22, 1889, North Dakota, South Dakota, Montana and Washington were admitted as states. 25 Stat. 676. Among other provisions, the people of those states agreed that:
Immediately after California was admitted, Congress, fearful of increased hostility between whites and Indians over the occupation and ownership of land, sought to settle Indian title and private land rights in the newly admitted State. On September 11, 1850, only one day after they were sworn in as California Senators, John Fremont and William Gwin introduced bills providing for the extinguishment of Indian territorial claims. Fremont’s bill was reported back with an amendment that authorized the President to appoint agents for Indian tribes in California and appropriated money for the President to deal with the tribes. In the debates that followed, the comments of the Senators reflected the general uncertainty about the nature of Indian rights. Quoting from Spanish law, Fremont echoed the earlier reports that found only certain Indians had a right of occupation under Spain and Mexico:

The statements that I have given... are sufficient to show that the Spanish law clearly and absolutely secured to Indians fixed rights of property in the lands they occupy beyond what is admitted by the Government in its relation with its own domestic tribes, and that some particular provisions will be necessary in order to divest them of these rights. We hold these by strong hand alone. The Indians dispute our right to be there, and they extend the privilege which the law secured them of killing the cattle to that of killing the owner whenever they find an occasion. Our occupation is in conflict with theirs, and it is to render this occupation legal and equitable, and to preserve the peace, that I have introduced this bill. It recommends itself to the favorable consideration of the Senate by its obvious necessity, and because it is right in itself, because it is politic, and because it is conformable to the established custom of this Government.

... they forever disclaim all right and title to the unappropriated public lands lying within the boundaries [of the new states] and to all lands lying within said limits owned or held by any Indian tribes; and that until the title to thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;...

Sec. 4, 25 Stat. at 667.


72. Fremont was the successor to the grantee of an extremely valuable land grant, encompassing gold bearing regions. Robinson, supra note 60, at 143-44. This grant was later confirmed. Fremont v. United States, 58 U.S. (17 How.) 542 (1855).


74. Id. at 1816-1817; Anderson, supra note 70, at 8.

Senator Gwin doubted that the Indians had any right in land whatsoever but urged that the matter be investigated.\textsuperscript{76}

Eventually, after considerable discussion, Congress passed an amended version of Fremont’s bill.\textsuperscript{77} By the Act of September 30, 1850, Congress appropriated $25,000 to enable the President to appoint three commissioners to study the “California situation and negotiate treaties with the various Indian tribes in California.”\textsuperscript{78}

Between March 19, 1851 and January 1852, the three commissioners appointed by President Fillmore met with some 402 Indian chiefs and headmen and negotiated a series of eighteen treaties.\textsuperscript{79} The tribes and bands that negotiated with the United States constituted about one-third to one-half the total number of the members of the tribes and bands then living in California.\textsuperscript{80} The treaties were communicated to the Senate by President Fillmore on June 1, 1852.\textsuperscript{81}

At the time the treaties were negotiated, California Indians had aboriginal title to nearly 75,000,000 acres of the state.\textsuperscript{82} Typically, under the terms of these treaties, the Indians agreed to live under the jurisdiction and authority of the United States Government in peace and friendship with United States citizens and to make a blanket cession, quitclaim and relinquishment to the United States of all their rights in the land.\textsuperscript{83} As far as Indian title was concerned, a typical treaty provided:

The said tribes hereby severally relinquish, and forever quit claim to the government of the United States all the right, title, claim, or interest, of whatsoever character, that they, or either of them may have had, or now hold, in and to any lands in the limits of the State of California, or the United States.\textsuperscript{84}

In return for their relinquishment of ownership, the Indians were promised reservations of land, described in each treaty, totalling some

\textsuperscript{76} Id. at 1816.
\textsuperscript{77} E.g., id. at 1816-1817, 1828, 2008-2009, Appendix, pp. 1706-08; Anderson, supra note 70, at 12-13.
\textsuperscript{78} 9 Stat. 544, 558.
\textsuperscript{79} See Kenney, supra note 45, at 10; Kappler, Indian Affairs, Law and Treaties 1081-1128 (1927). For a narrative treatment of the history of treaty-making with certain of the California Indians see Anderson, supra note 70, at 13-26; Hoopes, supra note 46, at 27-81; Heizer, supra note 38, at 701-04.
\textsuperscript{80} See Indians of California, 98 Ct. Cls. at 591; Heizer, supra note 38 at 703. These treaties were not negotiated with all tribes in California. Id. In fact, 14 of the 139 signatory groups were duplicates and 13 were unidentifiable. Id. Also the land ceded by such treaties was not specified. Id.
\textsuperscript{81} See Kappler, supra note 79, at 1081, n.1.
\textsuperscript{82} See Indians of California v. United States, 98 Ct. Cls. at 588.
\textsuperscript{83} See id. See also Kenney, supra note 45, at 10.
\textsuperscript{84} See Kappler, supra note 79, at 1082 (Treaty with the Si-Yan-Te).
8,518,900 acres. The Indians were further promised specific quantities of goods, supplies, livestock and clothing.

Any hopes for a peaceful resolution were doomed by the emigrants who had been lured to California by the promise of Gold Rush wealth. Throughout the state, particularly through newspapers and government officials, the desire to remove or exterminate the Indians was expressed and by January 1852, a strong, vocal anti-treaty attitude developed throughout the state. Typical was the view of the Governor of California who demanded removal of the Indians through federal military intervention.

Eventually the rumors about the treaties led to meetings between the United States treaty commissioners and the state legislature. Committees of both legislative houses were formed to investigate the treaties. One State Senate special committee on the disposal of the public lands prepared a lengthy memorial setting forth the understanding of the committee regarding the problem and proposed that a system of missions rather than reservations be established. The California Senate committee specifically formed to inquire into the treaties recommended against the policy pursued by the commissioners in entering into treaties with the Indians in California. That Senate committee submitted concurrent resolutions instructing the United States Senators of California to oppose the confirmation of any and all treaties made with the California Indians granting to those Indians the exclusive right to occupy any of the public lands in California. The Senators were instructed to use their best endeavors to induce the United States to remove the Indians from the State. The Assembly Committee made similar proposals. Substantially identical resolutions opposing ratification of the treaties were eventually adopted by both houses.

85. See Indians of California, 98 Ct. Cis. at 598.
86. See Heizer, supra note 38, at 702; Kenney, supra note 45, at 56-83. Some $1,405,799.48 worth of articles and chattels were promised by the treaties. Id. at 56, (Sched. 2). These articles included coarse calico (at $3.15/yd), pants (at $2.25/pr) and flannel shirts (at $2.00 each). Id. at 57, (Sched. 2A).
87. See Hoopes, supra note 46, at 82.
88. "Our best policy, and perhaps that of the General Government, would be to remove them beyond the confines of the State." Calif. Sen. Journal, 3rd Sess., 21 (1852) (Message of Governor McDougal); see also Hoopes, supra note 46, at 83.
93. Id.
of the California Legislature.\footnote{95} The opposition of the state legislature was effectively communicated to the California Senators, \footnote{96} then holding the balance of power between the Whigs and the Democrats.\footnote{97} Although President Fillmore and his Secretary of Interior supported ratification,\footnote{98} the Senate ultimately refused to ratify any of the treaties.\footnote{99} The reasons for Senate rejection were best expressed by Senator Weller of California. Speaking in support of an appropriation designed to preserve peace with the California Indians after the failure of the Senate to ratify the treaties, Senator Weller stated:

> We who represent the state of California were compelled, from a sense of duty, to vote for the rejection of the treaties, because we knew it would be utterly impossible for the General Government to retain these Indians in the undisturbed possession of these reservations. Why, there were as many as six reservations made in a single county . . . and that one of the best mining counties in the State. They knew that these reservations included mineral lands, and that, just so soon as it became profitable to dig upon the reservations than elsewhere, the white man would go there, and that the whole Army of the United States could not expel the intruders.

> It was, therefore, under this stern necessity that we were compelled to reject the treaties . . . after the Indians complied with them . . . It will be hard indeed to explain to these Indians how it came that the formal treaties made with your accredited agents have been violated.\footnote{99}
After the Senate refused to ratify any of the eighteen treaties, the treaties were classified as secret.\textsuperscript{100}

Pending the advice and consent of the Senate on the treaties, federal officials induced the tribes to remove from their original habitats to the "reservations" specified in the treaties.\textsuperscript{101} With the rejection of the treaties, the California Indians became homeless. Ultimately the California Indians were reduced through starvation, disease and murder to a population of only about 17,000.\textsuperscript{102} One commentator described the effect of the failure to ratify the treaties:

\ldots The Indian population was reduced \ldots. Much of this wantonly destroyed humanity and a great deal more of native culture would have survived if the California Indians had been protected on the reserves stipulated in the 18 treaties. But with the failure of the U.S. Senate to ratify the very treaties they had authorized, the California Indians \ldots were helpless [citations omitted]. In the history of California Indians no other single event (that is "non-event") had a more rapid destructive effect on their population and culture than the about-face the Senate made between authorizing president Fillmore \ldots to make treaties and its failure \ldots to ratify those treaties.\textsuperscript{103}

An understandable desire to place land title in California on a solid foundation arose during the period in which the treaties were negotiated.\textsuperscript{104} As a result, on March 3, 1851, Congress enacted "An Act to Ascertain and Settle the Land Claims in the State of California."\textsuperscript{105} Under the terms of the Land Claims Act, "each and every person claiming lands in California by virtue of any right or title derived by the Mexican government" was required to present a claim\textsuperscript{106} to a three-person Board of Land Commissioners ("Land Commissioners") appointed with the approval of the Senate.\textsuperscript{107} The Land Commissioners were to decide on the validity of the claims presented,\textsuperscript{108} and United States would issue patents to those whose

\begin{thebibliography}{100}
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\bibitem{100} See 1928 Hearings, supra note 38, at 86. For a narrative treatment of the rejection of the treaties, see Hoopes, supra note 46, at 97-121; Heizer, supra note 38, at 701-704.
\bibitem{102} See Kenny, supra note 45, at 19. See also Heizer, supra note 40, at 704; Hornbeck, supra note 44, at 35.
\bibitem{103} Heizer, supra note 40, at 704.
\bibitem{104} E.g., Fremont, 50 U.S. at 553-554; Summa, 104 S. Ct. at 1756.
\bibitem{105} Act of March 3, 1851, 9 Stat. 631. (Hereinafter referred to as the Land Claims Act).
\bibitem{106} Id. at section 8, 9 Stat. at 632.
\bibitem{107} Id. at section 1, 9 Stat. at 631.
\bibitem{108} Id. at section 8, 9 Stat. at 632.
\end{thebibliography}
valid title was confirmed.\textsuperscript{109} All lands, the claim to which was invalid or not presented within two years of the date of the Land Claims Act, would pass into the public domain.\textsuperscript{110}

Further, under section 16 of the Land Claims Act, the Land Commissioners were ordered to "ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblo or Ranchero Indians."\textsuperscript{111} This duty was presumably performed.\textsuperscript{112}

On March 3, 1853, "An Act to Provide for the Survey of the Public Lands in California, the Granting of Pre-Emption Rights Therein, and for Other Purposes" was adopted.\textsuperscript{113} Not coincidentally, the Act of March 3, 1853 became effective on the same date on which the lands, title to which was not applied for pursuant to the Land Claims Act, passed into the public domain by virtue of the two-year statute of limitation contained in the Land Claims Act.

The Act of March 3, 1853 provided that public lands in California, other than those claimed by recipients of Spanish or Mexican land grants, granted to the State for public schools or reserved as mineral lands, were subject to pre-emption under the Pre-emption act of 1841.\textsuperscript{114} However, the Act of March 3, 1853 was not construed to authorize settlement of "... tracts of land in the occupation or possession of any Indian tribe, or grant any pre-emption right to the same."\textsuperscript{115}

The effect of these two acts, particularly the Land Claims Act, on then-existing aboriginal title historically has been the subject of some

\textsuperscript{109} Id. at section 13, 9 Stat. at 633. These patents were deeds of the United States that operated as a quitclaim of any claim of interest of the United States. Beard v. Federy, 70 U.S. (3 Wall) 478, 491 (1865). Such patents were a record of the action of the United States on the claimant's title as such title existed when the United States acquired California. Id. \textsuperscript{110} Id.; Rodrigues v. United States, 68 U.S. 582, 588 (1863); Newhall v. Sanger, 92 U.S. 761, 763-64 (1875); Bottiller, 130 U.S. at 249.


\textsuperscript{112} See Barker, 181 U.S. at 493; Thompson, 8 Ind. Cls. Comm. at 36-38. Although Thompson, referred to such a report, the authors have been unable to find any such report. Cf. Report of California Land Commissioner, 33rd Cong., 2nd Sess., S. Ex. Doc. 1, Ser. 746, 3 (1854).

\textsuperscript{113} Act of March 3, 1853, 10 Stat. 244 (hereinafter Act of March 3, 1853).

\textsuperscript{114} Id. at sec. 6, 10 Stat. at 246. Pre-emption defines the preferential right of purchase given to actual settlers. Robinson, supra note 60, at 167. A brief history of the pre-emption law and its operation in California is found in Robinson, Id.

\textsuperscript{115} Act of March 3, 1853, supra note 113, sec. 6, 10 Stat. at 246. This provision also recognizes that on March 3, 1853, Congress authorized the President to establish five military reservations in California for Indian purposes. See Act of March 3, 1833, Stat. 238.
controversy.116 Even today, litigation concerning the claimed existence of unextinguished aboriginal title is vigorously pursued on behalf of Indian claimants.117 Not surprisingly, the California Indians claim to have been unaware of the need to present their claims before the Land Commissioners, and, therefore, assert that no such claims need to have been or were made.118

After 1852, the United States made no further effort either to negotiate new treaties, or renegotiate the rejected treaties with the California Indians.119 The United States dealt with the California Indians either through special legislation passed by Congress, or through Executive Orders of the President.120

Ultimately, the United States statutorily confirmed the unstated policy of removal of the California Indians that had begun with the treaty negotiations. One manifestation of this new policy was the creation of Indian reservations in California.121 For example, Congress gave the President discretion to set apart, "... not exceeding four tracts of land, within the limits of said State, to be retained by the United States for the purposes of Indian Reservations, which shall be of suitable extent for the accommodations of the Indians of said State, and shall be located as remote from white settlements as may be found practicable ..."122 The President could also alter and enlarge reservations from time to time in light of experience.123 Accordingly, reservations were established and periodically were altered

117. E.g., U.S. ex rel Chunie v. Ringrose, et. al., U.S.D.C., C.D. Cal. No. 84-4144 DWW (JRX), app. pdg. (9th Cir. 1985) No. 85-5508. In that case, representatives of the Island Chumash Indians claim aboriginal ownership of certain of the Channel Islands and surrounding tide and submerged lands lying off the Santa Barbara County coast. These Channel Islands were the subject of confirmed Mexican land grants. United States v. Castillero, 64 U.S. (23 How.) 464, 469 (1859); Manuel Carrillo de Jones v. United States, (S.D.Cal. 1855) No. 56.
118. See Indians of California, 98 Ct. Cls. at 592; Thompson, 8 Ind. Ct. Comm. at 8, 23-29; Robinson, supra note 60, at 15-16; Goodrich, supra note 96, at 98-99.
119. See Robinson, supra note 60, at 15-20; Stewart, Litigation and Its Effects in 8 Hand-
120. Id., Kenney, supra note 45, at 22-23. These acts and executive orders are collected in Kappler, supra note 79, at 815-32. For a narrative treatment of this period, see Castillo, supra note 38, at 110-127.
123. See Donnelly v. United States, 228 U.S. 243, 257 (1912), on reh'g, Donnelly v. United States, 228 U.S. 708 (1913); Mattz, 412 U.S. at 493-94.
Since 1864, 117 reservations have been set aside by executive order, comprising a total of about 632,000 acres. These lands held for the Indians "... were largely—not entirely—the desert, mountain, grazing lands, isolated, ill-adopted to agriculture, largely without water, the lifeblood of agriculture in California—waste lands, those left after the host of settlers had filed on and became possessed of the water and practically all the best lands of the State."

