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ABORIGINAL TITLE CLAIMS IN THE INDIAN CLAIMS COMMISSION: *UNITED STATES V. DANN* AND ITS DUE PROCESS IMPLICATIONS

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I. INTRODUCTION

Six hundred years ago the Indians of North America were the sole possessors of the United States' current land mass.[1] Today, they possess less than two percent of that land.[2] The United States government acquired much of the land from the Indians by treaties, which the government did not always keep; by purchases, for which the government did not always pay; or by force.[3] Federal policy toward this displacement fluctuated until 1946, when Congress enacted the Indian Claims Commission Act of 1946[4] (the Act), and thereby created the Indian Claims Commission (the ICC) to right all wrongs, legal and moral, which the United States government had committed against the Indians.[5]

Most claims brought before the ICC, which was authorized to award money judgments to tribal descendants whose land had been confiscated,[6] were based in the doctrine of aboriginal, or Indian, title. Aboriginal title describes the possessory rights of American Indians to lands they have occupied since time immemorial.[7] Occu-

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[1] Barsh, *Indian Land Claims Policy in the United States*, 58 N.D.L. REV. 7, 8 (1982).

[2] *Id.*

[3] *See generally* F.P. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984), for a comprehensive history of the relations between the United States government and the Indians.

[4] Indian Claims Commission Act of 1946, §§ 1–28, ch. 959, 60 Stat. 1049 (codified at 25 U.S.C. §§ 70 to 70v-3 (1976) (repealed 1978)).

[5] Barsh, *supra* note 1, at 11.

[6] *See* Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70–70v-3 (1976) (repealed 1978).

[7] Inupiat Community of Arctic Slope v. United States, 680 F.2d 122, 128 (Ct. Cl. 1982), *cert. denied*, 459 U.S. 969 (1982).

pancy under the doctrine is determined with reference to Indian habits and modes of life; thus aboriginal title vests in the tribal group in its entirety.[8] Many tribes or bands, however, are now divided or defunct, so tribal descendants who brought claims before the ICC may not have had a formal tribal structure in which to resolve conflicts among themselves.[9] Instead, disagreements about whether tribal descendants still hold aboriginal title to a particular parcel of land often arose only after proceedings before the ICC were begun.

The ICC was dissolved in 1978,[10] but its actions are the focus of continuing controversy regarding aboriginal title. The ICC often granted compensation for lands to which some tribal descendants might still have had valid aboriginal title.[11] This occurred because many tribal descendants filed claims for lands to which the United States had never formally obtained title.[12] In such claims, the attorneys for the tribal descendants, and for the government, stipulated to dates of extinguishment, in order to determine a money value for the land.[13] The ICC then awarded compensation, even though aboriginal title was never actually extinguished.[14]

The Act provides that determination of a claim by the ICC, and payment of the judgment, forever discharges the United States government, and bars any other claims on the matter at issue.[15] ICC judgments therefore may have the unexpected effect of extinguishing aboriginal title.[16] Indians who contended that their title had been extinguished would file claims before the ICC; those who disputed that contention, usually because they still occupied the supposedly confiscated lands, had no reason to file a claim but were later barred from intervening in the claimants' actions before the ICC.[17] The

[8] Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745 (1835). *See infra* notes 25–83 and accompanying text.

[9] Note, however, that a "majority of Indians in this country continue to be tribal members, regardless of where they live and regardless of whether or not their tribe is recognized by the Federal government . . . ." American Indian Policy Review Comm., FINAL REPORT, vol. I, at 434 (Comm. Print 1977).

[10] UNITED STATES INDIAN CLAIMS COMMISSION, FINAL REPORT (1978) [hereinafter cited as FINAL REPORT].

[11] *See, e.g.*, Temoak Band of W. Shoshone Indians v. United States, 593 F.2d 994, *cert. denied*, 444 U.S. 973 (1979).

[12] *See, e.g.*, Shoshone Tribe v. United States, 11 I.C.C. 87 (1962).

[13] *See, e.g.*, *Temoak Band*, 593 F.2d at 996.

[14] *Id.*

[15] 25 U.S.C. § 70u (1976).

[16] Claimants seeking compensation for aboriginal title land before the ICC did not have to assert extinguishment. Alternative claims could have been asserted — for example, for restricted use and enjoyment of aboriginal lands.

[17] *See infra* notes 174–215 and accompanying text.

tribal foundation of aboriginal title resulted in the ICC's inability to accommodate individual Indians with differing contentions respecting aboriginal lands. Thus, it was often claimed that decisions by the ICC violated the procedural due process rights of Indians who contended, in conflict with their fellow Indians, that the federal government had not extinguished their aboriginal title.[18]

In *United States v. Dann*,[19] the United States Supreme Court recently addressed the issue which may determine the ultimate effectiveness of many of the ICC's judgments. The *Dann* case is the most recent of a series of actions brought by Indians who claim that their aboriginal title was not lawfully extinguished, and that they were not represented before the ICC.[20] In practical terms, the Court determined in *Dann* that a judgment by the ICC can extinguish aboriginal title,[21] although in *Dann*[22] the Court did not address the constitutional issue of whether failed intervenors before the ICC had a protectable right of due process.

