Perspective

RECOVERING INDIAN LANDS: THE LAND PATENT ANNULMENT SUIT

Preservation of the land occupies a central position in the value system of the American Indian, and the effects upon Indian tribes of the historical taking and environmental degradation of Indian lands have been profound. The Indian, however, has unique legal remedies available to recover some of his lands. This Perspective reviews the importance of land in American Indian cultures and then argues that a land patent annulment suit can be used to revoke certain early land patents, allowing recovery of the land rather than monetary damages.

The cultures of the American Indian place the land in a position of central and almost mystical significance. Thus, the Indian has felt a great loss in the divestment and abuse of his land by the white man. The unique legal status of the Indian in relation to some of this land provides hope that it can be reallocated to the tribes that originally occupied it. This paper will focus first upon the close ties between the Indian and his land and then upon a proposed legal approach to mending these severed ties.

I

THE CONSERVATION ETHIC OF THE AMERICAN INDIAN

The conservation ethos of the American Indian could provide a model for restructuring the value system that is at the base of our ecological crisis. At the very least, its adoption would assure mainte-

1. Although the authors generalize by treating all Indians as one, they recognize that significant differences exist in the customs of various tribes. Nevertheless, their research indicates that the nature ethic is strong in all Indian cultures and thus that some generalization is permissible.


3. See note 56 infra.
nance of a better ecological balance on those lands reallocated to Indian tribes. This part examines the nature ethic of the American Indian through an exploration of his religion, myths and life style.

A. The Conservation Ethic

1. A Reverence for the Earth

The Indian's reverence for his land is indeed difficult to describe, particularly in the language of the white man. Examples can, however, illustrate and perhaps even explain this part of the Indian's conservation ethic.

A noted anthropologist, describing aboriginal California, stated that

[e]ach territory contained spots which had religious, magical, or other affective associations to its inhabitant. . . . [There was a] tremendously strong attachment which all California Indians had for the place in which they were reared and had spent most of their lives. . . . They wanted to go on living where they had always lived.

Part of the Indian's reverence for land appears to stem from his belief that man "is truly born from the earth." The Hopis and Navahos, seeing Mother Earth as their true mother, expressed their reverence to her in symbolic dances and ceremonies and by their respectful treatment of the land that surrounded them. It was this particular attitude which prompted Dee Brown to write:

4. The rapport between the Indians and the land is difficult to understand, much less describe. In a materialistic society the affinity between the Indians and their mountains, lakes, and rivers has been all too frequently disregarded.


7. Although all land was important and many places were religiously significant,

[V]ol. 2:195
The Navahos could forgive the Rope Thrower [Kit Carson] for fighting them as a soldier, for making prisoners of them, even for destroying their food supplies, but the one act they never forgave him for was cutting down their beloved peach trees.\(^8\)

This aspect of the Indian’s conservation ethic has recently manifested itself in spirited opposition to the white man’s appropriation of certain lands for ecologically detrimental development. The actions of Quinault and Lummi Indians in Washington\(^9\) and the Hopis and Navahos in the Four Corners area\(^10\) provide but two examples. The reaction of the Taos Indian Pueblo at the time of their recent reacquisition of the Blue Lake lands is typical: “[T]he land will now be preserved.”\(^11\)

2. \textit{A Belief in the Harmony of All Things}

A second aspect of the conservation ethic is the Indian’s mystical view of the unity and vitality of all natural things.

Ever in touch with the mystery, he acknowledges the spiritual essence in all things—the forests and the fields, the clouds and mountains, the young corn, the eagle, and the deer. Like him they exist to play their parts in the cosmic whole.\(^{12}\)

Historically, the Indian has been appalled by the white man’s lack of respect for other living things:

Fathers, fathers, fathers, hear me well. Call back your young men from the mountains of the bighorn sheep. They have run over our country; they have destroyed the growing wood and the green grass; they have set fire to our lands. Fathers, your young men have devastated the country and killed my animals, the elk, the deer, the antelope, my buffalo. They do not kill them to eat them; they leave

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8. Dee Brown, supra note 2, at 27.
11. Senate Hearings, supra note 1, are replete with statements of the high regard which the Indians of the Four Corners area have for the earth. See, e.g., pt. 2, at 793, 823, 825; pt. 3, at 1079; pt. 4, at 1339, 1540, 1541, 1544, 1549, 1551, 1568. To try to explain the feeling to the Senators at the hearing in words that white men could understand, one Navajo said, “Black Mesa is to the Navajo like money is to the whites.” Pt. 4, at 1549. Another compared the impending destruction of their sanctuaries in the Four Corners area to the strip-mining of the White House or Independence Hall. Pt. 5, at 1552.
them to rot where they fall.\textsuperscript{13}

But the Indian's concept of life encompassed more than blades of grass and herds of deer and buffalo. He believed that "matter has a spiritual essence as well as a material composition, that even mountains have a spirit form as well as a physical one . . .,"\textsuperscript{14} and saw all these forces as a living whole.\textsuperscript{15} This feeling of the wholeness of all things complemented the reverence he felt for the land. Both aspects of this conservation ethic are still a part of Indian cultures\textsuperscript{16} and may provide a solid foundation, from the standpoint of protecting the environment, for arguing in support of the return of certain parcels of land to the Indian.

These values permeate the Indian's religion, his myths and, generally, his way of life. Some examples have already been mentioned; the remainder of this part will be devoted to further illustration.

\textbf{B. Conservation Values Reflected in Indian Religion}

Although each tribe differs, the religions of the various Indian nations usually reinforce the values of reverence for the land and the harmony of all things. This is evidenced by the sacredness of certain geographical areas, by the Indian's concept of God in nature, and by certain of his religious ceremonies, including death observances.

Many of these sacred places\textsuperscript{17} are presently not in Indian possession, but certain of the surviving tribes have sought to reclaim them, utilizing force and legal means.\textsuperscript{18} The United States Congress recently returned one piece of sacred land in trust to the Taos Indians of New Mexico;\textsuperscript{19} Blue Lake is again theirs.\textsuperscript{20} Although whites have gen-

\begin{footnotes}
\item[14] \textit{MASKED GODS}, supra note 6, at 48.
\item[15] It is all one: the dancing gods; the pulsing cries and the singing drum; the whirling horizon; the mountains in the sky; the white clouds squatting on the plain. And one no longer thinks it is all over, done, finished, for in this evolution of spaceless space and timeless time which obliterates the illusion of straight-lined progression from a distinguishable beginning to an ordered end, nothing ever is all over, done, finished. Seed and fruit, form and substance, deed and intention—everything fuses in a whirling circle that encloses an undivided, undifferentiated ever-living wholeness. \textit{Id.} at 162.
\item[16] \textit{See} H. HOUCH, \textit{supra} note 1, at 141; Barnes, \textit{Los Angeles vs. the Indians—II, Bad Day at Black Mesa}, \textit{NEW REPUBLIC}, July 17, 1971, at 23.
\item[17] \textit{See} \textit{MASKED GODS}, supra note 6, at 170.
\item[18] \textit{See part II infra.}
\item[20] Frank Waters' description of the pilgrimage to Blue Lake illustrates the sig-
\end{footnotes}
erally not been allowed to see the actual religious ceremonies at the lake, John Collier was permitted to go half way on the route to the sacred lake and described the first part of the religious event in the following terms:

A displacement of human and mystical factors . . . [and] a strange release of energies took place, . . . the dynamic potentiality of ancient beliefs was realized . . . . The Indian's relationship to these forces or beings is . . . a partnership in an eternal effort whereby, from some remote place of finding and communion, the human and the mechanical universes alike are sustained. Blue Lake of Taos, in the Navaho and Pueblo universes, is an opening to a system of waterways underneath the earth. It derives its religious significance as part of four successive underworlds important to their view of the nature of the universe.