On January 18, 1905, due in large part to public outcry, the wall of secrecy that surrounded the eighteen unratified treaties was removed by order of the Senate. The publication of the treaties sparked interest in the plight of the Indians of California, and efforts were made to legislate a special jurisdictional act that would enable the Indians to bring claims in recompense of the unfulfilled treaties. The first such proposal, made in 1920, was unsuccessful, as were the bills immediately following.

Finally, in 1927, the California legislature passed an act authorizing the California Attorney General to bring suit against the United States in the Court of Claims on behalf of the California Indians. The law was to take effect when Congress passed legislation permitting suit against the United States.

In 1928, Congress responded by passing the California Indians'
Jurisdictional Act of 1928. There are several pertinent features of this distinctive legislation. First, the "Indians of California" were defined as "all Indians who were residing in the State of California as of June 1, 1852, and their descendants now living in said state." Second, the Court of Claims was given jurisdiction over "[a]ll claims of whatsoever nature . . . [against the United States] by reason of lands taken from [the Indians of California] . . . by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians . . . ." Such claims could be submitted by petition to the Court of Claims by the California Attorney General. These claims would be allowed despite the failure to submit them to the Land Commissioners by virtue of the Land Claims Act. The Jurisdictional Act of 1928 further declared that:

The loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief.

Any decree for compensation was limited to the compensation promised in the unratified treaties, and compensation for land was limited to only $1.25 an acre. Moreover, any payments or expenditures made by the United States on behalf of any California Indians prior to the date of the award would be set off against the final amount awarded. The judgment was not to be distributed on a per capita basis, but placed in the Treasury of the United States for the benefit of the Indians. The State of California was to be reimbursed for costs, but not for the services of the California Attorney General.

Besides the limitation on compensation for lands and the allowance of set-offs, the most glaring deficiency of the 1928 Jurisdictional Act was the fact compensation for all Indians of California was to be

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141. Id.
granted on the basis of the treaties made with only one-third to one-half of California Indians. In other words, the Indian tribes who were not parties to the unratified treaties were not to be compensated for lands from which they were removed, but were left to share in the award based on the failure of the United States to honor the promise to set aside lands for the other one-third to one-half of California Indian tribes. Moreover, the United States would be allowed to set-off all appropriations made on behalf of any California Indians.

On August 14, 1929, the Attorney General of California filed the original petition with the Court of Claims. When the report of potential offsets was filed in 1934, the report showed that the offsets would largely vitiates any compensation for the lands taken. As a result, numerous attempts were made to amend the limitations on the final recovery contained in the original Act, including, inter alia, bills to broaden the base of recovery by including non-treaty Indians, and bills to increase the price to be paid for lands from $1.25 to $5.70 per acre.

The facts of the case were finally presented to the Court of Claims on May 7, 1941, by Attorney General Earl Warren. The decision of the Court of Claims was delayed pending last-ditch efforts to broaden the base of recovery.

Finally, on October 25, 1942, the Court of Claims, emphasizing the equitable nature of the claim based on the unfulfilled promise of the United States to ratify the treaties, established the liability of the United States for the broken promises. Significantly, however, the court denied recovery for interest as “the case does not involve payment for land of which the Indians had a cession, or use and occupancy . . . there has been no taking which under the Constitution would require just compensation to be paid and therefore would involve interest.” The United States Supreme Court denied certiorari
on the question of interest.\textsuperscript{151}

Fearful that a trial on the issue of damages would produce no recovery because of the set-off provision, the California Attorney General negotiated a settlement of $5,024,842.34, which was approved by the Court of Claims.\textsuperscript{152} Congress appropriated the sum in payment of the judgment.\textsuperscript{153}

As was the case with \textit{Indians of California}, tribes seeking to redress grievances against the United States had long been forced to lobby for the passage of specific jurisdictional acts that provided the requisite consent of the sovereign to suit. The process was enormously time-consuming, often requiring many years to have a single jurisdictional act passed. Once suit was commenced, the Court of Claims was often prevented from giving adequate relief if the narrowly defined jurisdiction did not extend to all aspects of the tribe's claim.\textsuperscript{154} Indeed, when the Attorney General of California recommended accepting the settlement, he suggested that the Indians of California seek further compensation "... for the injustice practiced upon them by the rejection of the treaties negotiated in 1851-52, and to satisfy their legal, moral and equitable claims against the United States of America."\textsuperscript{155}

Due to the inadequacies of the jurisdictional act approach to resolving Indian claims,\textsuperscript{156} Congress in 1946 established the Indian Claims Commission (hereinafter "Claims Commission").\textsuperscript{157} In brief, the Claims Commission was empowered to hear a broad range of claims\textsuperscript{158} by Indians against the United States, including claims for taking of aboriginal title to lands.\textsuperscript{159} As a consequence of a long, drawn-out and complicated series of proceedings before the Claims Commission, the Indians of California were finally compensated for claims based on loss of aboriginal title.

\begin{itemize}
\item \textsuperscript{151} See \textit{Indians of California} v. United States, 319 U.S. 764 (1944).
\item \textsuperscript{152} \textit{Indians of California} v. United States, 102 Ct. Cl. 837 (1944). For a discussion of the settlement, see \textit{Kenney}, \textit{supra} note 45, at 35-49.
\item \textsuperscript{153} See 59 Stat. 77, 94. A distribution of this fund has been made. 25 U.S.C. §§658, 661.
\item \textsuperscript{154} United States Indian Claims Commission, Annual Reports, 1968-74, Appendix 7, p. 1; see \textit{Kenney}, \textit{supra} note 45, at 49.
\item \textsuperscript{155} See \textit{Kenney}, \textit{supra} note 45, at 49.
\item \textsuperscript{156} Assiniboine Indian Tribe v. United States, 121 F. Supp. 906, 914 (Ct. Cl. 1954).
\item \textsuperscript{157} See \textit{supra} note 14 and accompanying text; see also 25 U.S.C. §70 et. seq.
\item \textsuperscript{158} See 25 U.S.C. §70a; United States v. Tillamooks, 329 U.S. at 55 (Black, J., concurring); Thompson v. United States, 1 Ind. Cls. Comm. 366, 378 (1950) ("Jurisdiction so broad that no tribe could later come back and say it had a claim which the commission was not authorized to consider."); F. \textit{Cohen}, \textit{Handbook of Federal Indian Law} 160-162 (1982 ed.).

\end{itemize}
In a suit docketed *Thompson v. United States*, a group of Indians petitioned for the exclusive right to present, on behalf of all the “Indians of California,” all claims to land in California based on aboriginal title. The “Indians of California” were defined by the petitioners to include the same class of Indians that was described and defined in the 1928 Jurisdictional Act—all Indians living in the State of California as of June 1, 1852, and their living descendants. Before the Claims Commission, the United States successfully challenged the characterization of the “Indians of California,” claiming that the “Indians of California,” as defined, were not an “identifiable” group of Indians within the meaning of the Claims Commission Act. The Court of Claims, relying on the legislative history of the Indian Claims Commission Act and on the model of the 1928 Jurisdictional Act, reversed the finding of the Claims Commission and found that the “Indians of California” were an identifiable group for purposes of presenting a claim before the Claims Commission.

On remand, the Claims Commission denied the “Indians of California” the exclusive right to represent all Indians of the State, pointing to language in the Claims Commission Act which allowed a tribal organization, where one existed, to be the exclusive representative. Individual tribal organizations were therefore allowed to and did file claims distinct from the claim of the “Indians of California.” In order to facilitate the manageability of the claims before the Claims Commission, on motion of the Indian groups (including the “Indians of California”), the Claims Commission divid-
ed California into Area A and Area B.\textsuperscript{169} Area A comprised the lands in California that were subject to aboriginal claims of certain designated individual tribal organizations;\textsuperscript{170} the remaining lands in California, known as Area B, were subject to the aboriginal claims brought before the Claims Commission on behalf of the "Indians of California" and generally comprised California west of the Sierra Nevada Mountains.\textsuperscript{171}

In 1964, representatives of the Indians of California, as well as the Pit River and Mission Indians, agreed to a tentative settlement of their claims.\textsuperscript{172} The land involved in the settlement comprised 57,000,000 acres, after deduction of land grants and reservations paid for as the result of the 1944 settlement;\textsuperscript{173} 29 million dollars was to be paid in satisfaction of this claim.\textsuperscript{174} The settlement stipulation also provided:

The stipulation and entry of final judgment shall finally dispose of all claims or demands which any of the petitioners and claimants represented in any of said dockets . . . have asserted or could have asserted against defendant in any of said cases either before or after any consolidation, and petitioners (and all claimants represented thereby), and each of them, shall be barred from asserting all such claims or demands in any future action.\textsuperscript{175}

\textsuperscript{170} Id.; Thompson, 13 Ind. Cls. Comm. at 373, n.2.
\textsuperscript{171} See Thompson, 6 Ind. Cls. Comm. at 673; Thompson, 13 Ind. Cls. Comm. at 381.
\textsuperscript{172} See Thompson, Ind. Cls. Comm. at 507-510. For a detailed history of the procedural aspects of the cases that led to the settlement, see id. at 369-384.
\textsuperscript{173} See id. at 382. The Indians of California contended that Spanish and Mexican land grants were made subject to the Indians' right of occupancy, and that therefore, the rights were preserved under the Treaty of Guadalupe Hidalgo. However, the Commission held:

It is plain that by the terms of the Treaty of Guadalupe Hidalgo, there passed to the United States full title to all the lands of the Republic of Mexico lying northerly of the boundary line between the United States and Mexico fixed by Article V of said treaty. And . . . the Mexican Republic could not and did not cede to the United States lands which either it or the Spanish Crown had granted prior to May 13, 1846 (Art. 2d of the Protocol), so had the Mexican Republic recognized Indian right of occupancy in Spanish and Mexican grants it would have been necessary to require the United States to recognize and respect such Indians rights in the granted lands as it required our Government to respect and acknowledge the grantees' rights and titles in the granted lands. Since no such provision was made in the treaty, the Indians had no rights of occupancy in the granted lands that we are required to consider as obligations of the United States.

Thompson, 8 Ind. Cls. Comm. at 20. The Area B lands were therefore reduced by the acreage of the confirmed Spanish and Mexican grants and confirmed grants to California Missions located in Area B. See id. at 5. On the other hand, the award made by the Court of Claims pursuant to the 1928 Jurisdictional Act could not be considered as compensation for aboriginal lands taken because that judgment was made on the basis of the value of only the lands included in the 18 unratified treaties and not the state at large. Id. at 30. However, the Commission suggested that Congress might reduce its appropriation for the present award by the amount paid under the 1928 Act. Id. at 30-31.

\textsuperscript{174} See Thompson, 13 Ind. Cls. Comm. at 386.
\textsuperscript{175} Id.
Hearings were held throughout the State of California on the proposed settlements. Members of the “Indians of California” and the other specified tribes were invited to express their views, ask questions of the attorneys representing them, and then cast their votes in favor or against the settlement. At the conclusion of these proceedings, members of the Indians of California and the Pit River and Mission Indians voted to approve the settlement. After an investigation of the various charges alleging improprieties about the manner in which the settlement was presented to the Indian groups and the manner in which votes were cast, the Claims Commission approved the settlement. Congress appropriated and authorized the distribution of funds on a per capita basis to all members of the “Indians of California” except to members of those organizations who were represented exclusively by their tribal organizations. The remaining tribal organizations who brought suit, but were not included in the settlement, also have been awarded judgments by the Claims Commission.

The history of federal actions in California demonstrates that the United States would not adhere to a policy that would protect Indian title. Indeed, since the inception of the United States’ sovereignty over the territory of California, the United States focused attention on securing a solid basis of land title for new settlers at the expense of California Indians. Although the United States has taken actions to compensate the Indians of California for the loss of their aboriginal lands, the central question is whether, in light of the actions of the federal government, aboriginal title still exists in California and burdens land titles. To answer that question, the methods of extinguishing aboriginal title must be understood.

176. See id. at 393-434.
177. Id. at 434. With 58.8% of the eligible Indians voting, 11,427 favored the settlement, and 3,310 opposed it. Id.
178. Id. at 543. In Andrade v. United States, 485 F.2d 660 (9th Cir. 1973), the Pit River Indians sought to reopen the judgment, realleging these purported improprieties, but they were prohibited from doing so.
METHODS OF EXTINGUISHMENT

Aboriginal title may be extinguished by a great variety of sovereign actions. The classic statement is that extinguishment may be accomplished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . .". The leading case concerning extinguishment is United States v. Santa Fe Pacific R. Co. In Santa Fe, the United States, as guardian of the Walapai tribe, sued to enjoin the railroad from interfering with the tribe's occupancy of lands in Arizona both inside and outside the reservation. The railroad claimed full title to lands by virtue of a United States' grant to the predecessor of the railroad. However, the act on which the title of the railroad was based required that "the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act . . .". Thus, unless the United States had previously extinguished aboriginal title, the railroad would own the land subject to the Indian right of occupancy. Although the Court of Appeal had held that the United States had never recognized Indian title in the Mexican Cession, the Supreme Court found that, as a matter of policy, the United States did recognize aboriginal possession. After reviewing various federal transactions that related to the land in question, the Court found that the acceptance of a reservation created by request of the Walapais amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of [the Act donating title to the predecessor of the railroad].