This article addresses the issues associated with the ICC's attempts to resolve aboriginal title claims, and concludes that the ICC's consideration of aboriginal title claims often violated the right to due process of would-be intervenors. The first section introduces the doctrine of aboriginal title, which, since its inception in the American common law, established overlapping and sometimes contradictory property rights in native Americans and the United States government. The second section discusses the legislative history behind the Indian Claims Commission Act, the claims brought before the ICC, and the positions of the parties bringing those claims. The third section examines the procedural history and outcome of the *Dann* case, in order to illustrate the inadequacies of the doctrine of aboriginal title. In conclusion, the article considers alternative avenues of relief for Indian groups whose aboriginal title was declared extinguished by the ICC. As one commentator noted, "[t]he time has passed when it would have been possible to create a Commission

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[18] *See, e.g.*, Brief for Respondents at 29–33, United States v. Dann, 53 U.S.L.W. 4169 (U.S. Feb. 20, 1985) [hereinafter cited as Brief for Danns].

[19] 53 U.S.L.W. 4169 (U.S. Feb. 20, 1985).

[20] *See, e.g.*, Six Nations Confederacy v. Andrus, 610 F.2d 996 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980).

[21] 53 U.S.L.W. 4169 (U.S. Feb. 20, 1985); *see also* United States v. Dann, 706 F.2d 919, 923 (1983) [hereinafter cited as *Dann II*]. Legally, the issue is whether members of a tribal descendant group may assert unextinguished aboriginal title as a defense in collateral litigation when the ICC has granted a judgment for extinguishment of that title to claimants representing the descendant group. *See infra* notes 216–90 and accompanying text.

[22] 53 U.S.L.W. 4169 (U.S. Feb. 20, 1985); *see infra* notes 291–322 and accompanying text.

most appropriate to its purpose,"[23] but it is not too late to seek to rectify further injustices by the ICC.

II. The Doctrine of Aboriginal Title

The legal doctrine of aboriginal title has developed in every Anglo-European culture that conquered lands inhabited by people viewed as primitive and culturally disadvantaged.[24] The legal centerpiece of the doctrine is that the conquered people maintain merely the right to occupy their own land once the conquering nations have "discovered" it. This notion developed from the conquerors' prevailing belief in Anglo-European superiority and manifest destiny. Another of the doctrine's principles is that aboriginal title vests in the entire tribe so that the individual has no rights outside of the tribal group. This notion originated in the collective character of many conquered peoples' culture. This section will discuss the common law development of aboriginal title doctrine, to conclude that aboriginal title is an outmoded theory which has no rational basis in present-day Indian land claims.

A. Common Law of Aboriginal Title

The doctrine of aboriginal title was first enunciated in 1823, in the Supreme Court's landmark decision, *Johnson v. M'Intosh*.[25] In this case, the plaintiff sued to eject the defendant from land in Illinois which plaintiff had purchased from the Piakeshaw Indians.[26] The federal government, however, had granted the same land to the defendant's predecessor-in-interest.[27] The issue before the Court was whether plaintiff's title, derived by a purchase from the Indians, was legally enforceable.[28]

The Court in *Johnson*[29] held that a private land sale, by an Indian to a nongovernmental party, to which the government had not consented, gave the purchaser no valid title against the government's claim. The federal government alone had the right to extinguish

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[23] Note, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D.L. Rev. 359, 380 (1975).

[24] Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 209 (1984) [hereinafter cited as *Federal Power*].

[25] 21 U.S. (8 Wheat.) 543 (1823).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 572.

[29] *Id.* at 604–05.

Indian title; Indians had no independent power to sell or to convey their lands without the government's approval.[30] Writing for the majority, Chief Justice Marshall set forth the doctrine of discovery, and reasoned that sovereign nations obtained "ultimate title" by discovering land inhabited by non-Europeans.[31] This sovereign title gave the United States government, as the discovering nations' successor, an exclusive right to extinguish Indian title by purchase or conquest. In contrast, the Indians retained a legal claim merely to possess the land.[32] Based on these principles, Marshall concluded that until the United States exercised its right to confiscate, both the Indians and the government held simultaneous rights in the territory. After extinguishing aboriginal title, however, the government obtained "absolute title," unencumbered by any Indian property rights.[33]

To the extent that it effectively split the title to land possessed by the Indians into two distinct bundles of rights, the *Johnson* decision provided a sensible compromise.[34] However, this compromise has uncertain implications. In theory, the "doctrine of discovery" leaves title vested in the Indians, and merely grants to the government a preemptive right to purchase or take by conquest.[35] Practically, however, the *Johnson*[36] opinion denies recognition of Indian title by denying Indians the right to transfer their title through sale or conveyance without governmental participation. Ordinarily, such a disabling restraint on alienation of real property ownership would be unconstitutional.[37] Despite the resulting restraint on alienation, subsequent decisions involving aboriginal title[38] follow *Johnson*'s practical result, and characterize the government's interest as full title ownership,[39] and the Indians' interest as mere possession.[40]

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[30] *Id.* at 585.

[31] *Id.* at 591.

[32] *Id.* at 603.

[33] *Id.* at 592.

[34] *See Federal Power*, *supra* note 24, at 208 n.69.

[35] The federal government's preemptive right means that Indians have a perpetual right to use and occupy aboriginal title lands "virtually equivalent to a fee interest against all but the United States." F. COHEN, FEDERAL HANDBOOK OF INDIAN LAW 489 (1982 ed.).

[36] 21 U.S. (8 Wheat.) 543 (1823); *see supra* notes 25–33 and accompanying text.

[37] *See, e.g.*, Blackstone Bank v. Davis, 38 Mass. 42 (1838).

[38] Sac and Fox Tribe v. United States, 383 F.2d 991 (Ct. Cl. 1967); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946).