As the Taos Indians revere Blue Lake, so the Paiutes worship Pyramid Lake, the Menominees worship their land in Wisconsin and other tribes have their own sacred places. Few tribes have been fortunate enough to have their land restored to them. Perhaps their chances will improve as conservationists realize that supporting the Indian's quest for return of his land is consistent with, and will promote, the protection of America's unspoiled wilderness. And even if

mification of not only this religious site, but also the importance of various sites revered by Indians of other tribes:

The trip is long and difficult: a steep ascent of over six thousand feet in twenty miles, and it is one of the most beautiful ever to be found. The route leads from the pueblo up along the Glorieta wagon road under the great interlocking cottonwoods, then turns off a narrow trail. Up the dark forested canyon around the sacred mountain. Over the high ridge. Through groves of aspen already so yellow that one seems to be plodding through a golden cloud. There is a tiny spring oozing from beneath a boulder, where one can rest the sweating, heaving horses. Then the trail starts climbing again along a foot wide trail cut into the cliff walls extending far above and below. . . .

Suddenly as you cross the slope of the peak just below its summit, you see it below. Way down below the tortuous slope of loose gravel, set deep in the forest, indescribably blue. The clear turquoise of the sky above. The dark purplish blue of the forest in its depths. The light blue of the edges washing on its shores. All these blues merging into one blue, whose stainless purity seems instead to color sky and earth with its pulsing vibrancy.

This is Blue Lake which feeds the little stream that trickles down the dark canyons, pours fresh and full through the pueblo to separate its dual halves, and empties at last in the Rio Grande. The blue lake of life that ever nourishes field, beast, and man below. The ancient sacred lake beneath which live the thlatsinas, the spirits of the dead, the elements, the inner forms of all the outer forms visible to man.

Masked Gods, supra note 6, at 343.

21. Commissioner of the Bureau of Indian Affairs from 1933 to 1945.
23. Masked Gods, supra note 6, at 170.
24. Veeder, supra note 4, at 497-512.
the land is not actually returned to its Indian claimants, the Indian example could engender sufficient concern for the environment to assure protection and preservation of these special areas.

In addition to this belief in the sacredness of certain locales, the Indian's concept of God (though hardly the anthropomorphic concept promoted by the white man) is that God is in everything:

According to the Whites there is God and there is the rain, the flood, the mud, and all inanimate nature. But, according to the Navahos, there is God in the heavens, God in the rain, the flood, the mud, God in his children, The People, and all these Gods together are one God, the God of all the living universe.25

This religious belief affirms and reinforces both aspects of the Indian's conservation ethic. With such a belief, the Indian of necessity is a true conservationist.26

Various religious ceremonies reflect the Indian's respect for nature. The Taos Deer Dance,27 the Navaho Sings,28 and the Pueblo Dances29 are three examples of such ceremonies.30

Also illustrative are the death observances, which show the naturalness of this last event in life. The songs accompanying the death ceremonies exemplify these beliefs.31 The death song of a Kiowa soldier society illustrates the belief in the permanence of the rest of nature as compared to the finiteness of man's earthly life:

O sun, you remain forever, but we Kaitsenko must die.
O earth, you remain forever, but we Kaitsenko must die.32

Similarly, the Cheyenne death song relates:

Nothing lives long
Only the earth and the mountains.33

25. Masked Gods, supra note 6, at 115. Perhaps this is no more than saying that "the whole world was animate—night and day, wind, clouds, trees, the young corn, all was live and sentient. All matter had its inseparable spiritual essence." F. Waters, supra note 12, at 284.
26. See Dee Brown, supra note 2, at xvii.
27. Masked Gods, supra note 6, at 186.
28. Id. at 229.
29. Id. at 262.
30. See text accompanying notes 5-7 supra.
31. For example, Vine Deloria writes that "[i]n Indian religions, regardless of the tribe, death is a natural occurrence and not a special punishment from an arbitrary God." He concludes that the ceremony of mourning, followed by a feast, channels the expression of grief into constructive behavioral patterns. Death becomes an ongoing part of life. V. Deloria, supra note 7, at 120.
32. Dee Brown, supra note 2, at 254.
33. Id. at 89. See also J. Neihardt, supra note 6, at 125. This same attitude, the realization of nature's infinitude and man's dependence on it, is expressed by Indians today: "Even when we were small, our cradle was made from the things given to us from Mother Earth. We use these elements all of our lives and when we die we go back to Mother Earth." Senate Hearings, supra note 1, at 1549.
C. Conservation Values Reflected in Indian Myths

In any collection of Indian tales there is a subtle emphasis on man's relationship with nature. Sometimes a sacred mountain might be mentioned. Or the Yuroks tell of places of retreat for a man or a woman who, seeking power, goes to them to pray, to cry, to smoke, to fast; in short to engage in ceremonial lonely ritual, these being places of solitary mystic communion.

And the measure of a man's education from his travels often was described in terms of his increasing knowledge of nature:

He came to know the properties of plants and springs and mountains and deserts. He subdued Rattlesnake, and thereby his own fears. He crossed and re-crossed the Colorado River until it was no longer a barrier, and its total course was known to him. He reached the sea, staying there until the shells along its shore and the life in its waters seemed no longer strange to him, but were known and within his control, just as he came to know the water birds, so different from the birds of the desert.

Tales related to Earth Mother and Sun Father are, of course, significant as a reflection of the Indian's concept of the origins of the world. Whether known as Earth Mother, Changing Woman, Iatiku ("Bringing to Life"), or the Corn Mother, Indians revere her as the symbolic source of all life. The Navahos believe that Changing Woman—so named because the earth changes in her seasons—"was found lying on the east side of a mountain in a bed of flowers marked by a rainbow. She had been born of the darkness and the dawn." Furthermore, they believe that

34. Masked Gods, supra note 6, at 178. See also T. Kroeber, The Inland Whale (1964).
36. Id. at 163. In a similar vein, Mr. Justice Douglas wrote:
America is on the move. But it is the car, not man, that does the work. Only a few leave civilization to rejoin nature and become once more an elemental part of the wilderness. The thrill of tramping alone and unafraid through a wilderness of lakes, creeks, alpine meadows, and glaciers is not known to many. A civilization can be built around the machine. But it is doubtful if a meaningful life can be produced by it. When man worships at the feet of avalanche lilies or discovers the delicacy of the pasqueflower, or finds the faint perfume of the phlox on rocky ridges, he will come to know that the real glories are in God's creations. When he feels the wind blowing through him on a high peak or sleeps under closely matted whitebark pine in an exposed basin, he is apt to find his relation to the universe.

37. T. Kroeber, supra note 34, at 133.
38. Masked Gods, supra note 6, at 190-94.
39. Id. at 190. Hopis and Navahos still refer with reverence to their Earth Mother. See, e.g., Senate Hearings, supra note 1, at 1542, 1544, 1549.
[w]ith the maturity of her prototype, Changing Woman, the earth-world solidified into form and substance; earth and sky, the mountains and the stars, plants and animals assumed their proper roles. Impregnated by sun fire and water, she immaculately conceived the dual Hero Twins, and then gave birth to a new race—the Navahos.  

Along with this affinity for Earth Mother is the belief that the sun is the “primal source of life.” Just as the Corn Dances are held for Earth Mother, so various ceremonies are held in honor of the sun. At Taos, the Pueblos held races. The Sun Dance of the Cheyennes and Kiowas is perhaps the most brutal illustration of the Indian’s concept of his own humility before nature: “[They] kept dancing around the tall pole, buckskin thongs tied to muscles and sinew, until they had ripped out their own ligaments without betraying pain.”

D. Conservation Values Reflected in Indian Living Patterns

The Indian’s great respect for nature and the protection of his environment is also apparent in the general living patterns of the Indian tribes. The tribal group itself, its hunting practices and its land use patterns all reinforced the Indian’s conservation ethic. The tribe was an entity noted for its unity. In the words of one writer, “[w]hen hunting was good everyone ate, when it was bad everyone suffered.”