In deciding what acts amounted to an extinguishment of Indian title, the court set forth certain rules. "The power of Congress [to

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181. Santa Fe, 314 U.S. at 347; Lipan Apache Tribe, 180 Ct. Cl. at 492. See Johnson v. McIntosh, 21 U.S. at 587 (extinguishment can be accomplished by purchase or conquest).
182. Santa Fe, 314 U.S. at 339.
183. Id. at 343-44.
184. Id. at 343.
185. Id. at 343.
186. Id. at 344-45.
187. Id. at 345.
188. Id. at 345-46. See infra notes 352-365 and accompanying text.
189. Santa Fe, 314 U.S. at 347-57.
190. Id. at 357-58 (emphasis added).
extinguish Indian title] is supreme. The manner, method and time of such extinguishment raises political, not justiciable, issues . . . .\textsuperscript{191} The right of the United States to extinguish Indian title has never been doubted; the justness of the right is not open to inquiry in the courts.\textsuperscript{192} However, "... an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal government for the welfare of its Indian wards."\textsuperscript{193}

Thus, according to \textit{Santa Fe}, the prerequisite for an effective extinguishment is that the power be exercised \textit{only} by the United States. While language in the \textit{Santa Fe} decision suggests that Congress, as opposed to other governmental branches — possesses the exclusive right to extinguish, most opinions dealing with this subject use "federal government" fungibly with "Congress". Certainly, in practice, actions of the executive branch have served to extinguish aboriginal title.\textsuperscript{194}

Irrespective of whether both branches of the federal government or Congress alone have the power to extinguish, the United States alone has the ability to do so. This is the unmistakable teaching of the eastern Indian land claims litigation. As emphatically, although narrowly, decided in the Oneida Indian cases, only the United States can terminate or permit the termination of aboriginal title.\textsuperscript{195} The conceptual basis of this sole power was analyzed in an Indian Claims Commission case, \textit{Lipan Apache Tribe v. United States}.\textsuperscript{196} In \textit{Lipan}, the United States sought to avoid liability for the extinguishment of Indian title lands in Texas. The government, in defense, pointed out


\textsuperscript{192} \textit{See Santa Fe, 314 U.S. at 347.}

\textsuperscript{193} \textit{Id.} at 354. Some courts appear to set a more stringent standard, at least rhetorically. \textit{Compare Lipan Apache Tribe,} 180 Ct. Cl. at 492, (acts of extinguishment must be "plain and unambiguous") and \textit{Bennett County, South Dakota v. United States,} 394 F.2d 8, 9 (8th Cir. 1968) (intent to extinguish by grant or legislation must be clearly and unequivocally stated) \textit{with Turtle Mountain Band of Chippewa Indians v. United States,} 490 F.2d 935, 946 (Ct. Cl. 1974) (will not lightly imply extinguishment). Indeed, the standard may differ depending on whether the Courts are considering the extinguishment of aboriginal title or of treaty-recognized title. \textit{Lac Courte Oreilles,} 700 F.2d at 351-352. The United States can extinguish aboriginal title "... at any time and by any means ... " abrogation of treaty-recognized title requires "... an explicit statement by Congress or at least, it must be clear from the circumstances and legislative history surrounding a Congressional act." [Citation omitted]. \textit{Id. Santa Fe} supports this distinction as the Indians off-reservation aboriginal rights were extinguished by implication in that case. \textit{Santa Fe, 314 U.S. at 358; Lac Courte Oreilles,} 700 F.2d at 352-53. Thus, the cases requiring a "plain and unambiguous" act of extinguishment must be read with this distinction between aboriginal title and treaty-recognized title clearly in mind.

\textsuperscript{194} \textit{See, e.g., Plamandon ex rel. Cowlitz Tribe of Indians v. United States,} 467 F.2d 935, 937 (1972); \textit{United States v. Pueblo of San Ildefonso,} 513 F.2d at 1391-92.

\textsuperscript{195} \textit{See Oneida Indian Nation,} 414 U.S. at 667; \textit{County of Oneida,} 105 S. Ct. at 1251.

\textsuperscript{196} \textit{Lipan Apache Tribe,} 180 Ct. Cl. 487.
that Texas, unlike most states, had title to public lands within the borders of the state, and that the Texas Legislature, soon after statehood, had passed a resolution extinguishing aboriginal title. The Court of Claims rejected this contention. The court held that the power of the United States to extinguish stems not from ownership of lands, but from the general constitutional grant of power to deal with Indians. The court reiterated the principle that only the federal government, even though not feeholder in the lands, had the power to abrogate aboriginal title through unilateral action.\textsuperscript{197}

There is no magic formula, however, for extinguishing aboriginal title. For example, Indian title may be extinguished through acquisition, by eminent domain, by wrongful appropriation against an unwilling party, by a coerced, unfair or invalid agreement, or by purchase for an unconscionably low consideration.\textsuperscript{198} Indeed, despite their reference to the need for "unequivical" federal conduct courts, in practice, have not required as a precondition to a finding of extinguishment any single, discrete, plain and unambiguous act terminating the right of occupancy. Courts recognize that an examination of each individual governmental action in isolation will not provide an answer to whether or not there was an intent by the United States to extinguish aboriginal title. Rather, these courts have determined the extinguishment of Indian title based on an accumulation of factors, often without being able to point specifically to any particular event or act.\textsuperscript{199} This was evident in many cases for compensation filed with the Claims Commission, in which the Commission averaged possible dates of the "taking" of aboriginal title for the purposes of evaluating and determining the price of the lands,\textsuperscript{200} due to the extreme difficulty in pointing to a single, definitive date of extinguishment.\textsuperscript{201} Congress does not often make explicit the intent to extinguish Indian title as in the Alaska Native Claims Settlement Act.\textsuperscript{202} Actual extinguishment more typically resembles the process

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\textsuperscript{197.} Id. at 497.  
\textsuperscript{198.} See Pillager Bands of Chippewa Indians in the State of Minnesota v. United States, 428 F.2d 1274, 1277 (Ct. Cl. 1970).  
\textsuperscript{199.} See, e.g., Santa Fe, 341 U.S. at 357-358; Gemmill, 535 F.2d at 1149; Plamondon, 467 F.2d at 936. Cf. Dann II, 706 F.2d at 933.  
\textsuperscript{200.} The date and fact of extinguishment is a necessary and critical finding in these cases since compensation for loss of lands awarded in Claims Commission cases is measured by the fair market value from the date the United States actually takes over possession or exerts dominion. Pillager Bands of Chippewa Indians, 428 F.2d at 1277.  
\textsuperscript{201.} See, e.g., Pueblo of San Ildefonso, 513 F.2d at 1391-92; United States v. Northern Paiute Nation, 490 F.2d 954, 957 (Ct. Cl. 1974).  
described by the Court of Claims in one such case:

The Commission could not have supposed that any of the facts it recited respecting the end of 1862 constituted takings in and of themselves . . . . The explanation seems and is obvious: they were laying down an average, composite, or jury verdict taking date . . . . Such a legal shortcut is often necessary in Indian claims litigation, if it is ever to be concluded, and has the sanction of the Supreme Court. Creek Nation v. United States, 302 U.S. 620 . . . (1938). [In this case] the record was void of any single clear-cut extinguishment. The miners staked their claims, the miners mined, the Indians attacked, the United States troops came to the rescue of the miners, the troops defeated the Indians, the United States agents hopefully established reservations they wished the Indians to move onto, but did not compel them to, some Indians nevertheless did, the Congress retroactively validated the miners' claims, vis-a-vis one another, and vis-a-vis the United States, the President at long last established the reservations. As to non-mineral portions of the tract, there was even less. It was arguable, and defendant argued, that the Indian title had never been extinguished. Somehow by the concatenation of events, at some unknown date or dates, it was. The Commission closed its eyes and picked a date; the parties, relieved, went on to prove things that could be proved.203

What must be understood is that the United States rarely performs a definitive act of extinguishment. Nevertheless, the policy of the United States has always been to extinguish aboriginal title,204 and the courts, by reviewing the cumulative effect of the government's actions, have found extinguishment.

The fact that extinguishment can be implied from a series of events and circumstances, rather than requiring a single, discrete "plain and unambiguous" act, has important consequences. As the court suggests, one need only point to the "concatenation of events," take note that Indians have been removed from their aboriginal lands, and find that their title has been extinguished.205 This "cumulative impact" analysis greatly enhances the probability that an extinguishment will be found. This probability is increased by the fact that Congress can extinguish Indian title in any manner Congress chooses, unimpeded by constitutional restrictions.206 With that understanding, various specific methods of extinguishment that have been judicially approved will be examined.

203. Northern Paiute Nation, 490 F.2d at 957.
204. See Choctaw Nation, supra, 397 U.S. at 623.
205. See supra note 193 and accompanying text.
A. Voluntary Cession or Act of Congress

What are the specific methods by which Congress extinguishes aboriginal title? The traditional method is unambiguous: "Ordinarily, Indian title is extinguished by cession under treaty or act of Congress, and the land ceases to be Indian country when the cession becomes effective."207 This formal act of cession is the "usual" method of extinguishment.208

Once a treaty between a tribe and the United States has been ratified, aboriginal title to lands subject to the treaty is extinguished.209 Even an arguably ambiguous treaty cession has been found to have extinguished Indian title. In *Pillager Bands of Chippewa Indians of Minnesota v. United States*, the United States agreed to purchase 700,000 acres of land from the Pillagers in exchange for $19,000.210 Although a clause in the treaty stipulated that "the country hereby ceded shall be held by the United States as Indian land, until otherwise ordered by the President," the court rejected the argument of the tribe that the land was held in trust for them.211 The treaty acted as a relinquishment of further claims to the area, since the treaty also contained language that the Pillagers "hereby sell and cede" the land, thereby passing the entire interest in the land to the federal government.212

Congress can also extinguish title by legislation. In fact, after 1871, no further treaties with Indian tribes were authorized.213 Even before 1871, Congress enacted legislation designed to extinguish aboriginal title.214 After 1871, Congress enacted many statutes that transferred


211. *Id.* at 1278.

212. *Id.*


Indian lands free of any claim of Indian title. 215 The most recent of these statutes is the Alaska Native Claims Settlement Act. 216 That act retroactively validated selections of land made by the State of Alaska prior to enactment, 217 and was specifically intended to extinguish aboriginal title. 218

With respect to the lands received by the states by virtue of their sovereignty, 219 the operation of the constitutional Equal-Footing 220 and Paramount Rights 221 doctrines, in conjunction with the enactment of the Submerged Lands Act, 222 has extinguished Indian title in a similar fashion. 223 In United States v. Holt State Bank, the United States


218. See Atlantic Richfield, 435 F. Supp. at 1029.


220. Id.


222. See 67 Stat. 29, 43 U.S.C. §1301 et. seq. The exception to the Submerged Lands Act confirmation, ratification and quitclaim to the States of lands beneath navigable waters found in 43 U.S.C. §1313 (b) for “lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band or group of Indians or for individual Indians . . .” is not applicable to aboriginal title. No aboriginal title exists in the lands concerned in the Submerged Lands Act. Inupiat Community of the Arctic Slope v. United States, 548 F. Supp. 182, 185-87 (D. Alas. 1982), aff’d 746 F.2d 570 (9th Cir. 1984). The legislative history of the Submerged Lands Act makes plain that what was intended by this exception were lands in which the United States holds trust title and tracts set apart for Indians before or after the admission of the States in which they are located, not lands in which Indians had claims of Indian title. E.g. Joint Hearings on H. J. Res. 118 Before the Comm. on the Judic. of the House of Rep. and a Spec. Subcomm. of the Sen. Judic. Comm. (1945) 79th cong., 1st Sess., ser. 5, pp. 19-20 (letter from Secretary of Interior concerning a predecessor resolution to the resolution finally adopted as the Submerged Lands Act).

223. See United States v. Holt State Bank, 270 U.S. 49, 59 (1926); Montana v. United States, 450 U.S. 544, 551-52 (1981) (presumption in favor of sovereign ownership); United States v. Aranson, 696 F.2d 654, 664 (9th Cir. 1983), cert. den., sub. nom, Colorado River Indian Tribes v. Aranson, 464 U.S. 982, 104 S. Ct. 423 (1983); Inupiat Community of the Arctic Slope, 548 F. Supp. at 186-87; United States v. Ashton, 170 F. 509, 520 (Cir. Crt. W.D. Wash. 1909); Sub. Nom. Bird, v. Ashton, 220 U.S. 604 (1911). In litigation between the United States and the State of California about the ownership of the tidal and submerged lands lying off California’s coast, certain groups of California Indians sought to intervene claiming they were “. . . still the owners in their own right, and free from any lawful claims of the United States . . . or the State of California to substantial portions of the . . . tidelands underlying the Pacific Ocean.” Notice of Motion for Leave to Intervene, Petition for Intervention, and Motion for Injunction and Appointment of Receiver, United States v. California, 334 U.S. 825 (1948). The United States (as well as the State of California) vigorously disputed this claim. Importantly for purposes of this article, the United States argued, inter alia, that the mere fact Indians may have sailed on or fished in the waters that covered the lands did

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created a reservation after Minnesota became a State. The Supreme Court held, as to the navigable waters included within the reservation:

Without doubt the Indians were to have access to navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian . . . and emphasized in the enabling act under which [the state] was admitted as a state . . . which declared that the rivers and waters bounding the state and the navigable waters leading into the same shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States.

B. Force

Despite "the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force," extinguishment by force nevertheless has been held to be effective. Thus, in rejecting the claim that aboriginal title survived because the Indians were removed from their lands by military operations waged against them by the United States, the Ninth Circuit noted that "the military action of the mid-nineteenth century is a strong
indication of the sovereign's intent to revoke the . . . tribe's rights of permissive occupancy."

C. Voluntary abandonment

Although voluntary abandonment as a means of extinguishment has not been carefully explained, voluntary abandonment of aboriginal title by the Indians may serve to extinguish any further Indian rights of occupancy in the land. In Santa Fe, the "creation [of a reservation] at the request of Walapais and the acceptance by them amounted to a relinquishment of any tribal claims of lands which they might have had outside that reservation and that relinquishment was tantamount to an extinguishment by 'voluntary cession'."

Since aboriginal title can be extinguished exclusively by the United States, to argue that acts of the Indians themselves may "extinguish" their title may be inconsistent. The Court of Claims has noted the apparent incongruity of the Santa Fe opinion, characterizing Santa Fe as having established an "exception" to the exclusivity principle when the request of the Indians for land to the executive branch is followed by acceptance of a reservation in settlement of claims. Nevertheless, the Court later in the opinion accepted the possibility that voluntary abandonment, without more, could extinguish Indian title.

A conceptually more precise view would treat an abandonment as an element in disproving immemorial possession and not as a form of extinguishment. The effect of abandonment—loss of aboriginal title—is the same in either event.