[39] *See, e.g.*, Oneida Indian Nation, 414 U.S. at 667 ("[A]lthough fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign — first the discovering

The federal government may extinguish Indian title rights only by a clear and specific act of Congress.[41] In *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*,[42] the Court concluded that a series of congressional and executive actions that treated Indian lands as public lands[43] did not divest Indians of their aboriginal title since none of the actions evinced a "clear and plain indication" that Congress intended to extinguish the Hualpai's title.[44] The Court indicated, however, that once Congress has evinced a positive intent to do so, Congress is free to determine the manner, method, and time of such extinguishment without judicial interference.[45] The Court in *Santa Fe* listed the ways by which Congress could extinguish aboriginal title: "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise. . . ."[46] Absent such an action indicating clear congressional intent to extinguish, however, the Court concluded that the government's duty toward "its Indian wards" precludes implied extinguishment.[47]

Although Congress may extinguish aboriginal title by evincing a specific intent to do so, there is no right to compensation under the taking clause of the fifth amendment unless Congress has recognized the title.[48] The takings clause of the fifth amendment provides, "nor shall any private property be taken for public use, without just compensation."[49] However, in *Tee-Hit-Ton Indians v. United States*,[50] the Court held that mere aboriginal title, which Congress has not recognized, is not "property" within the meaning of the fifth

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European nation and later the original States and the United States — a right of occupancy in the Indian tribes was nevertheless recognized.")

[40] *See, e.g.*, Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745 (1835).

[41] F. COHEN, *supra* note 35, at 490.

[42] 314 U.S. 339 (1941).

[43] Congress had granted Indian lands to "certain qualified citizens," one of which was the railroad's predecessor-in-interest. *Id.* at 348. *See* F. COHEN, *supra* note 35, at 210 ("Indian property . . . is more properly classified as private property, subject to broad congressional control and special fiduciary obligations, rather than as public lands or other federal territory or property.").

[44] 314 U.S. at 353.

[45] *Id.* at 347.

[46] *Id.*

[47] *Id.* at 353–54 ("Extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.").

[48] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288–91 (1955). For a well-reasoned argument for overruling *Tee-Hit-Ton*, see Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980) [hereinafter cited as *Whim*].

[49] U.S. CONST. amend V.

[50] 348 U.S. 272 (1955).

amendment. Therefore, the Court concluded, such property may be taken by the government without compensation.[51]

In *Tee-Hit-Ton*,[52] a band of Tlingit Indians sought compensation under the fifth amendment for the government's confiscation of lumber from aboriginal title lands in Alaska. The Court rejected the claim on the grounds that Congress had not recognized, by treaty or other unambiguous legislation, the tribe's right to live permanently on the land.[53] Aboriginal title was determined to grant permission from the government to possess the land, but not to own it.[54] Congress may choose to recognize Indians' permanent right to occupy a territory, but until the Indians obtain such recognized title, the government does not violate the fifth amendment when it takes their lands without paying compensation.[55]

As it developed in these and other Supreme Court cases,[56] the doctrine of aboriginal title asserts, and simultaneously denies, Indians' title rights to lands that they have continuously occupied. Although courts have held that aboriginal title is as sacred as the fee simple,[57] it is not a constitutionally protected property right.[58] Even though Indians have an absolute present right to possess aboriginal land, the federal government may legitimately extinguish that right by force as well as by purchase.[59] In sum, aboriginal title grants Indians less than its name suggests. The government effectively holds fee simple title, while the Indians hold a revocable right of occupancy.

However characterized, aboriginal title vests in the tribe itself;[60] it is not divisible into title rights for individuals who move away from tribal lands and forfeit tribal membership.[61] In *Eastern Band*

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[51] *Id.* at 284–85. To determine whether a taking has occurred in all other types of property, a federal court must determine "when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated in a few persons." Penn Central Transp. Co. v. New York, 438 U.S. 104, 124 (1978).

[52] 348 U.S. at 273.

[53] 348 U.S. at 288–89.

[54] *Id.* at 279.

[55] *Id.* at 285.

[56] *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832). *See generally* Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947); Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFFALO L. REV. 637 (1978).

[57] *Santa Fe*, 314 U.S. at 345 (citing Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835)).

[58] *Tee-Hit-Ton*, 348 U.S. at 284–85.

[59] M'Intosh v. Johnson, 21 U.S. (8 Wheat.) at 589.

[60] F. COHEN, *supra* note 35, at 605.

[61] *Id.* at 607.

of Cherokee Indians v. United States,[62] the Court applied this principle to deny the claim of a group of Cherokees who had abandoned their tribal membership, yet who sought a share of the proceeds from the sale of tribal lands.[63] Since the tribe holds property for the common benefit of all tribal members, individual Indians were not permitted to possess a separable interest in such property.[64] Individuals have the right to use and share in tribal property.[65] That right, however, is conditioned upon tribal membership, governed by the applicable tribal laws, and revocable at the will of the tribe.[66] Thus, the Court in *Eastern Band*[67] held that the claimants forfeited their rights in tribal property by abandoning their tribal membership.

This is not the rule for individual Indians who are unaffiliated with any tribe. They may possess a recognizable claim of Indian title to a homestead, or the parcel of land that they continuously occupied.[68] For example, in *Cramer v. United States*,[69] three individual Indians claimed a right of occupancy in a parcel of land which the Central Pacific Rail Road Company had claimed under a federal land grant statute.[70] The government brought suit on behalf of the Indians,[71] claiming that the Indians' land was excluded from the grant to the railroad by a clause in the statute exempting land that had been "reserved . . . or otherwise disposed of."[72] The Court held that the grant to the railroad did not include title to the parcel held by the three Indians.[73] The Court reasoned that respect for tribal aboriginal title is extended to individual Indians' occupancy claims because of the federal government's "well understood policy . . . of inducing

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[62] 117 U.S. 288 (1886).

[63] *Id.* at 308.