There was a “solidarity of spirit,” a “sense that they were one people with common fortunes.” This concept would appear to be quite similar to the philosophy of wholeness which the Indian applied to the Universe.

The decision-making process of the tribal governing body was one of seeking a consensus. It was a patient process quite unlike the governing units to which the white man is accustomed:

In Council every trivial aspect of the subject is presented; it is looked at “from all directions.” Not only from practical viewpoints—and these are uncannily shrewd, but from a ceremonial viewpoint. How will it affect the pueblo as a whole in the long run? This is

40. Masked Gods, supra note 6, at 192.
41. Id. at 207.
Pueblos and Navahos alike recognize the sun as the most powerful creative force in the universe. Personified as the Sun Father, he is the great creator, the original impulse, the primal source of all life.

Id. at 196.
42. Id. at 264.
43. Id. at 197-98.
44. Id. at 198-99. The sun dance of the Oglala Sioux is described in J. Neihardt, supra note 6, at 95.
45. V. Deloria, supra note 7, at 239.
46. Kroeber, supra note 5, at 99.
the keystone to every question posed. And toward its answer they pray, "Let us move evenly together."

Homogeneity, a close-knit solidarity, is the distinguishing mark of secular government as it is of pueblo ceremonialism.

"We are all in one nest." This old saying expresses it perfectly. Stock, both horses and burros, are herded communally. The reservation land is held communally, but allotted to individual families. As long as a man works his field it is his under the communal title; he is free to bequeath it to his son, to sell it to his neighbor although not to an outsider. But if he neglects it, it is taken back and redistributed.  

Just as the communal nature of the tribe and its consensus-seeking governmental structure are illustrative of the Indian's efforts toward harmony, so too do his hunting methods and use of animals show his respect for nature. As a hunter, the Indian took only what he needed for sustenance; of the animals that were killed, every part was used.

The choice ribs were roasted over the coals. The stomach [of the sheep] was stuffed with a dressing of the blood and fat and a little flour, and boiled. Heart, lungs, and windpipe were cut up and fried. The intestines were washed and roasted on green sticks. Head and feet were singed, then cooked in hot ashes. And finally the bones were boiled for soup.

Rituals were frequently connected with the destruction of any living thing.

To the pine tree he is about to cut he says ceremonially, "We know your life is as precious as ours. But we also know that one life must sometime give way to another, so that the one great life of all

47. Masked Gods, supra note 6, at 357-58.
48. The signal is a bright and tender look; calmness and gentleness, freshness and ease of manner. Men, women and children—all of whom together hope to follow the timeless path of love and wisdom, in affectionate company with the sky, winds, clouds, trees, waters, animals and grasses—this is the tribe.

50. Masked Gods, supra note 6, at 95. Contrast the Indian's view of the white man's slaughter of bison:

The Wasichus [white men] did not kill them to eat; they killed them for the metal that makes them crazy, and they took only the hides to sell. Sometimes they did not even take the hides, only the tongues; and I have heard that fire-boats came down the Missouri River loaded with dried bison tongues. You can see that the men who did this were crazy. Sometimes they did not even take the tongues; they just killed and killed because they liked to do that. When we hunted bison, we killed only what we needed.

J. Neihardt, supra note 6, at 217.
may continue unbroken. So we ask your permission, we obtain your consent first.”

Also to the deer he is starting out to kill he says the same thing ceremonially. And when he kills the deer he lays its head to the east, towards the Sun Father, sprinkles it with pinches of corn meal, and lets fall drops of its blood on the ground for Our Mother Earth. And afterward when he builds its flesh into his flesh, when he dances in its robe and antlers, he knows that the life of the deer is continued in his own life.51

As with tribal structure and hunting practices, the Indian's use of land also demonstrates his concern for the environment. His system of communal ownership of land52 emphasizes that everyone derives benefit from the land and, more significantly, that everyone has a responsibility toward the land. From a speech by a Nez Perce Chief53 to a contemporary plea by the Hopis whose land is threatened by strip mining and power plants,54 the message is clear: land is the cultural keystone of the American Indian. The earth should be respected by man, should be worshipped and cared for.

E. Application of the Ethic

A conservation ethic is regrettably foreign to, or is at least frequently disregarded by, a society that has interpreted its calling to be industrial expansion and progress at the expense of the environment. When one compares the Indian conservation ethic as a customary

51. Masked Gods, supra note 6, at 178. For a similar ceremony after a killing, see J. Neihardt, supra note 6, at 64.
52. The Yuroks were a notable exception, allowing private ownership of land. See T. Kroeber, supra note 34, at 159.
53. The earth was created by the assistance of the sun, and it should be left as it was. . . . The country was made without lines of demarcation, and it is no man's business to divide it. . . . I see the whites all over the country gaining wealth, and see their desire to give us lands which are worthless. . . . The earth and myself are of one mind. The measure of the land and the measure of our bodies are the same. Say to us if you can say it, that you were sent by the Creative Power to talk to us. Perhaps you think the Creator sent you here to dispose of us as you see fit. If I thought you were sent by the Creator I might be induced to think you had a right to dispose of me. Do not misunderstand me, but understand me fully with reference to my affection for the land. I never said the land was mine to do with it as I chose. The one who has the right to dispose of it is the one who has created it. I claim a right to live on my land, and accord you the privilege to live on yours.
Dee Brown, supra note 2, at 316.
54. "We don't want money from coal companies. We love all earth and all nature. We get life from earth. We get food. Money go away fast. Then you have nothing left. We have no land, then we have nothing." Time, June 7, 1971, at 61.
John Lansa, a Hopi, testified during the hearings on the Four Corners power plant: "This is our Earth Mother, so that is why we don't want them to dig around just for the money. . . . We don't want to sell this land here, or any other. Sacred places are all around." Senate Hearings, supra note 1, at 1542.
"law" of the tribes\textsuperscript{55} with the property systems devised by the white man, it is obvious that the principles of private ownership and multiple use and the concept of land as a mere marketable commodity do little to discourage exploitation of the land.\textsuperscript{56} In this sense, there is a marked contrast to the treatment of the land by the American Indian.

The Indian's reverence for land may be more than can reasonably be expected from the modern white man whose technological, urban society urges a different life style. But Anglo writers,\textsuperscript{57} as well as Indians, have discussed the conservation ethic as a principle which the United States would do well to adopt. Just as the Hopi's concept of land ownership as a trust for the benefit of future generations has much to recommend it, so too does the Indian's belief in

the simple and monstrous truth of mankind's solidarity with all that breathes and does not breathe, all that has lived and shall live again upon the unfathomed breast of the earth we trod so lightly, beneath the stars that glimmer less brightly but more enduringly

\textsuperscript{55} The Indians knew nothing of formal titles or records, just as they knew nothing of any written lore. Their understanding was the common knowledge of a group, validated only by common assent. Primitive peoples got along together in their societies without law courts, without lawyers, without written laws, without police, without a written constitution. Custom rules everything. . . . 'History' extended only as far back as memory lasted. On the other hand, what was known as being so in one's own day and one's father's, and perhaps more dimly in one's grandfather's generation, was known more or less by everyone, and what everybody agreed on was accepted.

Kroeber, supra note 5, at 89.

\textsuperscript{56} These values may, in fact, encourage such exploitation. For example, one of the most recent government documents reflecting the direction of United States public policy toward the use of land is the Public Land Law Review Commission Report. As Phillip Berry and Michael McCloskey make clear in their critique of the Report, even though "environment" may be the word of the day, the proposals in the Report are generally made from an economic rather than a conservation viewpoint. Berry observes that "the basic assumption of the Report is that we will continue to have the no deposit-no return, use-once-and-throw-away Philistine culture we have today." Berry, An Analysis: The Public Land Law Review Commission Report, SIERRA CLUB BULLETIN, October 1970, at 19. This perspective of the Report—and of much of American law relating to property and the environment—would be anathema to the American Indian.