228. Geminill, 535 F.2d at 1148.
229. Santa Fe, 314 U.S. at 357-58; Buttz, 119 U.S. at 70, "Their right of occupancy was, in effect, abandoned and full consideration for it being afterwards paid, it could not be resum-
ed." Id. See Mitchell v. United States, 34 U.S. (9 Pet.) 711, 746 (1835); Williams v. City of Chicago, 242 U.S. 434, 437 (1917); County of Oneida, 105 S. Ct. 1265. n. 9 (Stevens, J., dissenting).
230. In County of Oneida, the Supreme Court narrowly re-affirmed this principle. County of Oneida, 105 S. Ct. at 1265. Responding to Justice Stevens' dissent that laches may be a defense in Indian title claims litigation, the majority noted that, in earlier cases, the Court had indicated that extinguishment required a sovereign act. County of Oneida, 105 S. Ct. at 1257, n.16.
231. See Turtle Mountain Band of Chippewa Indians, 490 F.2d at 947, n.23.
232. See id. at 947-948. However, the Court rejected the argument for lack of evidence. Id. at 948.
D. Incorporation of aboriginal lands into public domain

Incorporation of aboriginal lands into public lands managed by the United States, such as forest reserves, will also serve to extinguish aboriginal title to those lands. In one case, the dates when aboriginal areas were included by the United States in a Forest Reserve and a grazing district served as applicable dates for the determination of the value of the tribes' former lands.234 In Plamondon v. United States, plaintiff conceded, and the Claims Commission agreed, that the incorporation of 550,000 acres of tribal land into public forest reserves acted to extinguish aboriginal title.235

E. Grants to third parties

Grants of aboriginal lands made by the United States to the individual states and other third parties weigh heavily in the determination of whether there is an intent to extinguish the tribal right of occupancy. The grant of public lands to a state for public school lands is conceded to have effectively extinguished Indian title at that date.236 In another case, the cession to another tribe of land in which aboriginal title was later claimed, was an important factor in determining that Indian title had been extinguished.237

A less settled question is the effect upon aboriginal title of encroachment of settlers, whether by virtue of a patent issued by the United States or simply by acquiescence of the United States. Some cases have held that surveying an area, or other acts preparatory to settlement, do not by themselves affect aboriginal title.238 Neither does the expectation of future parcel-by-parcel settlement alone extinguish Indian ownership.239 Similarly, the unilateral acts of citizens in settling on Indian title lands do not end aboriginal ownership.240 These cases hold that even "authorized settlement is only one factor to be taken into account in determining when Indian title ceased."241

234. See Pueblo of San Ildefonso, 513 F.2d at 1391-1392.
235. See Plamondon, 467 F.2d at 936. See also Gemmill, 535 F.2d at 1149; Tlingit and Haida Indians of Alaska v. United States, 177 F. Supp. 452, 468 (Ct. Cl.) (1959); Sac & Fox Tribe of Indians of Oklahoma v. United States, 315 F.2d at 901; Northern Paiute Nation, 490 F.2d at 957; Strong, 518 F.2d at 564.
236. See Plamondon 467 F.2d at 936.
237. See Pillager Bands of Chippewa Indians, Minn., 428 F.2d at 1278.
239. See Gila River Pima-Maricopa Indian Community, 494 F.2d at 1391.
240. See Turtle Mountain Band of Chippewa Indians, 490 F.2d at 947.
241. See Gila River Pima-Maricopa Indian Community, 494 F.2d at 1391.
Generally, when the United States opens up aboriginal lands for settlement or homesteading, the cumulative effect of this action is to extinguish the Indian rights of occupancy. While extinguishment by this method generally contradicts the rule that extinguishment be plain and unambiguous, the cases do suggest that opening up lands for settlement can effectively terminate Indian title. Thus, in *Alcea Band of Tillamooks v. United States*,\(^{242}\) when the government negotiated treaties with four tribes:

they did not await ratification before taking the lands, but proceeded immediately after the treaty was signed to regard and treat the lands claimed by the [tribes] as public lands open to public homestead and settlement, except as conditionally withdrawn and reserved by the Executive Order . . . . This action, subsequently confirmed by the Congress, was a taking of the lands and the original Indian use and occupancy title.\(^{243}\)

In *Pillager Bands of Chippewa Indians*, the opening of the contested lands to settlers under the Homestead Act of 1864 was one transaction upon which the Court of Claims relied in finding an extinguishment.\(^{244}\) In *Plamondon*, a Presidential proclamation that offered up for sale fourteen percent of the plaintiffs’ aboriginal lands extinguished Indian title to them because the subsequent white settlement effectively deprived the Indians of their use and occupancy of the lands.\(^{245}\)

In *United States v. Northern Paiute Nation*, the Court of Claims affirmed the date of taking as the dates of the miners’ unauthorized entries and staking of claims on aboriginal lands, acts that were later ratified by Congress in retroactively validating the miners’ claims.\(^{246}\) Similarly, the dates that aboriginal lands of the Creek Nation were erroneously patented to settlers were the dates of the taking in *Creek Nation v. United States*.\(^{247}\) Finally, a recent Ninth Circuit case held that although the enactment of the homestead laws themselves did not extinguish aboriginal title, the issuance of patents pursuant to that act would extinguish title to the land actually patented.\(^{248}\)

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243. Id. at 967. The similarity between the United States’ treatment of the Tillamooks and its treatment of the California Indians is striking. See supra notes 79-120 and accompanying text.
244. See *Pillager Bands of Chippewa Indians*, 428 F.2d at 1278.
245. See *Plamondon*, 467 F.2d at 936-37; *Ashton*, 170 F. at 513 (“Oregon Donation Law” extinguished aboriginal title).
246. See *Northern Paiute Nation*, 490 F.2d at 958.
247. *Creek Nation*, 302 U.S. at 621.
248. See *Dann II*, 706 F.2d at 930.
F. Reservations

The effect of the establishment of a reservation on aboriginal title is ambiguous. As noted in Santa Fe, when a reservation is created by the federal government at the request of the tribe, the subsequent acceptance by the tribe of the reservation may serve to extinguish prior aboriginal title claims. However, as to an earlier reservation created for the tribe, the Santa Fe Court found "no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapai had in their ancestral home."250

This reluctance to find an extinguishment by the creation of a reservation in the absence of strong congressional intent is demonstrated in Gila River Pima-Maricopa Indian Community v. United States.251 The authorization for the establishment of the Gila River Reservation only provided that an area be surveyed and set aside as a reservation. "Nothing is said about extinction of Indian title or cutting off the Indians from other territory they were using." Consequently, establishment of this Indian reservation did not alone extinguish the Indians' right of occupancy in other lands they held. Unable to find any express indication from Congress as to extinguishment, however, the Court chose the date of the greatest expansion of the reservation as the date of "taking." The Court concluded that the expansion reflected the government's belief that all rightful Indian land was within the reservation.253

Likewise, in Turtle Mountain Band of Chippewa Indians, the establishment of a reservation did not extinguish Indian title in other lands, even though the tribe had petitioned for a reservation six years previously.254 The court found no indication that this Executive Order reservation fulfilled the Chippewas' request, or that the reservation so established was ever "accepted" by the Chippewas as a settlement of their land claims.255

The difficulties that courts have had in finding an extinguishment in the governmental authorization of settlement on reservations was demonstrated in United States v. Pueblo of San Ildefonso.256 Three tribes presented consolidated claims for compensation for the taking

249. 314 U.S. at 358.
250. Id. at 353.
251. 494 F.2d at 1389.
252. Id.
253. Id. at 1393-94.
254. 490 F.2d at 947.
255. Id.
256. 513 F.2d 1383.
of aboriginal lands in New Mexico. Noting that the date title is extinguished depends upon the particular facts, circumstances and history of each case, the Court of Claims evaluated the transactions between the tribes and the federal government. The court rejected the argument of the United States that the issuance of patents in confirmation of land grants made by the Mexican government to certain Indian pueblos, like the creation of a reservation, served to extinguish title, because the issuance showed an intent to extinguish aboriginal title outside of the pueblo boundaries. The court stated:

It should be clear by now that the creation of an Indian reservation does not invariably extinguish aboriginal title claims to outlying areas . . . . However, the particular facts and circumstances surrounding the establishment of a reservation in a given historical context may be such that the event will be deemed to have constituted a relinquishment of tribal claims to lands outside the reservation.

Thus, Indian settlement on a reservation was to be construed as an abandonment of claims only "when the specific circumstances warrant the conclusion." Extinguishment could not be implied from the issuance of confirmatory patents alone because the United States was obliged under principles of international law to confirm the bona fide grants of a prior sovereign to Indians. That situation was distinguished from a case in which the government established an Indian reservation without any legal duty to do so.

The court also rejected a later date advanced by the government, which contended that "the interruption of Indian occupancy by non-Indians — caused by white settlement under public land laws and land grants to non-Indians by prior sovereigns — had constituted such a substantial intervention as to effectuate an extinguishment of title over the entire area." Although, "unquestionably, the impact of authorized white settlement upon an Indian way of life in aboriginal areas may serve as an important indicator of when aboriginal title was lost," the lack of express intent to extinguish title, together with the declared policy of protecting unextinguished Indian title in New Mexico in this period, negated an intent to extinguish. Instead, the court found an extinguishment based on the average dates of entries

257. Id. at 1387.
258. Id. at 1388.
259. Id., (citing Turtle Mountain Band of Chippewas, 490 F.2d at 946).
260. Id.
261. Id. at 1390.
262. Id.
263. Id.
made under the various public land laws as well as the patent dates for mineral claims. Averaging dates of encroachment was a rational basis for inferring “confiscation” of all Indian lands.

With these methods of extinguishment in mind, this article will next consider the principal actions that evidence the intent of the United States concerning Indian title in California.

EXTINGUISHMENT IN CALIFORNIA

The dealing of the United States with the California Indians has extinguished Indian title in California. Nevertheless, the less-than-straightforward approach taken by the United States concerning Indian title in California may raise unwarranted hope that aboriginal title still has some remaining viability in California. Consequently, clarification as to exactly how and when extinguishment was effected is not merely an academic exercise; the time and method of the alleged extinguishment is of practical legal importance for those who would claim or dispute that aboriginal title has never been extinguished. Each of the significant events and actions will be scrutinized.

A. The Land Claims Act

The enactment of the Land Claims Act shortly after statehood is the most significant congressional act of extinguishment in California. Recall that the Land Claims Act required that all persons claiming lands in California by any right derived from the Spanish or Mexican government had to present their claim to the Land Commissioners. All valid claims had to be confirmed and patents issued. Claims not brought within the two year limitation passed into the public domain.

The effect of the Land Claims Act on aboriginal title has been subject to two conflicting interpretations. One argument is that the Act required all claims, including aboriginal title claims, to be confirmed. Thus, the failure of the Indians to present their aboriginal

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264. Id. at 1391.
265. Id.
266. This discussion is limited to the effect of the Land Claims Act. However, other congressional acts, confirmed by relatively recent legislation, also extinguished any claims of aboriginal title in the State of California in lands underlying navigable waters. See supra notes 219-25 and accompanying text.
267. See supra notes 105-110 and accompanying text.
title claims meant that such title had forevermore been extinguished.\textsuperscript{268} On the other hand, the language of the Land Claims Act that “each and every person claiming lands in California by nature of any right derived from the Spanish or Mexican government shall present the same . . . ,”\textsuperscript{269} has been said to mean that the Act applied only to lands that were directly granted by the prior sovereign.\textsuperscript{270} Thus narrowly construed, the Land Claims Act left aboriginal title intact. Since aboriginal title was not “derived” from any act of the prior governments, aboriginal claims for lands need not have been presented for confirmation.\textsuperscript{271}

The ambiguous language of this section of the statute is not the only reason urged for this latter interpretation. An argument can be made in support of the narrower view that Congress could not have intended that the Indians should present their aboriginal title claims when there was no realistic likelihood that the Indians would be notified of the need to present those claims. The only reference in the Land Claims Act to Indians was to those civilized Indians under the influence of the Catholic missionaries, and not to the “uncivilized” tribes occupying most of the land in California.\textsuperscript{272} In addition, the requirement of section 16 of the Act to report on Mission Indian title does not seem to support the conclusion that a direction to investigate tenure under Mission Indian title compelled the Indians, holding by right of possession under other laws, to present claims to the Land Commission.\textsuperscript{273} Finally, the Act of March 3, 1853 limited post-1853 settlement on land occupied or possessed by any Indian tribe,\textsuperscript{274} thereby arguably implying that Indian title was not extinguished by virtue of the Land Claims Act.\textsuperscript{275}

The above arguments, based on a rigid statutory construction of the Land Claims Act, were first substantially undermined in an early case construing the effect of the Land Claims Act. In \textit{Botillier v.}
plaintiff claimed land based on a "perfect title" received from the Mexican government but never presented for confirmation as required by the Land Claims Act. Much the same arguments have been made on behalf of California Indians claiming, by virtue of aboriginal occupancy, a "perfect title." The Supreme Court, in denying the plaintiff ownership, found nothing in the Land Claims Act implied an exclusion of "perfect claims" from jurisdiction of the Land Commissioners. In so holding, the Court determined that the main purpose of the Land Claims Act was to separate and distinguish the lands that the United States owned as property as a result of the Mexican Cession, the public domain of the United States, from those lands that belonged to private parties under a claim of right derived from the Spanish or Mexican government. The argument can be made that separating and distinguishing, claims by Indians by virtue of Indian title lands was unnecessary, because the fee to aboriginal title lands was already in the United States. The purpose of the Land Claims Act as established in Botiller, however, was not limited to fulfilling the promise made in the Treaty of Guadalupe Hidalgo to protect existing private rights of ownership of Mexican citizens living in the ceded territories. This purpose of the Land Claims Act was coupled with another:

The primary purpose of the [Land] Claims Act was the performance by the United States of its treaty obligations to quiet the title of the claimants under Spanish and Mexican grants. But as a necessary consequence of proceeding before the Commission, and one incidental to the determination of the validity of titles of such claimants, was a determination whether, by the cession, the lands in question had become part of the public domain. . . .

The manner in which the Land Claims Act operated implemented this dual purpose. Persons claiming under a valid Spanish or Mexican

276. 130 U.S. 238 (1888).
277. Id. at 247.
278. Id. at 249.
279. No similar intent was expressed in the instructions made to the Commissioners who heard claims filed under the Act. The Commissioners were told:

The growth and prosperity of California materially depends upon a speedy and just settlement of the claims to lands within her limits, and the separation of all private property from the public domain, so that the public lands in that State may be disposed of as Congress may hereafter direct, without danger of conflict of title, or interference with the rights of individuals.

Report of the Secretary of the Interior, Feb. 3, 1852, 32nd Cong., 1st Sess., Sen. Doc. 26, Ser. 614 at 2 (1852). By claimants furnishing the United States with evidence of what was asserted to be private property, the United States could ascertain what was undisputed public land. Id. at 5.

grant would have their valid titles confirmed as promised. In order
to avoid the prospect of centuries-old title disputes, however, lands
occupied by those without confirmed title would pass into the public
domain. So construed, the Land Claims Act was intended to affect
*all* claims of title in California, even claims for aboriginal title.\(^\text{281}\)

As the Treaty of Guadalupe Hidalgo, the Land Claims Act was not
indifferent to property rights of Indians;\(^\text{282}\) but the Land Claims Act
was unmistakably intended to have the effect of extinguishing *all*
titles not presented. Congress could hardly be indifferent to the upheaval
in California that resulted from the Gold Rush. Security of land titles
was essential to the development of the mines and the other resources
of California.\(^\text{283}\) To allow land claims, including Indian title claims,
to persist would prevent the prompt and orderly development and
growth of California.

Despite the appeal of arguments in support of a narrow construc-
tion of the Land Claims Act, cases interpreting the effect of the Act
on Indian title confirm that the narrow view has not prevailed. Cali-
forina courts initially provided conflicting rulings. In *Thompson v.
Doaksum*, the California Supreme Court held that a tribe of Indians
claiming aboriginal title could not connect their title to a recognition
of title by the United States because they failed to present their
aboriginal title claims to the Land Commissioners. Thus, their land
became part of the public domain subject to later preemption.\(^\text{284}\) This
holding implicitly rejects the argument\(^\text{285}\) that the Act of 1853, which
authorized preemption of public domain lands in California, somehow
recognized the continuing existence of aboriginal title.