[64] *Id.* at 309.

[65] *Id.* at 308.

[66] *Id.* at 308–09.

[67] *Id.* at 311.

[68] F. COHEN, *supra* note 35.

[69] 261 U.S. 219 (1923).

[70] *Id.* at 224–25. Most federal land grant statutes conveyed federal lands by means of patents (the governmental equivalents of deeds), issued pursuant to general laws. III AM. LAW OF PROP. § 12.20, at 231–32 (1952). However, even a grant by the United States government is entirely ineffective as to land to which the government does not hold title. *Id.* at 235.

[71] The Court determined, as a threshold matter, that the government had the right to sue as guardian of its Indian wards in order to effectuate Congress' policy of protecting Indian title which had not yet been explicitly extinguished. 261 U.S. at 232–33.

[72] *Id.* at 227. The three individual Indians' right of occupancy in *Cramer* is analogous to tribal aboriginal title, because it was not explicitly protected by any statute or treaty. *See* Aguilar v. United States, 474 F. Supp. 840, 844 (1979).

[73] 261 U.S. at 227.

the Indian to foresake his wandering habits and adopt those of civilized life."[74]

B. Modern Problems with Aboriginal Title

Because Indian tribal structure has changed so radically since aboriginal title first developed as a legal doctrine, the common law's continued application complicates present-day Indian land claims. Since title vests in the tribe as a group, tribal descendants collectively possess aboriginal title, regardless of whether the tribe still exists as a political, social, or economic entity.[75] Many tribes are now defunct or so divided that no coherent tribal organization exists. Thus, the principle that aboriginal title vests in the tribe has no clear legal meaning.[76] In addition, vesting title in the tribe presents three specific complications. First, Indian bands who have lived on a parcel of land for generations, without tribal or governmental interference, may consider such lands their own, despite the legal technicality that they lack fee simple title.[77] Second, without a formal tribal structure, such Indians have no organization from which to derive their continuing legal rights to use or to occupy the land.[78] Third, Indian bands or groups may disagree about which entity has aboriginal title rights to particular parcels of land. Without cohesive tribal organizations, no Indian forum exists where such disputes are resolved.[79] In short, individual Indians, unaffiliated with any tribe, may possess parcels of land, but they have no tribal organizations from which to derive aboriginal title, and no forum within which to resolve disputes.

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[74] *Id.* However, the Court's reasoning in *Cramer*, that individual Indians have a legally enforceable right to occupancy in addition to tribal aboriginal title, has not been applied in subsequent decisions. *See* E. Band of Cherokee Indians v. United States, 117 U.S. 288 (1886); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977).

[75] *See Eastern Band*, 117 U.S. at 308–09.

[76] *See, e.g.*, Osceola v. Kuykendall, 4 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) F-80 (Mar. 11, 1977). Of course, many Indian tribes do still exist, and exercise powers of self-government. Indian tribes are distinct, independent political communities, and still have rights of local self-government to regulate internal and social relations. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[77] *See, e.g.*, United States v. Dann, 572 F.2d 222 (9th Cir. 1978) [hereinafter cited as *Dann I*].

[78] Claims by individual Indians were beyond the jurisdictional scope of the ICC. *See* 25 U.S.C. § 70a (1976) (authorizing "claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians . . . ."). *See also* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977) (ICC is not empowered to hear individual claims).

[79] *See, e.g.*, Cramer v. United States, 261 U.S. 219 (1923).

In addition to these complications, in 1871 Congress withdrew recognition of Indian tribes as independent nations with which the United States may contract by treaty.[80] In 1924, Congress granted United States citizenship to all Indians.[81] Thus, Indian tribes are no longer politically or legally autonomous, but individual Indians possess the constitutionally protected rights of all American citizens.

The doctrine of aboriginal title, however, did not accommodate any of these fundamental changes. Furthermore, when it created the ICC, Congress did not address the legal quagmire of aboriginal title doctrine. It merely created a forum to resolve claims by Indians against the federal government.[82] Unfortunately, the majority of such claims are based on issues of aboriginal title.[83] The ICC merely inherited, *in toto*, an outmoded and unclear common law framework for ascertaining the existence, or the extinguishment, of aboriginal title.

III. The Indian Claims Commission

Despite its limitations, the ICC became the primary legal forum in which Indians could bring suit against the federal government. The legislative history of the Indian Claims Commission Act indicates that Congress intended the ICC to serve several purposes: to remedy the denial of due process that occurred when Indians were denied a forum in which to sue the federal government;[84] to resolve the financial and administrative problem resulting from Indian dependence on federal assistance;[85] and to settle all Indian grievances with finality.[86] The ICC did provide a viable legal forum for Indian groups, but it denied individual Indian citizens any opportunity to present individual claims or protect individual rights.[87] Furthermore, the ICC's group representation standard for claimants,[88] and its reluctance to permit intervention by other interested Indian groups,[89] so severely restricted the ICC's effectiveness that it failed

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[80] Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71 (1983)).

[81] Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(a)(1) (1983)).

[82] *See infra* notes 84–136 and accompanying text.

[83] Pierce, *The Work of the Indian Claims Commission*, 63 A.B.A. J. 227, 229 (1977).

[84] *See infra* notes 119–22 and accompanying text; *see also* H.R. Rep. No. 1466, 79th Cong., 2d Sess. (1945), *reprinted in* 1946 U.S. Code Cong'l Serv. 1347, 1348.

[85] *See infra* notes 123–28 and accompanying text.

[86] *See infra* notes 132–36 and accompanying text.

[87] *See infra* notes 137–215 and accompanying text

[88] *See infra* notes 137–81 and accompanying text.