\textsuperscript{57} Perhaps man was losing his freedom in a subtle manner. He was becoming more and more dependent on other men. . . . He looked to people rather than to himself and to the earth for his salvation. He fixed his expectations on the frowns or smiles or words of men, not on the strength of his own soul, or the sunrise, or the warming south wind, or the song of the warbler.

Once men leaned that heavily on people he was not wholly free to live. Then he became moody rather than self-reliant. He was filled with tensions and doubts. He walked in an unreal world, for he did not know the earth from which he came and to which he would return.

than our own brief lives.  

II

THE LAND PATENT ANNULMENT SUIT

The land patent annulment suit brought by the federal government on behalf of particular American Indian tribes is proposed here as a means of challenging certain land patents issued with respect to property rightfully belonging to such tribes at the time of issuance. The Indians’ claim to title to the territory involved would be based on the doctrine of aboriginal title.

A. Conceptual Bases

Aboriginal title is equitable title based upon actual, exclusive and continuous use and occupancy of a definable area of land for "a long time" prior to the loss of the property. Essentially, this concept applies to the semi-nomadic mode of occupancy common to American Indian tribes before they were Americanized or confined to reservations. Land subject to aboriginal title is held in trust by the federal government as guardian for Indian tribes, designated its wards. Establishment of aboriginal title in a given tribe is the first objective of the proposed patent annulment suit and is the factual foundation upon which the remaining elements of the suit rely.

Following the establishment of aboriginal title to certain land, the second objective is to demonstrate that the effect of such title is to remove the land involved from the operational scope of statutes which had purportedly authorized the issuance of patents to that land to private parties. Indian title is judicially recognized as removing land

58. F. Waters, supra note 12, at 306. Similarly, Momaday’s advice should be taken to heart:

Once in his life a man ought to concentrate his mind upon the remembered earth . . . . He ought to give himself up to a particular landscape in his experience, to look at it from as many angles as he can, to wonder about it, to dwell upon it. He ought to imagine that he touches it with his hands at every season and listens to the sounds that are made upon it. He ought to imagine the creatures there and all the faintest motions of the wind. He ought to recollect the glare of noon and all the colors of the dawn and dusk.


from the "public domain." As public domain is the typical denotation of what land is properly to come within the scope of land patent statutes, it follows that patents issued pursuant to such statutes are without legal authority and invalid as regards land subject to aboriginal occupancy at the time of issue.

At this point in the litigation, the technical invalidity of the challenged patent would be established. There would remain the task of persuading the court that the invalidity of the government patent taints the chain of private title flowing from the patent—providing the basis for quieting title in the United States Government in trust for the Indian tribe. Allegations of latent equity in the tribe or the fraudulent character of existing land patents typically are introduced to establish this third element of the litigation.

The first two elements of the cancellation suit, establishment of aboriginal occupancy and removal of the subject territory from the scope of land patent statutes, rely upon the unique character of aboriginal title as title held in trust by the United States Government. The third element, divestment of private claims to title originating in the invalid government patent, relies primarily upon case law precedent for the annulment of long-established titles where the underlying patents have been invalidated. Also relevant are decisions of the Department of the Interior which have recognized the latent equity of Indians in lands from which they have been wrongfully and fraudulently ousted by private parties.

A suit successfully establishing all three elements would achieve the desired goal of vesting legal title to the disputed land in the federal government in trust for present members of the tribe that had occupied it aboriginally. The Government would hold legal title; the tribe would enjoy the equitable rights of occupancy and use.


In his discussion of the disposition of public lands, referring to municipal grants of tideland property to private parties, Professor Sax observed that "[i]t has been suggested that some of the early grants were . . . so inconsistent with the authorizing statute . . . that they may be subject to invalidation even at this late date." Sax, The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471, 528 (1970). In People v. County of San Mateo, Civil No. 144, 257 (Super Ct., San Mateo County, filed April 12, 1969), the state has taken the position that it had no statutory [right] to convey any submerged lands to private claimants. . . . In the alternative, should the court find that the state could have conveyed the submerged lands, . . . said submerged lands are subject to the . . . public trust. . . .

Complaint para. 12(D) (i) (v).

63. See note 61 supra.
B. Evidentiary Problems

Utilization of the doctrine of aboriginal occupancy is a difficult undertaking. Were it not for the unique legal character of Indian title, the difficulties presented would be insuperable. Fortunately, intervention of the United States, as sovereign in its capacity as guardian for the tribes, avoids the otherwise fatal affirmative defenses available to present titleholders to sustain the validity of their title. Great difficulties, however, remain for Indian claimants to sustain their burden of presenting evidence to substantiate the fact of aboriginal tribal occupancy—the first element of the proposed land patent annulment suit. In contrast to a situation involving occupation of land by recent settlers, the Indians' claim as aboriginal occupants involves several elements all of which must be proven with great particularity. It must be established, for example, that the tribe has occupied and used a "definable area of land," and that such occupation and use was "actual," "exclusive," "continuous" and for "a long time" prior to the loss of the land.

It is apparent that in thrusting this burden upon the Indian claimant the courts are either unaware of, or insensitive to, the cultural traditions of the American Indian. Indian tribal history has been handed down from generation to generation orally and few formal written records exist. The Indian is therefore left to shoulder his burden of proof with evidence which is both ill-suited to and usually

64. Several affirmative defenses were raised against Indian claimants in early land suits. But such defenses were unsuccessful and are not crucial problems for present Indian claims.

The defense of laches and statute of limitations was rejected in United States v. Beebe, 127 U.S. 338 (1888), where the Court held "[t]he power of the United States to bring a suit at any time to enforce a public right or assert a public interest is established past all controversy or doubt." Id. at 344. In United States v. Minnesota, 270 U.S. 181 (1926), the Court observed that the Act of March 3, 1891, ch. 561, 26 Stat. 109, codified at 43 U.S.C. § 1166 (1970), generally limiting the period within which the United States can sue to annul patents, does not apply to suits brought against violators of rights of Indian wards. Id. at 196.


Doubts as to the rights and powers of the United States to act as guardian of Indian land rights were quieted by the United States Supreme Court in Cramer v. United States, 261 U.S. 219, 232 (1923).

The rights of bona fide purchasers were concluded to be subordinate to the United States when it is a real party to litigation in United States v. Beebe, 127 U.S. 338, 342 (1888).


discounted by the white-man's court. 68

In *Coos Bay Indian Tribe v. United States*, 69 twenty-one Indians presented oral testimony under oath regarding relevant details of their tribal history. The court summarily discounted the testimony by finding it to be in conflict with "contemporaneous documentary and historical evidence." 70 The court also observed that "seventeen of the twenty-one witnesses had a direct interest in the outcome of their case". 71 Shortly thereafter the Court of Claims again denied an Indian claim based upon aboriginal occupancy, finding insufficient proof that the occupation was to the exclusion of other tribes. 72

The burden of establishing all the elements of "actual, exclusive and continuous use and occupancy for a long time prior to the loss of the property" 73 continued during the quarter century following these early Court of Claims decisions. The obstacle was found to be insuperable in *Sac and Fox Tribe of Indians of Oklahoma v. United States*, 74 where the court found the evidence of exclusive Indian occupancy too weak to sustain the suit. It noted that the records of the Indian Claims Commission showed that the plaintiff tribes had driven other tribes from the area as late as the latter part of the 18th century. Such occupancy was held to be too recent for establishing aboriginal title. 75 Sustaining the findings of the Indian Claims Commission in toto, the court characterized as "too vague and ambiguous" 76 statements made by President Jefferson to the Senate which referred to the disputed land as being occupied by the Sac Tribe. Letters and documents to the same effect authored by General Harrison and Meriwether Lewis were similarly discounted by the court. It did, however, express the