\(^{281}\) Congress was aware of this intended result. In speaking against section 13 of the Land
Claims Act that held all unpresented titles were to become part of the public domain, Senator
Benton stated:

> Now, what proportion of the land claims in the State of California will [this section]
> involve . . . ? . . . Look . . . at section 8th, and you will there find that 'each and
every person claiming lands in California by virtue of any rights or title derived from
>Mexican or Spanish Government, shall present the same to said commissioners . . .'
> These are the words of the section to which the two cases of forfeiture apply; and
> they include all the claims of everybody! Who is left behind? What man, what woman,
> what child, what Indian is left behind, when 'each and every person' is included?
> What land is left behind? None!

Cong. Globe, 31st Cong., 2nd Sess. 362 (1851). The amendment proposed by Benton that
would have confirmed, without the necessity of presenting a claim to the Land Commissioners,
certain Spanish and Mexican grants, including grants made to Indians, was defeated. *Id.* at 408.

\(^{282}\) *See supra* notes 53-54 and accompanying text.

\(^{283}\) *See supra* notes 58-59 and accompanying text.

\(^{284}\) *See Thompson v. Doaksum, 68 Cal. 593, 597 (1886).*

\(^{285}\) *See supra* notes 274-75 and accompanying text.
Just two years later in *Byrne v. Alas*, just two years later in *Byrne v. Alas*, the same court appeared to come to a different conclusion. At issue was land included within a confirmed Mexican land grant claimed by “Mission or Pueblo Indians.” The Court agreed that both Mexican and Spanish law protected Indians in their occupancy of the land they needed and tilled, but noted that the Mexican land grant at issue specifically provided that the grantee “. . . shall in no way disturb nor molest the Indians who are established or living thereon . . .”. Thus, the Court held that the United States patent confirmed only fee title, burdened with the rights of the Indians and that since the lands were within a confirmed grant the Indians did not have to present their claim to the Land Commissioner. The Court distinguished *Thompson v. Doaksum* because “[t]he Indians interested in that case were not Pueblo . . . Indians and no duty of ascertaining their rights devolved upon the land commission.”

About eleven years later, the California Supreme Court in *Harvey v. Barker* eliminated the distinction the Court found important in *Byrne*. The *Harvey* Court held that even Mission Indians who failed to present their claim to the Land Commissioners were barred from proving their title claims. The *Harvey* court distinguished *Byrne* because, unlike *Byrne*, an investigation showed the land in *Harvey* had been vacant at the time of the Mexican grant and the clause referring to the rights of Indians was not included in the *Harvey* grant. The Court also explained that, in light of later cases such as *Botillier v. Dominguez*, *Byrne* was no longer good authority for the proposition that holders of “perfect title” in 1850 did not need to present their title to the Land Commissioners for confirmation. Since a claim of aboriginal title, “perfect” or not, was a “right to possess, occupy or use land,” the claim should have been presented to the Land Commissioners. To finally resolve the issue the United States Supreme Court granted certiorari.

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287. Id. at 630.
288. Id. at 634.
289. Id. at 635, 637.
290. Id. at 638.
291. Id. at 640.
292. Id.
294. Id. at 269-71.
295. 130 U.S. 238.
296. *Harvey*, 126 Cal. at 271.
297. Id. at 274-75.
In *Barker v. Harvey*, the Supreme Court characterized the claim of the Indians as "... a right of permanent occupancy by virtue of the alleged fact they are Mission Indians, so called, and had been in occupation of the premises long before the Mexican grants [later confirmed by the United States] ..." which occupation the Indians claimed was preserved and protected by general laws of Mexico.  

After upholding the power of the United States to enact the Land Claims Act, the Court held that the Indians had abandoned their claims by failing to present them to the Land Commissioners.  

The *Barker* decision supported the conclusion of the Court with reasoning that has retained its impact to this day:

If these Indians had any claims founded on the action of the Mexican government, they abandoned them by not presenting them to the [land] commission for consideration, and they could not, therefore, ... 'resist successfully any action of the government in disposing of the property.' If it be said that the Indians do not claim the fee, but only the right of occupation, and, therefore, they do not come within the provisions of section 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,' it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal. Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.

This would seem to dispose of any argument that the Court only held that claims "founded on the action of the Mexican government" needed to be presented to the Land Commissioners or be lost. The Court found that any claims of a "right of permanent occupancy"

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298. *Barker*, 181 U.S. at 482.
299. *Id.* at 487-90.
300. *Id.* at 490-91.
301. *Id.* at 491-92 (emphasis added).
also were lost if not presented to and confirmed under the Land Claims Act.302

In later decisions, the Barker opinion has been examined and continually relied on for the proposition that the Land Claims Act extinguished aboriginal title.303

In United States v. Title Insurance and Trust Co.,304 the Supreme Court was asked to reassess the Barker holding. In Title Insurance the United States, on behalf of Indians, sought to establish aboriginal title to land claimed by defendants under a grant by the Mexican government and confirmed pursuant to the Land Claims Act.305 The United States urged that Indian title was also recognized by a special provision in the Mexican grant which, like the grant concerned in Byrne v. Alas,306 protected the Indians from interference in their occupancy.307 The United States also argued that the Land Claims Act did not require tribal Indians to present their occupancy title to the Land Commissioners in order to avoid losing the claim.308 In addition, the United States asserted that the Barker holding was unnecessarily broad as evidence in Barker showed that the Indians had abandoned the land in dispute before the land was granted.309

Considering that the United States, rather than a private litigant was urging these propositions, the rather summary opinion of the Supreme Court310 is surprising. The Supreme Court reiterated the prior holding in Barker that an aboriginal title claim was abandoned by the failure of the Indians to present the claim before the Land Commissioners.311 The Court further rejected the argument made by the United States that Barker was decided on a non-essential ground.312 Like Barker, Title Insurance found that the Land Claims Act extinguished unconfirmed Indian title claims. In fact, the concern of the Court with establishing the certainty of title to land in California reinforced the conclusion that the Land Claims Act in fact barred all claims not presented and confirmed:

The [Barker] decision was given twenty-three years ago and affected

302. Id.
303. See, e.g., Indians of California, 98 Ct. Cl. at 592; Donahue v. Butz, 363 F. Supp. 1316, 1321 (N.D. Cal. 1973); Goodrich, supra note 96, at 100; Kenney, supra note 45, at 20.
304. 265 U.S. 472 (1923).
305. Id. at 481.
306. Byrne, 74 Cal. at 635.
308. Id. at 475.
309. Id. at 477-79.
310. The opinion is only six pages long. Most of the text is taken up with a restatement and quotation of Barker. Id. at 482.
311. Id.
312. Id. at 486.
many tracts of land in California, particularly in the southern part of the State. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results.313

Just months later, the District of Columbia Circuit reaffirmed the holdings of Barker and Title Insurance.314 In Super v. Work, Karuk Indians sought to enjoin the United States from issuing permits for the use of lands within the Klamath National Forest that would interfere with the Karuks' aboriginal use and occupancy.315 The Court held that by failing to bring their claims before the Commission, the Karuk tribe abandoned their aboriginal title claim.316 Citing Barker and Title Insurance, the Court stated:

No claim was ever made on behalf of plaintiff Indians under the Act of 1851, and they therefore must be treated as having lost, through abandonment, any claim which they may have had.317

Unlike Barker and Title Insurance (both of which concerned Mission Indians),318 the Karuks were roving bands.319 The Court, however, found this fact made no difference, and determined that the Land Claims Act also extinguished such aboriginal title claims in California.320

Another case decided by the Supreme Court shortly before Title Insurance and Super appears on first reading to reach the opposite conclusion. In Cramer v. United States,321 the Supreme Court appeared to render a conflicting construction of the Land Claims Act. In Cramer, the United States brought suit on behalf of three Indians who had continuously occupied certain lands in California since at least 1859, by enclosing and actually using the land.322 Although these lands were included in a United States patent to defendant's predecessors, the patent excepted from the grant such lands found

313. Id.
315. See Super, 3 F.2d at 90.
316. Id. at 91.
317. Id.
318. See Barker, 181 U.S. at 482; United States v. Title Ins. & Trust Co., 288 F. 821, 822 (9th Cir. 1923), aff'd., 265 U.S. at 472 (1924).
319. See Super, 3 F.2d at 91.
320. Id.
322. Id. at 221-22.
to be "granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of."\(^{323}\) The United States sought to cancel the patent insofar as the patent purported to convey the land occupied by the Indians.\(^{324}\)

The Court noted that the policy of the federal government had been to respect Indian rights of occupancy but that policy had in mind "... original nomadic tribal occupancy ..."\(^{325}\) The \textit{Cramer} court expanded this policy to include "... individual Indian occupancy as well ..."\(^{326}\) That this newly minted "individual Indian occupancy" was not the same as aboriginal occupancy is clear from the opinion of the Court. Indeed, the Court specifically noted that the Indians occupied the land "... with the implied consent of the United States and in accordance with its policies."\(^{327}\) Thus, considering the effect of the Land Claims Act, the Court stated that:

\(... \text{the act plainly had no application. The Indians here concerned do not belong to any of the classes described therein and their claims were in no way derived from the Spanish or Mexican governments. Moreover, it does not appear that these Indians were occupying the lands ... when the [Land Claims] Act was passed. [Thus, there was no need to file a claim before the Land Commissioners.]}^{328}\)

This language establishes that \textit{Cramer} was not concerned with aboriginal title and whether claims for aboriginal title were required to be presented to the Land Commissioners or be lost. This conclusion is strongly supported by the fact that in the \textit{Title Insurance} case, argued very shortly after \textit{Cramer} was decided, the United States did not cite \textit{Cramer} to support the arguments that aboriginal claims did not have to be presented to the Land Commissioners pursuant to the Land Claims Act.\(^{329}\)

\(^{323}\) \textit{Id.}\(^{324}\) \textit{Id.}\(^{325}\) \textit{Id.} at 225.\(^{326}\) \textit{Id.}\(^{327}\) \textit{Id.} at 233. The brief of the United States clearly indicates that the United States was not urging aboriginal occupancy:

\text{But it is immaterial whether the land was occupied by a band of Indians, because we contend that the occupancy of the two families was sufficient to except the lands from the grant to railroad company. We submit that the Indian right of occupancy, of which so much is said in various Acts of Congress and court decisions, is the mere right to occupy as for the purpose of hunting and fishing, and that is not the same as actual residence upon the land where the Indians live and make their homes. The latter means more than the mere right of occupancy and that is what we have in this case — actual residence upon and a high state of improvement of the land.}\(^{328}\) \textit{Id.} at 231 (Emphasis supplied).\(^{329}\) See \textit{Title Insur. Co.}, 265 U.S. at 475-478; Brief for the United States at 19, 24, 38,
After *Title Insurance*, the question of the effect of the Land Claims Act remained dormant for almost twenty years. Then, in *dicta* in a case that concerned the Walapai Tribe in Arizona, the Supreme Court made specific mention of the effect of the Land Claims Act on Indian title. In determining whether the passage of a series of acts calling for the survey of the Arizona territory and for a report about claims to land in the Territory extinguished aboriginal title the Court stated:

These Acts did not extinguish any Indian title based on aboriginal occupancy which the Walapais may have had. In that respect they were quite different from the [Land Claims Act] . . . . Under Sec. 13 of that Act 'all lands the claims to which shall not have been presented' to the commissioners, appointed to receive and act upon all petitions for confirmation of land claims, 'within two years after the date of this act, shall be deemed, held, and considered as part of that public domain of the United States.' This Court passed on that Act in *Barker*. . . . The plaintiff there claimed under two Mexican grants. The defendants were Indians who claimed a right of permanent occupancy; but they had not presented their claims to the commissioners within the time specified by Sec. 13. This Court held that as a result of that failure their claims were barred. And see *United States v. Title Insurance & Trust Co.*, supra, 265 U.S. 472. That is to say, the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy.

A very recent case, in which the State of California was a party, provides fresh evidence that the Supreme Court considers that the holdings in *Barker* and *Title Insurance* remain vital today. In *Summa Corp. v. California ex rel State Lands Commission* the State of California claimed that the state retained a sovereign interest in a lagoon encompassed within a patent from the United States issued pursuant to the Land Claims Act. The state argued, much the same as had the Indians in *Barker* and the United States in *Title Insurance*,

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53, 68. *Id.*
331. See *Santa Fe*, 314 U.S. 339.
332. *Id.* at 350.
333. The Ninth Circuit has also recently reiterated that the Land Claims Act was intended to extinguish unpresented aboriginal claims. *Dann II*, 706 F.2d at 929, n8.
335. *Id.* at 1756.
that such a claim did not have to be presented in the Land Claims Act proceedings and was therefore not extinguished by the United States confirmatory patent. After reviewing Barker and Title Insurance, the Supreme Court held:

... California cannot at this late date assert its public easement over [Summa's] property, when [Summa's] predecessors-in-interest had their interest confirmed without any mention of such an easement in proceedings taken pursuant to the [Land Claims Act]. The interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the State in its sovereign capacity, this interest, like the Indian claims made in Barker and in United States v. Title Insurance Co., must have been presented in the [Land Claims Act] proceeding or be barred.

Thus, the impact of the Land Claims Act on Indian title has long been resolved. The narrow construction sought by the Indians and on their behalf by the United States has been consistently rejected by the Supreme Court. Therefore, by 1853 the government regarded all lands, title to which had not been presented pursuant to the Land Claims Act, as having passed into the public domain for the purposes of the future land policy of the government.

When the Land Claims Act is viewed in conjunction with the Act of 1853 and subsequent federal actions, this conclusion is inescapable. The Act of 1853 granted lands in the public domain, including aboriginal lands, to the State of California and private individuals. The adverse dominion and the later conveyance and use of these lands by the federal government confirm that Indian title has been extinguished.

This extinguishment is further reflected in the government’s policy.

336. Id.
337. Id. at 1757.
338. Id. at 1758. Recall Barker, 181 U.S. at 491-92 used the same reasoning and virtually the same language over eighty years before. See supra note 301 and accompanying text.
339. Only dicta in one case lends credence to the narrow construction argument. In Gemmill, 535 F.2d at 1148, the Ninth Circuit noted, solely for purposes of argument, that some support for that argument could be found in Barker and in the Act of 1853 which limited post-1853 settlement on land “occupied or possessed by any Indian tribe.” As is apparent from the part of the opinion cited by the Ninth Circuit, Barker cannot be construed so narrowly. In addition, no other case has ever relied on the “limitation” in the Act of 1853 as establishing that aboriginal title still existed in public domain lands. Indeed, both state and federal courts have upheld public domain titles based on the operation of the Land Claims Act when challenged by Indians claiming by virtue of unpresented aboriginal title. Thompson v. Doaksum, 68 Cal. at 597; Super, 3 F.2d at 91. Recent Ninth Circuit authority is directly contrary. Dann II, 706 F.2d at 929, n.8. Finally, in light of Summa, little doubt exists that Congress, by virtue of the Land Claims Act, extinguished aboriginal title in California.
of Indian removal and its establishment of reservations. indeed, this intent is nowhere more apparent than in the United States' actions concerning the treaties negotiated with the California Indians.