[89] *See infra* notes 159–76 and accompanying text.

to develop into an effective forum to settle definitively Indian claims.[90]

A. Legislative History

Before the ICC was formed in 1946, Indians were barred from suing the federal government directly by the doctrine of sovereign immunity.[91] Congress attempted to resolve this problem by enacting special jurisdictional statutes that waived sovereign immunity and granted jurisdiction to the Court of Claims.[92] However, Indians could not bring their claims to the Court of Claims because a provision passed in 1863 expressly removed from the court's jurisdiction all claims arising out of treaties with Indian tribes.[93] In response to Indian petitions, Congress enacted more than one hundred special jurisdictional statutes that granted the Court of Claims jurisdiction over specified claims.[94] Both Congress and the Indian community grew dissatisfied with this time-consuming, costly, and often unfair process,[95] so they introduced a number of bills designed to settle all Indian grievances fairly and efficiently.[96]

The Indian Claims Commission Act of 1946[97] was one such bill. It created a commission with authority to hear and finally determine all Indian claims against the federal government that accrued before August 13, 1946.[98] Congress authorized the ICC to adopt its own

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[90] *See infra* notes 177–215 and accompanying text.

[91] *See, e.g.*, Morrison v. Work, 266 U.S. 481, 488 (1925) (sovereign immunity barred suit raising due process claim against Secretary of the Interior arising out of cession of timber lands in trust).

[92] F. COHEN, *supra* note 35, at 563. The Court of Claims was succeeded by the Claims Court in October, 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97–164, Apr. 2, 1982, 96 Stat. 25 (codified at 28 U.S.C. § 171 (1982)).

[93] The Court of Claims Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765, 767 (recodified as amended at 28 U.S.C. § 1502 (1982)). This Act was passed because some large, well-known Indian tribes had owned slaves and supported the Confederacy in the Civil War. Pierce, *supra* note 83, at 227. When Indians obtained citizenship status in 1924, 8 U.S.C. § 1401(a)(1) (1924), this prohibition became a serious violation of Indians' constitutional rights of due process. *See infra* at notes 291–322 and accompanying text. The prohibition remained in effect until 1949. *See* 28 U.S.C. § 259 (1940).

[94] Barsh, *supra* note 1, at 10.

[95] Otoe and Missouria Tribe v. United States, 131 F. Supp. 265, 272 (Ct. Cl. 1955) *cert. denied*, 350 U.S. 848 (1955).

[96] For a list of bills proposed, see *id.* at 272–73, nn. 11–12. For a detailed comparison of the enacted version of the Act with a proposed version of 1935, which effectively illustrates the evolution of the form and function of the ICC, see Note, *supra* note 23, at 367–70.

[97] 25 U.S.C. §§ 70–70v-3 (1976).

[98] *Id.* at § 70. Jurisdiction of claims accruing after that date is granted to the Court of Claims. 28 U.S.C. § 1505 (1976).

rules of procedure and provided a framework for fair, efficient and final determination of Indian claims.[99] According to the terms of the Act, during the first five years of the ICC's ten-year existence,[100] any Indian tribe, band, or identifiable group[101] was permitted to present claims.[102] When the Secretary of the Interior determined that one tribal organization was authorized to represent a group, that organization was recognized as having an exclusive privilege to represent that group before the ICC.[103] Both the government and the Indian claimants could appeal an ICC decision to the Court of Claims, and subsequently to the Supreme Court.[104] The ICC itself was authorized to certify to the Court of Claims any questions of law.[105] The Act provided that any attorney hired to represent a claimant group before the ICC must be hired according to the statutory provisions governing all contracts with Indian groups.[106] These provisions required that to create a valid contract with an Indian group, the contract terms must be approved by both the Secretary of the Interior and the Commissioner of Indian Affairs.[107] In addition, Congress authorized the ICC to set the fees payable to an attorney representing a claim before the ICC.[108]

The Act listed five broad classes of claims that could be brought before the ICC.[109] This article discusses the three such classes that encompass land claims: claims based on the Constitution;[110] claims involving treaties;[111] and claims that land owned or occupied by

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[99] 25 U.S.C. § 70h (1976).

[100] *Id.* at § 70a. Sixty-two percent of all claims before the ICC were filed in the last six weeks of the five-year period. *Hearings Before the Subcomm. of the Dept. of the Interior and Related Agencies Appropriations for 1960 of the House Comm. on Appropriations*, 86th Cong., 1st Sess. 1079 (1952). Because the 370 claims filed could not be completely resolved within the ten-year statutory time limit, Congress amended the Act four times to extend the life of the ICC. The final amendment called for the ICC to complete its work by the end of fiscal year 1978. 25 U.S.C. § 70v (1976). The ICC transferred its unfinished dockets to the Court of Claims. FINAL REPORT, *supra* note 10, at 20.

[101] 25 U.S.C. § 70a (1976).

[102] *Id.* at § 70i.

[103] *Id.*

[104] *Id.* at § 70s(b)-(c). The decisions published by the ICC are not readily available, nor conveniently indexed. Thus, appellate decisions by the Court of Claims and the Supreme Court provide the most accessible, though limited, view of the ICC's proceedings.

[105] 25 U.S.C. § 70s(a) (1976).

[106] *Id.* at § 70n (1976).

[107] *Id.* at § 81.

[108] *Id.* at § 70n. The fee was not to exceed ten percent of the ICC's award. *Id.*

[109] *Whim, supra* note 48, at 1256.

[110] 25 U.S.C. § 70a (1976).