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69. 87 Ct. Cl. 143, *cert. denied*, 306 U.S. 653 (1938). This case involved a procedural statute endowing the Court of Claims with special jurisdiction to adjudicate Indian claims to land ceded by the federal government. Act of Feb. 23, 1929, ch. 300 § 1, 45 Stat. 1256. The particular land involved was alleged to have been "ceded" by the Indians to the Government by force of a treaty which was never ratified by Congress.
70. 87 Ct. Cl. 143, *cert. denied*, 306 U.S. 653 (1938). The contemporaneous documentary and historical evidence referred to was summarized in the opinion of the court. Id. at 149-52.
71. Id. at 152. The seventeen witnesses were members of tribes parties to the suit. It should be noted that every Indian party to a suit will have a "direct interest in the outcome" of his case. The court's rationale is disappointing, to say nothing of its unfairness. If the Indian tribes had no direct interest in the dispute, they could not be in court (lacking standing). Yet oral testimony concerning tribal history is often their sole means of evidencing their occupancy.
74. Id.
75. 315 F.2d at 903.
76. Id. at 905-05.
opinion that the Indian Claims Commission should have dealt more specifically with these statements, for "such materials have a direct bearing upon the factual question of aboriginal title."\textsuperscript{77} The court reemphasized that there must be more definite evidence of exactly what territory was occupied by Indians.\textsuperscript{78} Despite the negative outcome and stringent standards set for establishing aboriginal tribal occupancy, this decision need not be read as foreboding disapproval of all attempts to establish such occupancy. Although the statements of several reliable personalities were discounted as "vague and ambiguous," the case was decided upon the simple point that the Indian use and occupancy was not for "a long time prior to taking."\textsuperscript{79} Assuming the veracity of these findings, the case does not represent the discounting of a strong Indian claim but rather the denial of a claim based upon insufficient evidence.

A stronger and more successful Indian claim for establishing aboriginal occupation subsequent to the \textit{Sac and Fox Tribe of Indians} decision was upheld by the Court of Claims, and the over-technicality of the Indian Claims Commission was concurrently criticized.\textsuperscript{80} Involved was an Indian claim of aboriginal occupancy of 298,634 acres in New Mexico. The crucial problem presented was the establishment of a definite area of tribal occupancy—"pinpointing" as the Commission termed it. To accomplish this the Indian claimants focused upon three lines of evidence, all of which were mutually corroborative.\textsuperscript{81} Finding the area established was "too vague" and not coterminous with the precise smaller area actually claimed by the tribes, the Commission discounted much of the presented evidence even though it was completely uncontroverted. Reversing, the court concluded:

\begin{quote}
[I]f the evidence establishes aboriginal occupancy of an area greater than that claimed, the greater must include the lesser. . . . The use of the lands outside as well as the claimed area merely facilitates the conclusion that Indians did adequately discharge their burden of proof. As a matter of law the Indians are entitled to the land under Indian title.\textsuperscript{82}
\end{quote}

In achieving the favorable reversal three lines of evidence were acknowledged by the court as supporting the Indian claims: First, oral testimony of tribal history by the present leaders of the tribe, a traditional form of Indian history, was found by the court to be entitled to some weight, and not to be ignored or disregarded as "totally

\begin{itemize}
\item \textsuperscript{77} Id. at 904.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id. at 903-05.
\item \textsuperscript{80} Pueblo De Zia v. United States, 165 Ct. Cl. 501 (1964).
\item \textsuperscript{81} Id. at 504-06.
\item \textsuperscript{82} Id. at 507-08.
\end{itemize}
worthless”. Second, the testimony of historians as expert witnesses, though discredited by the Commission, was accredited as a competent source of evidence and likewise entitled to some weight. And finally, expert testimony of archaeologists, also discredited as “vague and indefinite” by the Commission, was similarly accredited as a competent source of evidence relevant to the aboriginal occupancy issue.\(^{83}\) These three sources are essentially the only means available to Indians for establishing aboriginal occupancy and are obviously most effective when mutually corroborative. Assertions not supported by all three lines of documentation will of course be somewhat weaker, although this would depend on the relative strength of the evidence presented. Such claims would not, however, be inherently precluded.

With these modes of proof now recognized as competent evidence for substantiating the fact of aboriginal occupancy—which is the first stage of the proposed land patent annulment litigation—the foundation for the proposed suit can be laid. The next step is to employ the fact of aboriginal occupancy to demonstrate the technical invalidity of the challenged patents.

C. Aboriginal Title vs. Enabling Statutes


It has been the consistent policy of the Government and courts to protect the Indian right of occupancy from intrusion by non-Indians.\(^{84}\) Department of Interior regulations, decisions, and orders have denied patent applications by those attempting to gain title to any land which any Indians actually occupied at the time.\(^{85}\) These promulgations, however, did not involve aboriginal occupancy “from time immemorial” but rather involved homestead-type occupancy of more re-

\(^{83}\) Id. at 504-06.


cent origin by tribes or individual Indians. Such Indian settlement was in accord with the Government’s announced desire to have Indians settle in definable areas and give up their nomadic wanderings, no doubt prompted by the recognition of the impending collision between the property law of the white man and the traditional nomadic life-style of the American Indian. Such Indian settlement has, accordingly, been repeatedly encouraged by the federal government.

_Poisal v. Fitzgerald_ upheld the right of occupancy of an Indian having no recognized legal title, against an attempted homestead patent by a non-Indian. In _State of Wisconsin_, Indian occupancy prevailed over a swamp land grant to a state which encompassed part of an Indian reservation. Though the grant did not explicitly exempt Indian land, the implicit requirement that the land be “unappropriated public domain” prevented its inclusion within the grant. The decision was a clear indication of the Department’s previously announced policy. The fact that the grant was annulled soon after issuance saved the case from problems resulting from lapse of time and improvements made by the grantee, problems confronting almost any cancellation suit based upon aboriginal occupancy. Similarly, _Maguee-see v. Johnson_ involved an attempted entry under an enabling statute applying to “unappropriated public lands”. Here it was held that Indian occupancy, again non-aboriginal, rendered the land exempt from the enabling statute because the land was not “unappropriated” within the terms of the statute. A fourth Interior Department decision, _Schumacher v. Washington_ found that the terms of a school indemnity land grant did not include land occupied by an individual Indian because such land was “otherwise disposed of” by or under authority of Congress.

All four of the Interior Department decisions, however, involved patents or grants refused at the time of application or annulled soon after issuance. They involved individual Indian litigants who, because no appreciable lapse of time occurred between patent issuance and annulment, were not presented with the problem of overcoming the affirmative defense of laches, the running of the applicable statute of limitations, protection of bona fide purchasers, adverse possession, or the onerous burden of proving actual aboriginal tribal occupancy. The question not reached by these decisions, therefore, was whether oc-

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87. 15 Interior Dec. 19 (1892).
88. 19 Interior Dec. 518 (1894).
89. 30 Interior Dec. 125 (1900).
90. 33 Interior Dec. 454 (1905).
91. See note 64 _supra_.

occupation by Indians could overcome a patent when considerable time had elapsed since its issuance. That question was answered affirmatively shortly thereafter by the United States Supreme Court.

2. **Invalidation of Ancient Patents**

In *Cramer v. United States*, the leading Indian patent annulment case, a patent issued nineteen years earlier was annulled by the Supreme Court and the land involved made available to the Indian claimants. The patent was issued to the Santa Fe Pacific Railroad in 1904, granting alternate sections of land along a proposed line of track but exempting all land "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of." The United States, as guardian of the Indians, sought a partial annulment as to portions of the land which were occupied by Indians at the time the patent was issued on the ground that those lands fell under the exemption of the enabling act. Rejecting the railroad's affirmative defenses of laches, estoppel, state claim, intervention of a bona fide purchaser, and the absence of a legitimate guardianship duty, the Court stressed that the Government did have such a "duty" to "protect its dependent wards" and remove the cloud from their possessory rights. It held that the land actually occupied by Indians was land "otherwise disposed of" and not within the scope of the statute.