B. The Eighteen Unratified Treaties

Closely contemporaneous with the enactment of the Land Claims Act, Congress authorized the President to send commissioners to California to negotiate treaties with the California Indians. The commissioners negotiated eighteen treaties with various groups of California Indians calling for the cession of their aboriginal lands. The history of the subsequent refusal of Congress to ratify these treaties not only suggests that nonratification extinguished existing Indian title in California but also raises doubts whether Congress ever recognized that Indian title existed in the state.

The refusal to ratify these treaties was an act which, taken by itself, was arguably ambiguous as to whether Congress intended that aboriginal title be extinguished. On one hand, since the more favored method of extinguishment has been voluntary cession through treaties, the nonratification of the California Indian treaties arguably evinced an intent to maintain the status quo — that is, aboriginal title would remain intact. Indeed it appears incongruous that both ratification and nonratification lead to an identical result — extinguishment.

Despite the seeming logic of this argument, when the circumstances surrounding the negotiation and nonratification of the treaties are coupled with the principles of extinguishment, it is evident that the nonratification of the eighteen California Indian treaties is consistent with the federal policy of extinguishing the aboriginal title of the California Indians. In fact, the decision to commission agents to negotiate treaties that were intended to cause the removal of Indians from their aboriginal lands to reservations set aside for their occupation is, in itself, an expression of Congressional intent to

341. See supra notes 229-33 (abandonment), 234-35 (incorporation into public domain), 236-248 (grants to third parties), 249-265 (reservations), and accompanying text.
342. See supra notes 70-78 and accompanying text.
343. See supra notes 79-80 and accompanying text.
344. See supra notes 82-86 and accompanying text.
345. See supra notes 87-100 and accompanying text.
But why, once the treaties were negotiated and the Indians left their native lands for those promised in the treaties, did Congress refuse to go along? Two explanations are plausible.

First, nonratification of the treaties was not a deviation from the expressed congressional desire to extinguish Indian title in California, but only a change in the means of doing so. Since Congress can extinguish Indian title by any means, ratification was unnecessary if Congress believed that the effect of the treaty negotiations had been to extinguish Indian title, regardless of whether the treaties were ratified. From this viewpoint, a refusal to ratify the treaties would mean that Congress could avoid the implied promise to create the reservations and to comply with the other terms of the treaties the Congressional agents had negotiated. At the same time, as the Indians left their aboriginal lands upon negotiation of the treaties without prospect of return, the object of the treaties had been accomplished. In fact, Congress realized that removal had already begun by the time the treaties reached the Senate. Thus, some may conclude that since the treaties were having their intended effect anyway, Congress saw no need to ratify them. The outcome — extinguishment — was the same. Extinguishment by this backhanded method has been given effect by courts.

Considering that Congress enacted the 1851 Land Claims Act while these treaties were being negotiated, the fact that failure to ratify the
eighteen treaties was not intended to recognize or affirm the continued existence of aboriginal title becomes apparent. Survival of aboriginal title would be antithetical to the frequently and fervently expressed desire of the United States for secure land titles necessary for the orderly development of California. Thus, nonratification is consistent with the congressional intent to extinguish aboriginal title in California.

A second and more interesting explanation can be made why nonratification was consistent with an intent to extinguish aboriginal title. At the time the treaties were negotiated, many persons, including those who reported on the state of Indian title in Spanish and Mexican California, believed that aboriginal title in roving bands of Indians living outside of the missions simply never existed in California. Therefore such Indians had no possessory land title rights requiring legal extinction. This theory is seemingly at odds with the doctrine of aboriginal title that was explicated in Johnson v. MacIntosh. That traditional doctrine suggested that aboriginal title was recognized as inhering in lands occupied by Indians at the moment the “conquering” nation asserted dominion and took title to the lands. Thus, assuming that Spain and Mexico recognized the existence of and had not extinguished Indian title at the time California passed to the United States by virtue of the Treaty of Guadalupe Hidalgo, the “uncivilized” (as opposed to Mission) Indians of California would necessarily have had aboriginal title to all those lands they had possessed since time immemorial, without congressional acknowledgement or other further affirmative recognition.

Yet, despite the theory that aboriginal title is inherent at the moment of conquest, Congress had been advised through executive or congressionally commissioned reports that Mexico and Spain recognized Indian possessory rights in California only to lands the Indians actually occupied. In the debates over whether agents should be sent to negotiate treaties in California, the comments of Senator Fremont

350. See supra notes 266-341 and accompanying text.
351. See supra notes 58-59 and accompanying text.
352. Compare supra notes 62-65 and accompanying text with notes 75-76 and accompanying text.
353. See supra note 7 and accompanying text.
354. Id.
355. See supra notes 62-65 and accompanying text. Cohen agrees that there are conflicting views. However, Cohen does not mention the Jones or Halleck Reports commissioned to examine that question in California. 1942 Cohen, supra note 208 at 305. In Santa Fe, 314 U.S.
show that Congress understood that only certain Indians had "fixed rights of property in the lands they occupy beyond what is admitted by this Government in its relations with its own domestic tribes . . ." Further, Fremont's colleague, Senator Gwin, stated somewhat imprecisely that Mexican law did not recognize any titles in Indians. Indeed, when agents were finally authorized to go to California, Congress wanted treaties to be negotiated that would only "conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties binding on them towards the government and each other." Thus, the commissioners left with the idea that termination of Indian title in California was unnecessary, and that the object of their mission was to placate and remove the Indians from contact with ever-encroaching settlers driven by the lure of the Gold Rush.

The very fact Congress felt the need to send commissioners is an indication that Congress recognized some right of occupancy. Congressional expressions, however, contradict this possibility. After the treaties had been negotiated and the question of ratification reached Congress, the Senate was unwilling to concede that the California Indians had any rights that required compensation or even recognition. This opinion is reflected in the statement given by the Chairman of the Senate Executive Committee regarding the reasons the committee refused to recommend ratification:

We reject the treaties on the ground that the United States, acquiring possession of the Territory from Mexico, succeeded to its rights in the soil, and, as that Government regarded itself as the absolute and unqualified owner of it, and held that the Indians had no usufructuary or other rights therein which were to be in any manner respected, they, the United States, were under no obligation to treat with the Indians occupying the same for the extinguishment of their title.

at 345-46, the Supreme Court held that Indian title was respected by the United States in Mexican Cession, although the Court did not express any opinion about whether Indian aboriginal rights were recognized under Spanish or Mexican law. See Cohen, The Spanish Origin of Indian Rights In the Law of the United States 31 GEORGETOWN L. J. 1, 19 (1942).

356. Cong. Globe, 31st Cong., 1st Sess., 1817 (1850). These comments are in agreement with the findings of both the Halleck and Jones Reports and more modern commentators. See supra notes 62-65 and accompanying text.

357. See supra notes 75-76 and accompanying text.


359. 33rd Cong., Spec. Sess., Ser. 688, Sen. Exec. Doc. 4, p. 63 (1851) (Letter from Treaty Commissioners to Commissioner of Indian Affairs); see also supra note 79 and accompanying text.

360. See Hoopes, supra note 46, at 107.

361. Id. at 106.
Indeed, executive officials from the President on down confirmed that the California Indians had no aboriginal rights that the United States was bound to recognize. For example, President Fillmore in his message to Congress in December, 1852, stated:

In other parts of our territory, particular districts of country have been set apart for the exclusive occupation of the Indians, and their right to the lands within those limits has been acknowledged and respected. But in California . . . there has been no recognition by the government of the exclusive right of the Indians to any part of the country. They are, therefore, mere tenants at sufferance, and liable to be driven from place to place at the pleasure of the whites.

The treaties which have been rejected proposed to remedy this evil, by allotting to the different tribes districts of the country suitable to their fixed habits of life, and sufficient for their support. This provision, more than any other, it is believed, led to their rejection . . . .

And later the Commissioner of Indian Affairs stated:

... the treaties . . . effected were never confirmed, the Senate rejecting them on the ground that the United States, acquiring possession of the territory from Mexico, succeeded to its rights to the soil and, as that government regarded itself as the absolute and unqualified owner of it, and held that the Indians had no usufructuary or other right therein which were in any manner respected, they, the United States, were under no obligation to treat with the Indians occupying the same for the extinguishment of their title. 363

These comments were entirely consistent with a theory that no aboriginal rights were recognized by the United States in California Indians and that therefore no aboriginal title existed to be extinguished.

Although no court has directly decided that aboriginal title in California was not recognized by Spain or Mexico,364 one historical footnote can be found on the subject. In a case about the aboriginal


364. In dicta, Byrne v. Alas, 74 Cal. at 633-37, favorably noted the conclusions of the Jones Report that aboriginal title was not recognized in the wild or roving bands of Indians and that the only title recognized by Spain or Mexico was that of the “civilized Indians” connected with the Missions. See supra notes 60-65 and accompanying text.
claims of Oregon Indians, while discussing the theory of aboriginal
title, the Court of Claims noted, without explanation:

Ever since the Government of the United States was first
established the United States through its legislative and executive
departments has, with one qualified exception in the case of the
Indians of California, consistently conceded and recognized that
Indians had a beneficial possessory ownership in lands used and
exclusively occupied by them, notwithstanding general consent to be
sued by the Indians on the basis of such original occupancy title
or on a treaty title was not given.\textsuperscript{365}

Both the theory that nonratification was an alternative expression
of extinguishment, and the theory that Indians in California were
regarded as never having aboriginal rights requiring recognition by
the United States, support the conclusion that aboriginal title was
extinguished despite the lack of ratification of the eighteen treaties.
Whatever the reasons for nonratification, the attitude of the federal
government — as evidenced by the government's removal of Indians
— was repugnant to continued existence of aboriginal title and con-
firmed the fact of extinguishment. One 1853 government report on
the condition of Indians in California acknowledged that nonratifica-
tion, combined with removal, had effected an ad hoc extinguishment
of Indian title in the state.\textsuperscript{366} Since the treaties were rejected, the
Indians "remain[ed] without practical protection from laws and
treaties."\textsuperscript{367} Unlike other parts of the country, where the United States
recognized aboriginal claims and protected portions of those lands
from intrusion, Indian territorial possession in California was left com-
pletely unprotected by the government after rejection of the treaties.\textsuperscript{368}
Later attempts by the United States to remedy these acts only reaf-
firm the conclusion that aboriginal title in California has been
extinguished.

C. Confirmation of Extinguishment of Aboriginal Title

1. The Jurisdictional Act of 1928

The United States' failure to protect, or, as some may suggest, the

\begin{footnotesize}
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365. & \textit{Alcea Band of Tillamooks}, 59 F. Supp. at 962.
(1852) ("... in this way a state of things exists [in California] which is not known in other
parts of the United States, where Indian intercourse laws are enforced by the government and
Indian territorial possession is protected by the government.")
367. & \textit{Id.} at 1.
368. & See 1942 Cohen, supra note 355 at 62; see also, supra notes 119-31 and accompanying
text.
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deliberate policy of divesting the California Indians of their ancestral lands to make way for the rapid and chaotic settlement of California that followed the Gold Rush was largely unnoticed (except by California Indians) for over fifty years. In the 1920's, litigation to assert aboriginal rights of California Indians was brought, but failed. The Court in that case specially noted:

Congress may in the exercise of [plenary] power [over Indians] determine the rights of Indians to the occupancy of lands, and, if injury occurs, the relief must be sought from Congress, and not from the courts . . . .

The 1928 Jurisdictional Act reflected the initial response of Congress to requests for relief on behalf of the California Indians. Although the 1928 Jurisdictional Act provided limited recompense to the Indians of California, the Act also recognized that Indian title in California had been extinguished. The Act authorized the presentation of the claims as follows:

All claims of whatsoever nature the Indians of California as defined in . . . this Act may have against the United States by reason of lands taken from them . . . by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands . . . which the United States appropriated to its own purposes without the consent of said Indians, may be submitted to the . . . Court of Claims . . . .

The language, “by reason of lands taken from them” and “lands . . . which the United States appropriated to its own purposes without the consent of said Indians,” was an acknowledgement by Congress that aboriginal title had been extinguished, i.e., “taken.” Of course, the land ceded in the eighteen unratified treaties included only a portion, albeit sizeable, of the aboriginal lands in California, and the treaties were not made with all California Indians. Section 1 of

369. See Kenney, supra note 45, at 24; Cohen, Original Indian Title, 32 MINN. L. REV. 28, 36 (1932); see also supra notes 104-05 and accompanying text.
370. See Super, 3 F.2d at 91.
371. Id.
373. See supra notes 134-53 and accompanying text.
375. The clause in 25 U.S.C. Section 652 that “the loss to said Indians on account of their failure to secure the lands and compensation provided for in the unratified treaties is sufficient ground for equitable relief,” further supports this conclusion. Cohen agrees that the United States took the land. Cohen, supra note 369 at 36.
376. See supra note 80 and accompanying text.
the 1928 Jurisdictional Act, however, defined the "Indians of California" to include all Indians living in California on June 1, 1852, and their living descendants. This meant that Congress assumed that aboriginal lands had in fact been taken from all California Indians — not just from those who were actually parties to the treaties. Such an assumption was not unreasonable. In the past Congress has, by treaty, extinguished aboriginal title to lands occupied by tribes not parties to such treaties. Alternatively, the inclusion of all the Indians of California in the 1928 Jurisdictional Act may have meant that Congress intended that the payment to the "Indians of California" by virtue of the 1928 Jurisdictional Act would finally extinguish and compensate all the Indians of California for their aboriginal title claims even if the title of the non-treaty California Indians had not yet been extinguished.

These arguments are supported by the opinion in the action brought pursuant to the 1928 Jurisdictional Act. While the Court of Claims emphasized the equitable nature of the relief being granted, the opinion acknowledged that the California Indians had lost their aboriginal title. "This case does not involve the payment for land of which the Indians had a cession, or use and occupancy. No legal claim under any treaty or act of Congress setting aside land for the use of the Indians of California can be sustained." Instead, "[t]he claim sued on is one arising under an Act of Congress that says the promise made to these Indians in negotiating treaties with them, and afterwards not carrying out that promise by ratification, is sufficient to constitute an equitable claim . . . ." The Court explicitly expressed this view of the state of aboriginal title: "These Indians did not qualify before the Commission created by the Act of March 3, 1851 . . .

377. As Cohen noted:
In some cases payment for ceded land has long been delayed. Most of the State of California falls within an area which various Indian tribes of that region had undertaken to cede to the United States in a series of treaties executed in the 1850's . . . The Federal Government took the land but the Senate refused to ratify the treaties . . . The settlement of the California land claims [for recovery of over $5,000,000] closes a chapter in our national history. Today we can say that from the Atlantic to the Pacific our national public domain consists . . . of lands that we have bought from the Indians.
Cohen, supra note 369 at 36.
378. See supra note 349 and accompanying text.
379. See Indians of California, 98 Ct. Cl. at 583.
380. Id. at 600.
381. Id. at 598.
therefore, whatever lands they may have claimed became a part of the public domain of the United States." 382

In 1852, California Indians left their aboriginal lands in reliance on the promises made by the United States that if the Indians removed from and relinquished their aboriginal lands they would receive certain other lands and benefits. Even though the United States was not required to compensate the Indians for the "taking" of aboriginal lands, 383 the 1928 Jurisdictional Act was based on the recognition that the Indians of California kept their part of their bargain and therefore, albeit belatedly and only after considerable public pressure, the United States should honor its obligation. The judgment obtained pursuant to the 1928 Jurisdictional Act was computed on the basis of the lands promised in the treaties and established the intention of Congress to place the "Indians of California" in the position they would have been had the treaties been ratified — with the ensuing loss of their aboriginal lands. Thus, through the 1928 Jurisdictional Act, Congress itself confirmed that the United States had extinguished aboriginal title of the California Indians. This was further reaffirmed by Congress through later actions.