[111] *Id.*

Indians had been confiscated without the payment of agreed upon compensation.[112] According to the language of the Act, these claims could sound in either law or equity.[113] Thus, the Act seemed to empower the ICC to grant equitable compensation, in the form of fee simple title to the land in question.

Despite this implicit recognition of equitable claims, the wording of the Act also implied that Congress intended to limit the remedy available to monetary compensation.[114] One section of the Act, for example, provided that "[t]he final determination of the Commission . . . shall include . . . a statement [of] whether there are any just grounds for relief and, if so, the *amount* thereof . . . ."[115] Another section provided that "there is hereby authorized to be appropriated such *sums* as are necessary to pay the final determination of the Commission."[116] The ICC and the Court of Claims interpreted this

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[112] *Id.*

[113] *Id.*

[114] Note, *supra* note 23, at 390. Congress' creation of the ICC to hear Indian claims against the government had the anomalous result of establishing a quasi-judicial proceeding in which equitable claims could be heard but no equitable remedy could be granted. The Indian Claims Commission Act made possible equitable and moral claims otherwise not permitted under the common law that had developed in the era of special jurisdictional acts, *see supra* note 94 and accompanying text, but it implicitly limited the remedy available to Indian claimants to money judgments. *See infra* notes 114–17 and accompanying text. Since the Act's language was general, its interpretation was left to the discretion of the ICC and the courts. The Act's language did not, however, appear to leave any opportunity for the ICC to settle title disputes.

In Otoe & Missouria Tribe of Indians v. United States, 131 F. Supp. 265 (Ct. Cl. 1955), *cert. denied*, 350 U.S. 848 (1955), the Court of Claims rejected an interpretation of the Act which would have precluded claims based on aboriginal title that had not been "recognized" by Congress in the sense described in *Tee-Hit-Ton*. 131 F. Supp. at 285; *see supra* notes 48–55 and accompanying text. Had the court accepted the government's interpretation of the Act, many tribes would have been prevented from recovering for either unjust land transactions, or for outright confiscations of their aboriginal land. *Whim*, *supra* note 48, at 1256. Instead, the court unanimously concluded that claimants asserting extinguished aboriginal title before the ICC could recover the land's fair market value at the time of confiscation. 131 F. Supp. at 290–91. *Otoe* thus mitigated the potentially preclusive effect of the *Tee-Hit-Ton* decision on aboriginal claims before the ICC. *Whim*, *supra* note 48, at 1257. In addition, the court in *Otoe* reviewed extensively the congressional intent of the Act, and held that the ICC possessed broad authority to hear all outstanding Indian claims against the government, regardless of whether they were legal, equitable, or moral. 131 F. Supp. at 275. *See* 25 U.S.C. § 70a (1976). Indian individuals as well as groups may bring claims accruing after August 13, 1946 before the Court of Claims. 28 U.S.C. § 1505 (1976).

While the Court of Claims interpreted the Act broadly to allow the ICC to hear equitable and moral claims (otherwise not permitted under the common law that had developed in the era of special jurisdictional acts), neither the ICC nor the Court of Claims ever addressed the issue of whether any remedy other than monetary compensation was available under the Act. The silence of both the Act and the courts indicates that the ICC was not intended to decide title disputes.

[115] 25 U.S.C. § 70r (1976) (emphasis added).

[116] *Id.* at § 70u (emphasis added).

language to limit relief to monetary compensation.[117] The Act's failure to address the possibility of granting title as compensation indicated that Congress did not intend the ICC to settle title disputes.[118]

Instead, Congress intended the Act to accomplish three goals. First, the Act was to eliminate the injustice of denying Indians the opportunity to bring suits directly before the Court of Claims.[119] The report of the House Committee on Indian Affairs[120] that recommended passage of the Act stated that the Act was designed

> not only to grant the Indian his long-delay[ed] day in court, but also to set up an impartial fact-finding commission which [would] facilitate the judicial solution of disputed cases, and report directly to the Congress on those cases where the law is undisputed and the facts are clear.[121]

Although the Act did not provide for the ICC to hear valid claims by individual Indians, the Act was considered a sufficient forum for all Indian suits because Indian claims were assumed to be tribal and not individual.[122]

Second, Congress provided a forum for Indian claims to encourage Indians to sever their tribal ties and to become assimilated into American society.[123] Until all land claims were settled, the committee report claimed, Indians were "impelled to cling to tribal associations,"[124] in order to maintain their right to any forthcoming settlement from the government.[125] The Act would effectively diminish federal expenditures for Indians, because Congress intended the ICC's judgment funds to lessen Indian dependence on other federal assistance.[126] The committee report stated:

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[117] *See, e.g.*, Osage Nation v. United States, 1 I.C.C. 54, 65–66 (1948), *rev'd on other grounds*, 119 Ct. Cl. 592 (1951), *cert. denied*, 342 U.S. 896 (1951) ("The Indian Claims Commission Act does not specifically state the character of relief the Commission may grant, but this lack of specificity is not vital, for its provisions plainly limit the relief to that which is compensable in money . . . . No other kind of relief is provided for in the act.").

[118] *Id.* Settling a title dispute, however, is in effect what the ICC did in the *Dann* case. *See infra* note 217 and accompanying text.

[119] H.R. REP. NO. 1466, 79th Cong., 2d Sess. (1945), *reprinted in* 1946 U.S. CODE CONG'L SERV. 1347, 1348 [hereinafter cited as House Committee on Indian Affairs].

[120] *Id.* at 1349.

[121] *Id.* at 1348.

[122] *Id.* at 1349 ("Once Indian *tribes* are given the same right as any non-Indian to bring suit on grievances that may arise in the future, there would be no need to accord any special treatment to such Indian claims as may subsequently arise." (emphasis added)).