The Court, however, refused to annul the patent insofar as it involved land outside that actually enclosed and improved by the Indians. In so limiting the Indians' recovery, the Court distinguished *Quimby v. Conlon*, which had recognized a claim to land extending beyond that actually enclosed on the ground that the claimant has established an assertion of dominion over the unenclosed land. As *Cramer* involved Indians occupying land merely as settlers, the restriction upon extent of recovery was well founded. When an Indian claim is based upon aboriginal occupancy, however, a limitation of recovery to enclosed lands appears less justifiable.

The need for, and assertion of, dominion over unenclosed land by tribes occupying land in traditional tribal life-styles was judicially recognized as early as 1835 when the Supreme Court observed that "Indian possession or occupation [is] considered with reference to

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92. 261 U.S. 219 (1923).
93. Id. at 225. The grant was issued under authority of the Act of July 25, 1866, ch. 242, 14 Stat. 239.
94. 261 U.S. at 232-34.
95. Id. at 232, 233.
96. 104 U.S. 420 (1881).
97. Id. at 423; Cramer v. United States, 261 U.S. 219, 235 (1923).
their habits and modes of life; their hunting-grounds [are] as much in their actual possession as the cleared fields of the whites...". This relationship of the Indian to his land has been recognized recently in *Sac and Fox Tribe.* The Cramer Court observed the congressional policy of respecting Indian occupancy to be evidenced in the requirement imposed by Congress on several states, upon admission to the Union, to disclaim all right and title to lands "owned or held by any Indian or Indian tribes." Most significantly, the desire of the Government to induce its Indian wards to settle in definable areas was characterized by the Court as a "policy [having] in view original nomadic tribal occupancy." Such language lends support to the extension of land patent annulment, as in *Cramer,* to situations involving aboriginal occupancy.

*Cramer v. United States* stands as the most significant case with regard to the land patent annulment suit proposed by this paper. That decision recognized all the elements of the proposed suit except for extending its result to aboriginal occupancy. Such an extension will not, in all probability, be easily achieved. The difficulty comes, in part, from the new issues inherent in the transition from the *Cramer* context to semi-nomadic, tribal occupancy. One of these issues, of course, is the factual substantiation of such occupancy. At least as troublesome is the conflict with economic, political and perhaps nationalistic realities: whether the courts and legislatures would create the dangerous precedent of returning land, one of the primary bases of power and wealth in the American system, to the dispossessed Indian nations, and whether the latent equity of the Indians in their land, despite its almost obligatory character, would warrant more than monetary remuneration.

**D. Aboriginal Title Claims By and Against the United States: Fork in the Road**

The first attempt to regain land through use of the doctrine of aboriginal occupancy came in *Coos Bay Indians v. United States.* The Indian claimants sought to carve out a portion of the land in question for their present occupancy and use. Final determination rested on the factual issue of whether the burden of proving aboriginal tribal occupancy had been met. The court found that the claimants had failed to establish that fact.

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99. 179 Ct. Cl. 8, 21 (1967).
101. 261 U.S. at 227.
102. 87 Ct. Cl. 143 (1938).
Even if the Coos Bay tribe had succeeded in establishing aboriginal occupancy, its recovery would have been limited to damages. No land could have been recovered from the Government. The reasons for this limitation of remedy were two: before the Coos Bay decision no court had been given jurisdiction over Indian claims against the United States, and when special jurisdiction was conferred on the Court of Claims to hear such claims, Congress found it desirable to preclude recovery of land. This limitation of recovery to damages, though lessening the potential consequences of successful Indian claims against the United States, still posed extensive monetary liability. Undaunted by the potential extent of such liability the Supreme Court has recognized the equitable obligation of the United States to pay for lands taken from American Indian tribes and awarded damages to Indian claimants upon finding they had established aboriginal title. Ultimately, there has ensued a divergence of results in Indian land claims. One line of cases, exemplified by the Coos Bay decision, arises under special statutory jurisdiction and involves claims against the United States. These cases are inherently restricted to recovery of monetary damages. A second line, exemplified by United States as Guardian of the Hualpai Indians of Arizona v. Santa Fe Pacific R.R. Co., involves claims by the United States as guardian of Indian tribes. Such suits are not restricted to monetary recovery because they do not arise under restrictive jurisdictional statutes.

1. Statutory Restrictions Upon Recovery of Land

In 1930 Congress again authorized an adjudication of Indian claims arising out of [ab]original title, but expressly directed an award of damages if a taking of lands held by immemorial possession were shown. This Act thus eliminated any judicial determination of a right to recover land once [ab]original Indian title was established.

This apparent end to all prospects for recovery of land is arguably applicable only to lands taken by the Government from Indians and subsequently involved in actions wherein the Government has consented to a determination of Indian rights regarding that land. Analysis of the legal character of Indian title reveals that land held "in trust" by the

105. 314 U.S. 339 (1941).
Government for its wards which is erroneously patented by an agent of the Government is not "taken" within the terms of the statute. Indian claims to such land lie not against the Government qua Government as a wrongful taker, but against the private party securing title by inducing mistake or perpetrating fraud upon the governmental agent. The force of the claim is not that the sovereign wrongfully appropriated Indian land, but that the patent issued to the private party is a nullity and the title asserted by that party never vested in him or his predecessor by operation of law. While the United States operates as a sovereign when engaging in treaties and cannot be later questioned as to the validity of such actions, the granting of patents to private parties does not enjoy the same sovereign immunity because the act is not, technically speaking, a sovereign act and the Government is not estopped by the mistakes of its employees.107 Far from being a "taking" under the terms of the statute, the land involved in Indian title claims by the United States as guardian for the Indians is land to which the Government already possesses legal title and which it holds in trust for its wards. Only under a strained sense of the word can land mistakenly patented be included as a "taking" under a jurisdictional statute. Therefore, the congressional limitation to recovery of damages contained in jurisdictional statutes need not, and cannot logically, be extended to such Indian land held in trust. Once accepted by the courts, there is promise for actual recovery of tribal land through an otherwise meritorious patent cancellation claim. This procedural distinction between Indian suits against the Government, which are admittedly relegated to recovery of damages, and Indian claims brought by the Government as trustee for the Indians, against private parties, is crucial to the success of the patent annulment suit proposed by this paper.

2. Claims Against the United States

Grave concern regarding the limits to be imposed on aboriginal title claims arose as the courts and Congress became aware that, once successful upon an aboriginal title claim against the United States, Indians would establish dangerous precedent casting a cloud upon title to vast areas of land.108 The Coos Bay decision, at the relatively late

107. Neither is the Government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights.


date of 1938, was the first adjudication of an aboriginal title claim against the United States as a sovereign, and, as such, was the first case to give rise to such concern.109

The particular statute upon which the Coos Bay claim was based conferred limited jurisdiction "upon the Court of Claims to hear, examine, adjudicate and render final judgment in any and all legal claims and equitable claims of the Coos Bay . . . Indian tribe . . . against the United States arising under or growing out of the original Indian title. . . ."110 This statute, limiting Indian recovery to monetary damages, applied exclusively to the tribes stipulated and only insofar as their claims were against the United States. Although the statute later incidentally spoke in blanket terms of unceded land "taken, sold or disposed of by the United States . . .,"111 such language still had in mind solely "claims against the United States within the purview of this Act."112

3. Claims By The United States On Behalf of Its Indian Wards

In United States As Guardian of the Hualpai Indians of Arizona v. Santa Fe Pacific R.R. Co.,113 the Supreme Court observed that the

109. For an excellent survey of Indian aboriginal title claims from 1899 to 1946, see Cohen, Original Indian Title, 32 MINN. L. REV. 28 (1948). Cohen's view that the significance of such claims is "a matter of concern to real property lawyers generally," [id.] is not shared by the writers. Neither is his view that "[a]s long as the Indian gets paid for aboriginal holdings that the Government takes from him, he will not quibble about the reasons assigned for the decision" [id. at 56] consistent with the approach to Indian land rights presented here. Despite these observations, the clear recognition of the equitable rights of the American Indian to land taken from him is reflected throughout Cohen's writing and is supported by his analysis.