2. The Claims Commission

Advocates for the California Indians recognized the inadequacy of the 1928 Jurisdictional Act. 384 In 1946 Congress also recognized such inadequacies and created the Claims Commission. 385 The Claims Commission had jurisdiction to consider and award compensation for a broad range of claims brought by tribes or "identifiable group[s] of Indians" against the United States. 386

The cases brought by California Indians before the Claims Commission definitely and finally established that all aboriginal title had been extinguished within California. Not only did such claims cover all aboriginal lands in California, but the Court of Claims also upheld the right to bring a representative action on behalf of all the "Indians

382. Id. at 592.
383. See Tee-Hit-Ton, 348 U.S. at 279.
384. See supra note 155 and accompanying text.
385. See supra note 156-57 and accompanying text.
386. See 25 U.S.C. §70(a); 1982 Cohen, supra note 158, at 564. A claim can be brought by any identifiable group. 25 U.S.C. sec. 70(i). Where the identifiable group is a tribal organization recognized as such by the Secretary of the Interior, such organization is accorded the exclusive privilege of representation unless fraud, collusion, or laches is shown on the part of the tribal organization. 25 U.S.C. §70(i).
The only lands not involved in the suit brought on behalf of the "Indians of California" ("Area A" lands), were subject to claims for compensation by other tribal organizations.\(^{388}\)

Compensation awarded by the Claims Commission and paid by Congress for the taking of aboriginal lands is evaluated from the date of extinguishment. Finding an extinguishment is therefore a necessary predicate for establishing compensation. In passing on the claim for compensation of the Indians of California, the Claims Commission was required to determine when and if aboriginal title was extinguished in California. In doing so, the Claims Commission established the date of taking — all aboriginal claims were extinguished in California on March 3, 1853. The Claims Commission found:

The entire area here involved lies within the territory acquired of Mexico in the Treaty of Guadalupe Hidalgo during 1848. The State of California was admitted to the Union on September 9, 1850 (9 Stat. 452). On March 3, 1851, Congress passed the Private Land Claims Act (9 Stat. 631) requiring registration of all land claims within a two-year period thereafter. On March 3, 1853, Congress passed an 'Act to Provide for the Survey of the Public Lands of California and the Granting of Pre-emption Rights to Settlers' (10 Stat. 244). It has been previously held that by this latter Act the defendant took such action toward the vesting in others of the fee title to Indian land within California as was possible only by it becoming a part of the public domain and by extinguishment of Indian title. That date is, therefore, the date upon which Indian title to the land here involved may be said to have been taken by defendant [citations omitted].\(^{389}\)

After setting forth certain provisions of the Land Claims Act that established the Land Commission (section 1), the Land Commissions duties (section 8) and the consequences of the rejection for the failure to present a claim (section 13), the Claims Commissions' findings went on:

The Commission finds that nothing in said Act required the Indian inhabitants of California to present their claims for their original Indian title to California lands; that no such claims were presented,

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\(^{387}\) See Clyde F. Thompson, 122 Ct. Cl. at 357, 361.

\(^{388}\) See supra notes 166-170 and accompanying text. Judgments awarding compensation for those claims were also ordered. See supra note 180 and accompanying text.

\(^{389}\) Thompson, 8 Ind. Cls. Com. at 2. Order Clarifying and Supplementing Findings of Fact and Amending Interlocutory Order of July 3, 1959, p. 2 (1959). This order was made at the request of the Indians of California and after objections of the United States. Id. at 1.
or presented by the California Indians and rejected by the Commissioners, or finally decided to be invalid by the District or Supreme Court . . .

11. The Commission finds that the ancestors of the group known as the Indians of California held original Indian title to the lands in Area B, except the Spanish and Mexican grants made therein. . . . and never voluntarily abandoned any lands therein prior to the taking thereof by the United States; that such Indian title was extinguished by the United States under the provisions of Section 13 of the [Land Claims Act], and by the Act of March 3, 1853, the latter being the date of taking by the United States . . . .

On their face these findings appear confusing, even contradictory. The Claims Commission found that the Land Claims Act extinguished aboriginal title, yet simultaneously appeared to conclude that the Land Claims Act did not require the Indians of California to present their claims. Careful reading of the opinion alleviates the confusion and dispels the contradictions.

The confusion stems from the Claims Commission’s imprecise use of the word “claim” in its response to a contention of the United States. The Claims Commission used this word as a shorthand reference to the Indians of California’ claim for compensation for the value of the land taken from them as distinguished from a claim of aboriginal title.

The United States had argued that the petitioners failed to present “their claim” under the Land Claims Act the petitioners lost whatever rights they had to the land involved, \textit{including the right to compensation for the monetary value} of the land taken.\footnote{391} The focus of the Claims Commission’s discussion of the Land Claims Act was therefore directed to whether the Land Claims Act had extinguished the Indians of California’ \textit{claim for compensation} for the loss of their aboriginal title.

The Claims Commission found that the Land Claims Act did not bar the Indians of California claim for compensation. After first noting

\footnote{390. \textit{Id.} at 3. This finding had also been iterated by the Commission in other suits brought by various California tribes for compensation for the taking of their aboriginal lands. Pit River Indians \textit{v.} United States, 7 Ind. Cls. Com. 815, 848 (1959); Mohave Tribe \textit{v.} United States, 7 Ind. Cls. Com. 219, 242-43 (1959); Washoe Indians \textit{v.} United States, 7 Ind. Cls. Com. 266, 280, 281 (1959).}

\footnote{391. \textit{See Thompson,} 8 Ind. Cls. Com. at 23. This contention was not far-fetched. To avoid this argument the 1928 Jurisdictional Act specifically exempted the “Indians of California” claim pursuant to that Act from such a defense. 25 U.S.C. §653.}
that the claim presented to the Commission "is one based upon aboriginal title" and then after reviewing the doctrine of aboriginal title, the Commission found that a "claim for lands" based upon original Indian title did not come within the class of claims required to be presented under Section 8 of the Land Claims Act as such rights were not derivative from the Spanish or Mexican government. After discussing the authority (Barker and Title Insurance) relied upon by the United States in support of the position that the petitioners lost all their land rights under the 1851 Act, including the right to compensation, the Claims Commission concluded that the Indians of California had not lost their right to present the "present claim" under the Indian Claims Commission Act because of the failure of their predecessors to present a claim under the Land Claims Act more than 100 years before.

We are of the opinion that the Indians of California were not required by the 1851 Act to present their present claim for confirmation and that they are not barred by such failure or said Act from asserting the present claim.

Thus, the Claims Commission held that the "present claim" of the "Indians of California," a claim for compensation for "the value of all lands within the boundaries of the present State of California," was not required to be presented under the Land Claims Act and was not barred by the provisions of the Act. The Claims Commission did not state nor imply that the claim for aboriginal title itself was not barred by the Land Claims Act. In fact, the Claims Commission specifically found that the Land Claims Act had extinguished aboriginal title. After quoting Section 13 of the Land Claims Act the Claims Commission stated:

The plain effect of [Section 13 of the Land Claims Act] when read in conjunction with the other provisions of the Act, is that all lands in California not included in valid private land grants . . . became vested in the United States free of Indian rights.

The Claims Commission further stated: "Since no provisions were made in the 1851 Act for presenting claims for lands in California held and occupied by the aboriginal inhabitants thereof, the Indians of

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393. Id. at 27 (emphasis added).
394. Id. at 4; Thompson, 1 Ind. Cls. Comm. at 370 ("recovery is sought"); Clyde F. Thompson, 122 Ct. Cl. at 350 ("... [the] claim presented by the petition ... is for compensation for certain lands ... alleged to have been taken by the United States ... ").
California, the Indian lands became part of the public domain.\textsuperscript{396} The findings of the Claims Commission were never appealed and the claim was later settled.\textsuperscript{397} These findings and the later judgments rendered by the Commission embraced, by necessity, all of the Indians of California and all aboriginal lands in the State.\textsuperscript{398} This further confirms that aboriginal title to all lands in California has been extinguished. The Indians of California ratified this conclusion in Section 4 of the “Stipulation for Compromise and Settlement and Entry of Final Judgment” in Thompson v. United States:

The stipulation and entry of final judgment shall finally dispose of all claims or demands which any of the petitioners and claimants represented in any of said docket[s] . . . have asserted or could have asserted against defendant in any of said cases, either before or after consolidation, and petitioners (and all claimants represented thereby), and each of them, shall be barred from asserting all such claims or demands in any future action.\textsuperscript{399}

The finality of this stipulation is reinforced by the statutory finality accorded to all claims adjudicated by the Claims Commission.\textsuperscript{400} Since payment has been made,\textsuperscript{401} there is no room to argue that aboriginal title in the Indians of California has remained unextinguished,\textsuperscript{402} nor may the Indians of California now relitigate that claim.\textsuperscript{403} Even after the Claims Commission proceeding, however, the proposition that aboriginal title still exists in California has been asserted.

3. Recent Developments

In Donahue v. Butz,\textsuperscript{404} plaintiffs were twenty-five members of an unorganized band of Karuk Indians. They alleged occupancy of cer-
tain lands in northeastern Humboldt and southwestern Siskiyou Counties, administered by the Secretary of the Interior as national forest lands. Plaintiffs alleged that such lands had been ceded in a treaty with the United States and that the United States maliciously refused to submit the treaty for ratification\(^{405}\) and instead induced the Karuks to move off their lands.\(^{406}\) Plaintiffs sought restoration of lands, not specifically on the basis of aboriginal title, but based on the failure of the Secretaries of Interior and Agriculture to perform their fiduciary obligations to Indians as wards of the government.\(^{407}\)

Although plaintiffs attempted to base a cause of action on a breach of trust theory, the court was unable to find that the United States recognized\(^{408}\) the Karuks' right to some clearly defined area of land.\(^{409}\) The court referred instead to the Land Claims Act and the 1928 Jurisdictional Act to show that Congress recognized any Indian title in any clearly defined area of land within the national forest.\(^{410}\) Far from evidencing an intent to recognize Indian title, the court decided that the presence of these laws established that aboriginal title had been extinguished.\(^{411}\)

In *United States v. Gemmill* the Ninth Circuit was confronted directly with the issue of surviving aboriginal title in California in 1976. Three Indians were convicted of theft of government property valued at less than $100 for cutting and carrying away Christmas trees from the Shasta Trinity National Forest.\(^{412}\) The Indians claimed they acted under the authorization of the Pit River Indian Tribe of which they were members, and which they contended had Indian title to the land in question.\(^{413}\)

In passing on this aboriginal title claim, the Ninth Circuit noted at the outset "the relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights, not

\(^{405}\) This treaty was one of the 18 unratified treaties. *Id.* at 1320 n.4.

\(^{406}\) *Id.* at 1318.

\(^{407}\) *Id.* at 1318, 1321.

\(^{408}\) The United States contended that the complaint raised non-judicial issues (the power of the U.S. to extinguish title); that the court lacked subject matter jurisdiction because the 1928 Jurisdictional Act provided the means for the Indians of California to raise their claims; and that the question of aboriginal title was res judicata by virtue of either the judgment rendered in *Super v. Work* or *Indians of California.* *Id.* at 1319.

\(^{409}\) *Id.* at 1321-24.

\(^{410}\) *Id.* at 1322-23.

\(^{411}\) *Id.* at 1321.

\(^{412}\) See *Gemmill*, 535 F.2d at 1146-47.

\(^{413}\) *Id.* at 1147. Several other Indians were convicted of illegal occupancy of the Lassen National Forest in violation of closure orders issued by the Forest Supervisor; they also raised the defense of aboriginal title. *Id.*
whether the revocation was effected by permissible means." Since no one was disputing that the Pit River Indians prior to 1850 had aboriginal title, the only issue was whether that title had been extinguished.

The court first considered whether the Land Claims Act had revoked the right of occupancy of the Pit River Tribe. Noting defendants' arguments that Indian title was not extinguished by the Act, the court assumed arguendo that the 1851 Act was ambiguous as to extinguishment. The Court, however, found "a series of federal actions subsequent to 1851 clearly demonstrate[d] that the Pit River Indian title has been extinguished."

First, the Court noted that in the 1850's and 1860's the Government undertook concentrated military action against the Pit River Indians and other tribes in the area. The court rejected defendants' contentions that their title survived because they were removed by force, since an extinguishment by force is effective. Second, the court found that the claimed land was included in National Forest reserves and the continuous use of the land for conservation and recreation left "little doubt" that Indian title was extinguished. Finally, any ambiguity about extinguishment was 'decisively resolved' by congressional payment of compensation to the Pit River Indians in the Claims Commission.

California courts have also recently considered the question of the continuing viability of claims of aboriginal rights. In In Re Wilson, a Pit River Indian claimed he was exempt from California hunting regulations, because, as a member of the Pit River tribe, he held unextinguished aboriginal hunting rights. After noting that it was "... established that the tribe's aboriginal 'right to occupy' their native territory has been extinguished. ..." the California Supreme Court found that aboriginal hunting rights were incidents of aboriginal title and likewise extinguished.

414. Id. at 1148.
415. Id.
416. Id.
417. Id.
418. Id. at 1148.
419. Id.
420. Id. at 1148-49.
421. Id. at 1149.
423. Id. at 23, 177 Cal. Rptr. at 337-38.
424. Id. at 24, 177 Cal. Rptr. at 338.
425. Id. at 25-35, 177 Cal. Rptr. at 338-45. Federal courts agree. See United States v. Min-
As seen above, the specific factual findings made in cases that have considered the effect of the federal government’s long course of treatment of the land title claims of the Indians of California, provide an additional and considerable obstacle to future claims of aboriginal title. Future aboriginal title claimants must not only show that no extinguishment has been effected in fact, despite almost 100 years of case law and conduct of the United States to the contrary, but the claimants must also dissociate themselves from the legal finality of the prior judgments. Recent cases in which plaintiff tribes have sought, unsuccessfully, to escape the effect of such prior judgments or proceedings show the futility of attempting to overcome the finality of prior judgments.