[123] *Id.* at 1351.

[124] *Id. See supra* notes 60–67 and accompanying text.

[125] *Id.*

[126] *Id.* at 1354.

> [i]f the result of the proposed adjudication of existing claims will be, as your committee confidently expects, to permit a reduction of at least 50 percent in Federal expenditures on Indians during the next 50 years, the total ultimate saving in such expenditures would be in the neighborhood of $750,000,000, a sum many times the most optimistic estimate made by the Indians of probable recoveries on all existing claims.[127]

If the estimates proved true,[128] the ICC would benefit all concerned — government as well as Indians.

Third, Congress intended the ICC to accomodate all Indian claims with finality, so that Congress could be rid of cumbersome Indian claims forever. The process of passing special jurisdictional acts "impose[d] a vast and growing burden upon the legislative and executive branches of the Government."[129] Special jurisdictional acts took time and resources to secure.[130] Claims presented in the proposed jurisdictional acts may have been incomplete or subsequently changed, thereby requiring some amendment to the original jurisdictional act, or additional legislation.[131] Although the committee report initially stated the Act's primary purpose was "to grant the Indian his long-delay[ed] day in court,"[132] the report later stated that the "chief purpose" of the Act was "to dispose of the Indian claims problem with finality."[133] The report referred to the explicit listing of all classes of cases,[134] and the treatment of an ICC decision as a final judgment of the Court of Claims,[135] as provisions intended to provide finality.[136] Although Congress clearly articulated its three goals of providing a fair forum for Indian grievances, reducing federal assistance to Indians, and settling all pendent claims, Congress did not indicate which goal had priority over the others. Instead, Congress left the task of establishing the relative weight of its three goals to the ICC and the Court of Claims.

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[127] *Id.*

[128] One commentator notes the inaccuracy of the committee report's analysis:

> Ideally, claims payments would give Indian people the necessary stake to begin a new life as ordinary citizens far from the reservations. In actual fact, the amounts paid were relatively small on a per capita basis and Indian communities persisted.

Laurie, *Historical Background*, in THE AMERICAN INDIAN TODAY 81 (L. Stuart & N. Lurie ed. 1968).

[129] House Committee on Indian Affairs, *supra* note 119, at 1352.

[130] *Id.*

[131] *Id.* at 1352–53.

[132] *Id.* at 1348.

[133] *Id.* at 1356.

[134] *Id.*

[135] *Id.* at 1358.

[136] *Id.* at 1356, 1358.

B. Representation before the Indian Claims Commission

As a result of the ICC's internal procedures, the congressional goals of reducing the federal burden of both Indian dependency and numerous pending claims were satisfied, but the less explicitly articulated congressional goal of providing Indians with a forum to protect their constitutional rights was not. However, while it did provide an adequate forum for Indian groups, the ICC failed to provide a similar forum for individual Indians.

Congress in the Indian Claims Commission Act[137] granted the ICC authority to establish its own rules of procedure, but specified that potential claimants could only represent group claims:

> [a]ny claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.[138]

The ICC's regulations regarding recognized successors-in-interest[139] closely echoed this language. These regulations authorized three types of claimants: (1) a duly elected or appointed officer of a group that had been authorized by the Secretary of the Interior;[140] (2) any member of such a group if the group's organization did not bring a claim because of fraud, collusion, or laches;[141] and (3) any member of a group that was not formally authorized.[142] These categories of potential claimants were broadly framed, apparently to ensure that all viable Indian claims could be pursued.

In its opinions construing the parameters of the ICC's representation standards,[143] the Court of Claims allowed the broadly permissive representation of claims. For example, in *Thompson v. United States*,[144] the court held that claimants could bring suit on behalf of

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[137] 25 U.S.C. § 70h (1976).

[138] *Id.* at § 70i.

[139] 25 C.F.R. § 503.1 (1978).

[140] *Id.* at § 503.1(b).

[141] *Id.* at § 503.1(c).

[142] *Id.* at § 503.1(d).

[143] *See, e.g.*, Thompson v. United States, 122 Ct. Cl. 348 (1952), *cert. denied*, 344 U.S. 856 (1956); McGhee v. Creek Nation, 122 Ct. Cl. 380 (1952).

[144] 122 Ct. Cl. 348 (1952), *cert. denied*, 344 U.S. 856 (1952).

the "Indians of California," without identifying specific tribes or bands. The court reasoned that the inclusion of the phrase "or other identifiable groups" in the Act indicated congressional intent to broaden the category of Indian groups entitled to present claims against the government.[145] The court ruled that the Act permitted a single representative action on behalf of several groups where the claimants can be identified as members or descendants of members of tribes, bands, or communities existing when the claim arose.[146]

In *Turtle Mountain Band of Chippewa Indians v. United States*,[147] the Court of Claims addressed the issue of whether the ICC properly had designated the ancestral land-owning group. Three distinct bands of the same ancestral group filed separate claims before the ICC.[148] All three claims involved the same 10 million acre parcel of land in North Dakota, and each sought fair compensation for the extinguishment of the ancestral group's aboriginal title.[149]

In a consolidated proceeding, the ICC coined a name for the identifiable ancestral group, and ruled that the identifiable group had held aboriginal title to most of the land involved in the agreement.[150] One of the five issues raised on appeal was whether the ICC properly had designated the ancestral land-owning entity.[151] Two of the three claimant bands asserted that the correct designation of the identifiable group was the name of their own band.[152] They claimed that the ICC's designation was either too broad, too recently coined, or too vague.[153] The Court of Claims agreed, and modified the ICC's designation into a definitional, 24-word title,[154] accompanied by an

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[145] *Id.* at 360.