111. Id. § 4.

112. Id. § 5 (emphasis added). Similarly, Congress conferred limited jurisdiction upon the Court of Claims regarding any claims which the Assiniboine Indians may have had against the United States Government concerning land appropriated by the United States to its own use or to the use of any other Indian tribe. Act of June 9, 1930, ch. 423, 46 Stat. 531 (emphasis added). The narrow scope of the statute, similar to that applicable to the Coos Bay tribe, is typical of jurisdictional statutes limiting Indian recovery to monetary damages.

More significant is the eventual codification of these very limited acts into the Indian Claims Act, 25 U.S.C. §§ 70a-w (1970), a statute of general scope, which applies to claims by any and all tribes "against the United States, whether as the result of a treaty of cession or otherwise." The terms of the Act expressly narrow its focus to claims against the Government taking land as a sovereign or claims arising out of treaties of cession where the Government functioned as sovereign. Jurisdiction conferred by the Act extends only to claims accruing before August 13, 1946. Jurisdiction of claims accruing after that date is controlled by 28 U.S.C. § 1505 (1970) which is substantially identical to the Indian Claims Act.

113. 314 U.S. 339 (1941). Other cases involving this grant include: Santa Fe Pacific R.R. Co. v. Work, 267 U.S. 511 (1925); Santa Fe Pacific R.R. Co. v. Fall, 259 U.S. 197 (1922); Santa Fe Pacific R.R. Co. v. Lane, 244 U.S. 492 (1917);
power of Congress is supreme in matters of extinguishment by aboriginal title. "The manner, method and time of such extinguishment raise political, not justiciable, issues."\textsuperscript{114} This is precisely the reason Congress enacted jurisdictional statutes conferring special power upon the Court of Claims to hear specific Indian claims, such as that in \textit{Coos Bay}, against the sovereign for taking of Indian lands.

The tension of the times was visible even in the \textit{Santa Fe} case where an aboriginal title claim was brought by the federal government as guardian for the Indians. The pressure was apparently great enough to persuade the United States Attorney General to decline to argue the case on behalf of the Indians, leaving the task to the Solicitor of the Department of the Interior.\textsuperscript{116} The Indians represented in \textit{Santa Fe}, however, were not victims of the times, partially because their claim was not subject to the restrictions which affected Indian recovery against the United States.

The \textit{Santa Fe} Court discussed and distinguished the land grant situation then before it from those instances of extinguishment of Indian land rights by the United States as sovereign.\textsuperscript{116} In contrast to \textit{Coos Bay}, \textit{Santa Fe} did not arise under a jurisdictional statute or involve the United States as defendant. It came to the Court on certiorari regarding the Circuit Court of Appeals decision to affirm a District Court order dismissing Indian claims against the Santa Fe Pacific Railroad company. The Hualpais sought to establish that the railroad's rights under an 1866 grant were subject to the tribe's right of occupancy both inside and outside the area then defining their reservation.\textsuperscript{117} Responding to these claims, the Court was openly inclined to recognize the Indian right of occupancy to all the land involved and also the effect of aboriginal title as operating to preclude any valid transfer of fee to the railroad. But the Court was constrained by the facts presented to hold that the adoption by the Hualpai tribe of the reservation created by Executive Order in 1883,\textsuperscript{118} constituted a voluntary cession of any Indian rights to land outside the boundaries of that reservation.\textsuperscript{119} The United States had, as sovereign, extinguished Indian title to this non-reservation land in a manner consistent with its policy to seek voluntary and just dealings with Indian tribes. This action,

\textsuperscript{115} Cohen, \textit{supra} note 109, at 33.
\textsuperscript{116} 314 U.S. at 350-51.
\textsuperscript{117} \textit{Id.} at 343-44.
\textsuperscript{118} 314 U.S. at 344; Exec. Order Creating the Hualpai Reserve, Jan. 4, 1883, \textit{compiled at} 1 C. Kappler, \textit{Indian Affairs: Laws and Treaties} 804 (1904).
\textsuperscript{119} 314 U.S. at 358.
not the grants of land by governmental employees to the railroad, ex-
tinguished Indian title.\textsuperscript{120}

Because the railroad advanced the argument that all land within
the Hualpai reservation was not land aboriginally occupied by the tribe,
the Court's final disposition of the case directed "an accounting
as respects any and all of the lands the Hualpai did in fact occupy ex-
clusively from time immemorial."\textsuperscript{121} This was necessary because the
railroad's grant of title in 1866 preceded the creation of the Hualpai
reservation in 1883 and only by aboriginal title would the Hualpais ex-
hibit a prior and surviving title to the land in question. Even state-
ments by the Secretary of the Interior to the effect that the railroad held
title to certain parcels of that land "[did] not estop the United States from
maintaining this suit. For they could not deprive the Indians of their
rights any more than could the unauthorized leases in \textit{Cramer v. United
States, supra}."\textsuperscript{122} The Court's language suggests the extension of
the \textit{Cramer} rationale to the aboriginal title situation. Although the
\textit{Santa Fe} Court did not explicitly so state, the result of the establish-
ment of aboriginal occupancy of land within the reservation would give
the Hualpais the right of occupancy of that land as well as the right
to an accounting by the railroad. The final result of the case was
"that on March 13, 1947, the trial court entered a decree, consented
to by all parties, establishing Indian title to some 509,000 acres of
land which two Departments of the Government had promised to the
defendant railroad."\textsuperscript{123} The \textit{Cramer} result was thus achieved by an
aboriginal title claim.

\textbf{E. The Element of Fraud: An Equitable
Ground For Recovery}

\textbf{1. Annulment of Patents Due to Fraud or Misrepresentation By
Patentees}

To present the strongest possible claim, land patent annulment
litigation should make use of case law involving cancellation of fraud-
ulently secured patents. The function of such use is dual. Not only is
the Indian tribe endowed with a stronger equitable position against a
fraudulent patentee, but demands for total annulment will be demon-
strated to be a legally realistic objective.

In \textit{Basil C. Sanders}, the Commissioner of the Department of the
Interior had declared that "[w]here a homestead entry was obtained

\begin{footnotes}
\footnotetext{120. Id.}
\footnotetext{121. Id. at 359.}
\footnotetext{122. Id. at 360, citing Cramer v. United States, 261 U.S. 219 (1923).}
\footnotetext{123. Cohen, \textit{supra} note 109, at 33.}
\end{footnotes}
by fraud, it must be cancelled, notwithstanding the fact that the en-
tryman made his home on the tract for seven years afterwards, and
that there was no adverse claim."124 The Department's official policy
appears to have been to invalidate fraudulent patents even after con-
siderable time has elapsed and improvements have been made.

This view was adopted by the Supreme Court in United States v. Beebe,125 which involved a suit brought by the United States to annul a
fraudulently obtained land patent. Defendant Beebe had fraudulently
concealed the fact that the land involved was already patented under
"Madrid Certificates" and improved by subsequent construction of a
city (Little Rock, Arkansas). Although finding for defendant Beebe on
other technical grounds,126 the Court accepted as well settled the doc-
trine

that the United States can properly proceed by bill in equity to have
a judicial decree of nullity and an order of cancellation of a patent
issued in mistake, or obtained by fraud, where the Government has a
direct interest, or is under an obligation respecting the relief invoked.