In Andrade v. United States, a tribe of Indians attempted to overturn the settlement approved and judgment rendered by the Claims Commission in Thompson v. United States. The Indians challenged the propriety of the procedures through which the settlement was presented and also claimed inadequate representation. Stating that the claims of the tribe “... would normally be barred by res judicata and by 25 U.S.C. sec. 70u, which established a final determination of the Commission, filed with Congress, as having the same effect as a final judgment of this Court,” the Court of Claims considered the challenge as independent action seeking relief from the judgment. Although the Court of Claims held that the suit was barred because

426. In one unreported case, Judge David Williams of the U.S. District Court for the Central District of California recently dismissed for failure to state a claim on which relief could be granted claims of aboriginal title:

The [Indians] did not file a claim [pursuant to the Land Claims Act]. Any rights that the [Indians] may have had was then extinguished by their failure to proceed with a timely claim in accordance with the requirements of the [Private Land Claims Act]. See, e.g., Summa Corp. v. California, Barker v. Harvey. The State of California received absolute title to the tidal and submerged lands ... That title is grounded in the state [sic] constitution, and it has been confirmed and ratified by later federal legislation and Supreme Court decrees.


428. Id. at 661-62.

429. Id. at 663.
of the eight-year delay in bringing the suit, the court also found on the merits that the tribe had not shown any wrongdoing in conjunction with the negotiation or the approval of the settlement. Thus, any attempt to overturn the 1964 settlement and to re-open the question of the continued existence of aboriginal title in California would appear to have a severely limited chance of success. Even that slim hope has been dashed by the conclusion of an almost 35-year long series of proceedings that concerned the aboriginal claims of the Western Shoshone Tribe to lands in Nevada and California.

In 1951, the Western Shoshone Tribe presented a claim to the Claims Commission for compensation for lands taken by the United States in Nevada and California. After a lengthy proceeding, the Claims Commission determined the aboriginal claims of the Shoshones had been extinguished. In 1974, the Commission was about to establish a final value for the lands taken when an association claiming to be the representative of a majority of the members of the tribe attempted to intervene and stay the proceedings. The association's purpose was to prevent payment of compensation for the Nevada lands based on the justifiable fear that payment of compensation would bar the future assertion of aboriginal title to the Nevada lands. The association hoped to show that such title had never been extinguished.

The same obstacle faced by the tribe in Andrade (and by any tribe or group of Indians still wishing to raise claims that have been finally decided by the Claims Commission) confronted the association in Western Shoshone. Because of the delay in raising the claim, the

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431. See Andrade, 485 F.2d at 664-665. In 1983, the Ninth Circuit rejected a challenge to the manner of distribution of the settlement fund. Angle, 709 F.2d at 577-78.
432. See Western Shoshone Legal Defense & Educ. Asn, 531 F.2d at 496.
433. Id.
434. Id. at 497.
435. Id.
436. Id. The association hoped to argue that aboriginal title to large portions of the land in Nevada was not extinguished because a treaty provided the only method by which plaintiff's aboriginal title might be extinguished and because the United States obtained and was holding large quantities of former aboriginal lands of the plaintiff for purposes not authorized by the treaty. See Western Shoshone Legal Reference and Educ. Assoc. v. United States, 35 Ind. Cis. Com. 457, 471 (1975). The Claims Commission found and the association conceded that the aboriginal title to California land also claimed by the Shoshones was extinguished in March, 1853. Western Shoshone, 531 F.2d at 496.
437. The attempt to intervene in 1974 came 23 years after the claim was filed, 12 years after the Claims Commission found that title had been extinguished, 8 years after the parties stipulated to a valuation date, and one and one-half years after the finding of a value of the
Court of Claims refused to allow intervention.\footnote{438}

The court also rejected the attempt of the association to displace the plaintiff group as the exclusive representative of the Shoshones, noting that Indian claims under the Indian Claims Commission Act were unlike a class suit in that the position of each individual member of the group need not be represented; only the group claim need be put forward.\footnote{439} However, in subsequent proceedings, the position of the intervenors was ultimately adopted by the Shoshones and sought recognition of Shoshone aboriginal title, not compensation for the taking.\footnote{440}

The same approach was taken by individual members of the association charged with trespass (illegal grazing) by the United States. The individual Indians (the Danns) defended the criminal case on the basis that the United States could not exclude them because they and the Western Shoshones held beneficial ownership to the lands based on unextinguished aboriginal title.\footnote{441} The District Court agreed with the United States that the Danns were collaterally estopped from asserting title by virtue of the Claims Commission finding that aboriginal title was extinguished.\footnote{442} However, the Ninth Circuit held that not only was the Claims Commission finding not “final” and thus not a bar to the assertion of aboriginal ownership by the Danns, but that the fact of extinguishment had never been litigated.\footnote{443} The case was remanded.\footnote{444}

A year later, the Western Shoshone claim before the Claims Commission was finally decided in \textit{Temoak Band of Western Shoshone I., Nev. v. U.S.}\footnote{445} The issue was whether money compensation should be sought for the taking of the aboriginal lands or whether the Western Shoshone could claim title to the land. The Western Shoshones sought a stay of the Claims Commission proceeding to allow the claim of aboriginal title to be asserted.\footnote{446} The Court of Claims recognized that

\footnotesize{land. \textit{Western Shoshone}, 531 F.2d at 498. Furthermore, the association was aware of the adverse position taken by its rival before the Claims Commission, and there was no adequate excuse for the delay in intervening. \textit{Id.}}

\footnotesize{438. \textit{Id.} at 499.}

\footnotesize{439. \textit{Id.} at 500-03.}

\footnotesize{440. \textit{See United States v. Dann, 572 F.2d 222, 225 (9th Cir. 1978) (Dann I).}}

\footnotesize{441. \textit{Id.} at 223.}

\footnotesize{442. \textit{Id.}}

\footnotesize{443. \textit{Id.} at 226.}

\footnotesize{444. \textit{Id.}}

\footnotesize{445. 593 F.2d 994.}

\footnotesize{446. \textit{Id.} at 995-96. However, even the association conceded that some land had been taken. \textit{Id.} at 997.}
the position of the Western Shoshones was a natural reaction to a change in the legal climate, in which large aboriginal title claims have been reported in litigation or favorably settled in contrast to mere claims for money awards under the Indian Claims Commission Act.\textsuperscript{447} However, the Court held "... far too much water had gone under the bridge ... We think the Commission effectuated the will of Congress more perfectly by allowing this case to come to final judgment, and we therefore affirm on appeal its decision not to suspend."\textsuperscript{448} The Court referred the Western Shoshone to Congress if they desired to avert extinguishment of their claims by final payment from Congress.\textsuperscript{449}

In the meantime, the Dann case had continued. On remand, the District Court, found for the United States, holding that the Danns were collaterally estopped from raising the aboriginal title claim and that the award approved in \textit{Temoak Band} extinguished aboriginal title.\textsuperscript{450} The Ninth Circuit again reversed, first holding on the basis of \textit{Dann I} that the Danns were not collaterally estopped.\textsuperscript{451} The Court held that the bar provision of the Indian Claims Commission Act, 25 U.S.C. sec. 70u, was the exclusive bar provision and that no additional bar may arise from common law principles of res judicata.\textsuperscript{452} The Court reasoned:

Indian claims proceedings are highly extraordinary creatures of statute. In the absence of a recognized tribal organization, they may be brought by any member of an identifiable group of Indians on behalf of all members. 25 U.S.C. sec. 70i (1976). There is no provision for members to opt out of the proceedings, as there is in the case of class actions ... Congress was careful to delineate the manner in which the judgments reached in these unusual proceedings would be effectuated. We are reluctant to add to the statutory sanctions. We conclude, therefore, that the bar arising from a favorable claim determination takes effect upon the payment of the claim, pursuant to section 70u(a).\textsuperscript{453}

\textsuperscript{447} \textit{Id.} at 996.

\textsuperscript{448} \textit{Id.} The award was certified to the General Accounting Office which had the effect of automatically appropriating the amount of the award. 31 U.S.C. §724a; \textit{Dann III}, 105 S. Ct. at 1061. In contrast to Claims Commission proceedings, the Supreme Court has just narrowly held (5-4) that time will not bar a claim by Indians that their lands were taken in violation of the Non-Intercourse Act. \textit{County of Oneida}, 105 S. Ct. at 1256-57.

\textsuperscript{449} \textit{Temoak Band}, 593 F.2d at 999.

\textsuperscript{450} \textit{See Dann II}, 706 F.2d at 923.

\textsuperscript{451} \textit{Id.} at 924.

\textsuperscript{452} \textit{Id.} \textit{Cf. Oglala Sioux Tribe}, 722 F.2d at 1414; United States v. Southern Ute Tribe or Band of Indians, 402 U.S. 159, 159-64 (1971).

\textsuperscript{453} \textit{Dann II}, 706 F.2d at 924-25.
The Court held that because "payment" had not been made, the Danns could assert aboriginal title as a defense to the trespass charge. The United States Supreme Court granted certiorari.

In a very recent decision, a unanimous Supreme Court reversed the Ninth Circuit holding that "payment" had occurred and that the Danns were barred from asserting tribal aboriginal rights as a defense to the trespass charge. The Supreme Court found that the Indian Claims Commission Act had two purposes: the chief purpose was to dispose of the Indian claims problem with finality; the secondary purpose was to transfer the responsibility of determining the merits of Indian claims from Congress to the Claims Commission. Both of these purposes would be frustrated if the award were not held to be final once certified by the Court of Claims.

The consequences of the Western Shoshone and Dann proceedings are devastating to those who would claim aboriginal title in California. Future champions of aboriginal title will be unable to successfully claim that the decisions of the Claims Commission in the case of the California Indians should not be accorded finality, in light of the rule that once an award has been certified, as is the case with the Indians of California, the findings and decisions of the Claims Commission are final. The Indian Claims Commission Act (25 U.S.C. § 70u) expresses the firm Congressional intention that once resolved, these claims should not be relitigated, either before the Courts or in Congress.

Conclusion

The inherent deficiency with any future aboriginal title claim in California is that California Indians, unlike the Indians of the eastern United States, are able to point only to acts of the United States as the reason they have been dispossessed. Such claims are bound

454. Id. at 927. The Court also found that aboriginal title had not been extinguished as a matter of law as Congress had not shown a clear intention to permit extinguishment as a result of any given piece of legislation. Id. at 928-33.
456. See Dann III, 105 S. Ct. at 1062, 1065. In an interesting aside, the Supreme Court noted, without deciding, that the Danns were not barred from asserting "individual aboriginal rights." Id. at 1065. The other issues discussed in Dann II were not addressed by the Supreme Court's opinion.
457. Id. at 1062-63.
458. Id. at 1063-64. By virtue of 31 U.S.C. §724a certification automatically appropriated the amount of the award and deposited it for the tribe in an interest bearing account. Id. at 1061.
459. See, e.g., Andrade, 485 F.2d at 663; Dann III, 105 S. Ct. at 1063.
to fail since the United States possesses the plenary power to displace Indians from their lands, regardless of the means chosen to do so. The cumulative effect of the various actions taken by the United States inconsistent with the California Indians' right of possession has been to extinguish aboriginal title. In fact, the accepted date of extinguishment of aboriginal title in California was soon after California became a state.\textsuperscript{460}

The history of the treatment of Indians in California by the federal government is perhaps even more deplorable than the treatment accorded Indians in any other part of this nation. Sadly, this course of treatment makes inevitable the conclusion that the claims of California Indians to their aboriginal lands are no longer viable in California.\textsuperscript{461}

At the heart of this undeniably harsh result is the doctrine of aboriginal title itself. This doctrine has accorded the federal government the unilateral and unreviewable power to terminate the aboriginal possession of Indian homelands for whatever reasons, by whatever means, and with no compensation whatsoever required. Nowhere is

\textsuperscript{460} For example, in the New York Indian cases, the Oneida tribe claimed unapproved treaties were entered into with the State of New York after the enactment of the Non-Intercourse Act. County of Oneida, 105 S. Ct. at 1249. As a matter of historical fact, California did not engage in any remotely similar conduct with respect to California Indians. See supra notes 68-153 and accompanying text.

\textsuperscript{461} However, there may be one avenue for proving an aboriginal title claim — what the Supreme Court vaguely referred to as "individual aboriginal title." Dann III, 105 S. Ct. at 1065. The Supreme Court relied on Cramer, 261 U.S. at 227 and Santa Fe, 314 U.S. at 357-358. Id. Cramer was the only case relied on by the Supreme Court which specifically discussed "individual aboriginal title." Cramer, 261 U.S. at 227. Santa Fe, also cited by the Court, did not discuss or concern "individual aboriginal title." Santa Fe, 314 U.S. at 357-58. And in Cramer, the facts established adverse possession rather than a permissive right of occupancy: . . . [A]s early as 1859 the Indians named lived with their parents upon the lands described and had resided there continuously ever since; that they had under fence between 150 and 175 acres in an irregularly shaped tract, . . ., portions of which they had irrigated and cultivated; that they had constructed and maintained dwelling houses and divers outbuildings, and actually resided upon the lands and improved them for the purpose of making for themselves homes. Cramer, 261 U.S. at 226. Indeed the Court found the possession was with the implied consent of the United States, "was definite and substantial in character and open to observation." Id. at 230. But acquiring property interests against the public domain by adverse possession seems contrary to basic property law. See, e.g., United States v. California, 332 U.S. at 39-49; Sweeten v. United States, 684 F.2d 679, 682 (10th Cir. 1982); CAL. CIV. CODE §1007; People v. Chambers, 37 Cal. 2d 552, 557, 233 P.2d 557, 560 (1951); Patton v. City of Los Angeles, 169 Cal. 521, 527, 147 P. 141, 143 (1915). However, an argument can be made that such a right to occupancy against (federal) public lands can be rationalized since acquiescence by the federal government to the occupancy is compatible with its plenary authority over Indians, and such occupancy can later be terminated by the federal government at any time. Such a rationale would plainly have no application to state-owned lands because of the state's limited authority to deal with the Indians.
the extent of this power more evident than the manner in which the power was exercised in California. By the Treaty of Guadalupe Hidalgo, the federal government solemnly promised to protect Mexican landowners in their ownership of property; this promise was fulfilled in the Land Claims Act. As for Indians living contemporaneously in the state, this promise was false; no effort was made by the United States to protect them. Instead, an unstated but undeniable policy of prompt removal of Indians from their lands to avoid conflicts and interference with the Gold Rush was undertaken by the federal government. This policy was fully within the power of the United States. Given this extraordinary power and the willingness to exercise the power, the conclusion that aboriginal title has been extinguished is not remarkable.

Although the Land Claims Act provides a complete answer to the question of extinguishment, extinguishment also was accomplished by the “century-long course of conduct” by the Federal Government repugnant to Indian occupancy, as well as the general acquiescence of the government in the Indians’ loss of their aboriginal lands. Of course, the judgment and payment of the Claims Commission award settled the issue of extinguishment in the very real legal sense of finality of judgments and not only as a matter of history.

Despite the inevitable conclusion that aboriginal title has been extinguished, the issue is still not a dead letter. Even if not raised in the context of a suit to recover for loss of aboriginal lands as in the Maine litigation, claims of aboriginal title are likely to recur in cases (as in Gemmill, Wilson and Dann) where aboriginal title is used as a defense to a charge of trespass or illegal hunting or fishing. No doubt claims of aboriginal title will continue to be raised in other contexts as well. Even if they have little chance of success, such claims will nevertheless serve as a reminder of events that should not go unnoticed or be forgotten by future generations.