. . . [I]f it should come to the knowledge of the Government that a
patent has been fraudulently obtained, and that such fraudulent pat-
ent, if allowed to stand, would work prejudice to the interests or
rights of the United States, or would prevent the Government from ful-
filling an obligation incurred by it, either to the public or to an indi-
vidual, which personal litigation could not remedy, there would be
an occasion which would make it the duty of the Government to in-
stitute judicial proceedings to vacate such patent.127

The Court sustained the fraudulent patent on the ground that the United
States was, in this case, "a mere formal complainant, . . . a con-
duit"128 in the suit while private attorneys for the real parties in in-
terest maintained the suit;129 therefore, laches worked against the pri-
vate parties and prevented a patent annulment order which the Court
otherwise appeared willing to issue. From the language of the opinion,
Indians, as wards of the United States, could avoid the laches defense
and utilize the Beebe dictum to obtain a favorable holding.

The Court later reasserted its policy of annulling fraudulently ob-
tained land patents regardless of the lapse of time, when it cancelled
a twenty-eight year old mineral patent.130 More recently, in Siniscal
v. United States,131 a circuit court set aside a patent procured by fraud-

125. 127 U.S. 338 (1888).
126. Id. at 347.
127. Id. at 342 (emphasis added).
128. Id. at 347.
129. Id.
131. 208 F.2d 406 (9th Cir. 1953).
ulent misrepresentation. The land involved could be purchased without the necessity of a formal submission of public bids only if purchased by an Indian for his own use. Realizing that resort to public bidding would significantly increase the eventual purchase price, non-Indians approached and persuaded an Indian to purchase the land at the low, non-bid price, then reconvey it to them for a fee. In obtaining the land the Indian was required to file an affidavit attesting that she was an Indian qualified to purchase and that she was purchasing for her own use. The court found no difficulty in cancelling the patent.

The effect of a fraudulent affidavit, such as that involved in *Siniscal*, is applicable to other misrepresentations by patentees under enabling statutes, such as the Johnson Homestead Act. Thus, misrepresentations contained in applications for patents pursuant to the requirements of the Homestead Act and similar acts could result in annulment of the obtained patents. The Johnson Homestead Act is subtitled *Entry of Unappropriated Public Lands*. Other statutes similarly require that patentable land within their scope not be "reserved, appropriated or otherwise disposed of." It could be argued that filing of an affidavit in application for a patent to land under the dominion of those enabling statutes is an affirmation by the affiant that the land is patentable under the statute. And as the affiant must have entered the land and remained thereon for a period required by the statute before the patent would issue, it appears most probable that he would have had knowledge of Indian occupation. Whether he actively sought to homestead the land despite knowledge that Indian occupancy made such efforts legally ineffectual or merely regarded Indian occupation as a practical rather than legal obstacle is uncertain. Yet application for a patent to land not legally patentable is not deprived of wrongful character by an ignorance of the law. If a patentee had knowledge of the fact of Indian occupancy, the patent, arguably, was issued in fraud—failing to vest valid title by operation of law.

Although *Beebe* applied both to patents issued by mistake and through fraud, and noted the duty of the United States to secure cancellation of both, stronger equitable considerations in favor of Indian tribes are obviously present when the additional element of fraud is involved. Fraud can be employed in the Indians' argument for annulment of all title flowing from the original patent. It is particularly strong in regard to patents issued before 1868, for up to this date an entryman was required to attest that there was "no other settlement"

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133. See note 61 supra.
of the land applied for.\textsuperscript{134} Even after 1868, entrymen were required to stipulate in their affidavits that no "valid adverse claim" existed.\textsuperscript{135} Aboriginal title would qualify under both rubrics. Assertion of aboriginal occupancy of such land would thus bring the element of fraud into the litigation.

2. \textit{Potential Scope of the Element of Fraud: Large-Scale Abuse of Patent Affidavits}

Historical sources indicate that land patents secured by active fraud were far more extensive than those of individual settlors for their own use.\textsuperscript{136} Securing patents by fraud was part of the systematic land monopolization achieved by land speculators during the 1860's and 1870's.\textsuperscript{137} These speculators anticipated the flow of settlers into the western states, especially California, and succeeded in acquiring virtually all the best land under acts, such as the Homestead Act, in anticipation of later sale at high profit. This was done by active fraud and, often, collusion with Government land office officials.\textsuperscript{138} Speculators employed dummy entrymen to file false affidavits affirming that the patent was for the entryman's own use. When the patent was issued to the dummy entryman, he would convey it to his employer, the speculator. Entrymen were often passers-by on the street having no intention of securing the patent for themselves. This practice is said to have involved vast areas of land.\textsuperscript{139}

Another common device of the speculators was to represent themselves as attorneys for Indians in order to use land scrip issued exclusively to Indians for their personal use in securing patents.\textsuperscript{140} One commentator has remarked that the only persons who seemed unaware that patents were being fraudulently obtained were the land office officials.\textsuperscript{141}

If particular land involved in such fraudulent schemes can be shown to have been subject to aboriginal title at the time the patents were secured, recovery of Indian land under land patent annulment litigation could be very extensive. The difficulty of locating such land and substantiating the element of fraud at this point in time is not to be discounted. But to the extent that patent records and other forms

\begin{thebibliography}{9}
\bibitem{134} S. GEORGE, \textit{Our Land and Land Policy} 21 (1871).
\bibitem{135} Id.
\bibitem{138} GEORGE, \textit{supra} note 134, at 19-21.
\bibitem{139} Id. at 318-23.
\bibitem{140} Id. at 19-21.
\bibitem{141} Id. at 18-21.
\end{thebibliography}
of information exist, the effort would permit greatly increased application for annulment suits.

CONCLUSION

It would, of course, be unrealistic to assume that no difficulty or opposition would arise were a patent cancellation suit based upon Indian aboriginal occupancy brought by the federal government on behalf of its Indian wards. It is very probable that those forces arguing on behalf of maintaining the integrity of land titles traceable to government patents and grants would prove victorious. And as to the realistic potential of such suits to recover valuable land for the Indians, the prospects are not encouraging. The probability of recovering a particular area of land will be inversely proportional to the value of that land to the present title holder. Land in downtown Phoenix, for example, would be less likely to change hands than unimproved land in the Arizona desert. In general, the strongest opposition, both legal and political, can be expected in defense of titles to land presently used in a manner most objectionable from an environmental perspective.

The relatively marginal effect of successful cancellation suits upon the environment should not be forgotten. But neither should the right of Indians to their land. Were enough land involved, courts would be likely to defer to the legislatures on such questions. This is evidenced by the recently contested Alaskan native aboriginal title suit which was, in judicial discretion, left to Congress. The Alaskan Indians received considerable acreage in addition to monetary compensation in recognition of their valid aboriginal title claims. The Alaskan experience provides a somewhat favorable indication that aboriginal title claims demanding land, not money, are considered a legitimate matter for adjudication and legislation. It is all too probable that courts and legislatures, presented with the alternative, will find reason to award, at most, damages equivalent to rents and profits for use of land wrongfully taken. Yet such a result is incompatible with the frequently voiced concern for Indian right of occupancy. It is inconceivable to these authors that this long-cited policy could be so totally ignored when a patent, the only conflicting claim to Indian title, should be declared void—either because the Government itself breached its duty of trust to its wards in granting the patent or, even worse, because the original patentee obtained the patent by fraud.

143. See San Francisco Chronicle, Nov. 2, 1971, at 9, col. 5.
144. See note 84 supra.
Such a result would be inequitable and disappointing, particularly in light of the conviction expressed by the First United States Congress:

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs. . . .

Gayle L. Dukelow
Rosalyn S. Zakheim

145. Northwest Ordinance of July 13, 1787, art. 3.