[146] *Id.* at 357.

[147] 490 F.2d 935 (Ct. Cl. 1974).

[148] *Id.* at 938.

[149] *Id.* The court described the extinguishing transaction as follows:

> After two unsuccessful attempts to negotiate a cession, Congress established the McCumber Commission to acquire this Pembina North Dakota region. This agency negotiated with the Chippewas until Little Shell, the hereditary chief, withdrew along with several others from the negotiations in protest. The local Indian agent selected a "Committee of 32" to represent the Indians, and the negotiations continued, concluding with a pact on October 22, 1892. After a long delay, Congress amended and approved the agreement on April 21, 1904, . . . and the Indians approved [it] on February 15, 1905.

Id.

[150] *Id.* at 938, 939.

[151] *Id.* at 939.

[152] *Id.* at 950–51.

[153] *Id.*

[154] *Id.* at 952. The court designated the identifiable group as the "American Pembina Chip-

apologetic explanation: "[t]his title, although somewhat ungainly, accomplishes the purpose of excluding those not in interest, and including all with colorable claims."[155]

The court's premise was that the ICC was to determine which identifiable group of Indians had been wronged.[156] Therefore the ICC should not have described the identifiable group "in such a way as to exclude any claimant with a colorable right, or to give a 'leg up' to any one of several, possibly competing, entities all deriving [their claims] through the same ancestral group."[157] At the same time, the court acknowledged that the ICC merely had the duty to denominate the wronged entity. Congress alone had the authority to decide such questions as which members may share in the judgment award.[158]

The court's decisions in *Thompson* and *Turtle Mountain Band* illustrate their concern for designating the identifiable group broadly in order to include all claimants with a viable interest in the lands in question. Its holding in *Thompson*, that the loosely named "Indians of California" constituted an "identifiable group" under the Act, and its holding in *Turtle Mountain Band*, that the ICC's designation of the identifiable group should be as inclusive yet precise as possible, reinforced the broad sweep of the Act's phrase "identifiable group."

One of the ICC's noteworthy inadequacies is that neither its establishing Act[159] nor its own rules of procedure[160] contain any provision concerning standards for intervention by interested parties. This is surprising, in light of Congress' concern for full, fair, and final determination of all outstanding Indian claims.[161] In a report of the House Committee on Indian Affairs, for example, the Committee expressed its concern that the classes of claims to be heard by the ICC should "be broad enough to include all possible claims," to prevent further appeals for special jurisdictional acts.[162] Apparently, however, Congress did not foresee the similar potential for dispute

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pewa group (full and mixed bloods), including the subgroups of the Turtle Mountain Band, the Pembina Band, and the Little Shell Bands." *Id.*

[155] *Id.*

[156] *Id.* at 951.

[157] *Id.* at 951–52.

[158] *Id.* at 952–53.

[159] 25 U.S.C. §§ 70–70v (1976).

[160] 25 C.F.R. §§ 503.1–503.42 (1978).

[161] House Committee on Indian Affairs, *supra* note 119, at 1355.

[162] *Id.* at 1355–56.

resulting from a deficient intervention policy. Although decisions in the Court of Claims indicate that the standard for intervention should be as permissive as that for bringing a claim,[163] the ICC itself limited parties' rights to intervene once a claim had been filed.[164]

For example, in *McGhee v. Creek Nation*,[165] the Court of Claims held that any group identified as descendants of the tribe or band existing when the claim arose, met the statute's jurisdictional requirements, and may intervene in an action brought by another group of descendants.[166] The claimants recognized by the ICC in *McGhee* represented that part of the Creek Nation which had emigrated west to Oklahoma to establish a new tribal government. The United States government formally recognized the new tribe. The attempted intervenors descended from a group which had remained east of the Mississippi, and had become United States citizens.[167] The ICC denied their motion to intervene.[168] Because the intervenors did not constitute a tribe recognized by the United States, the ICC concluded that they were individuals with separate claims, and not a recognized tribe. Thus, the ICC determined that it lacked the authority to hear the claims.[169] Creek descendants who had brought the claim, on the other hand, represented the recognized Creek tribe.[170]

The Court of Claims reversed the ICC and granted the intervenors' motion.[171] The court reasoned that the disbanding of the tribe as it existed at the time the claim arose did not change the group

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[163] *See, e.g.*, McGhee v. United States, 122 Ct. Cl. 380, 391 (1952); *see infra* note 175 and accompanying text.

[164] *See infra* notes 178–215 and accompanying text.

[165] 122 Ct. Cl. 380 (1952), *cert. denied*, 344 U.S. 856 (1952).

[166] *Id.* at 391.

[167] *Id.* at 385. The land cession which was the basis of the claim before the ICC was part of a treaty entered into in 1814, between the Creek Nation and the United States, whereby the Creek Nation ceded to the United States some 23,000,000 acres of their aboriginal title land without compensation. *Id.* at 383–84. The claimant group before the ICC contended that the Creeks entered this treaty under duress, and the United States had violated the standards of fair and honorable dealings developed by the Indian Claims Commission Act. *Id.* at 384 n.6. *See* 25 U.S.C. § 70a(5) (1976).

[168] *Id.* at 382. The motion to intervene was filed in 1951, before the Act's deadline for filing new claims. *Id.*

[169] *Id.* at 391.

[170] *Id.* at 383. The ICC also concluded that it could not grant intervention because it did not have the authority; only Congress could identify the individual Indians eligible to recover on a claim. *Id.*

[171] *Id.* at 391.

character of the claim.[172] Thus, both an officially organized group of descendants and unorganized but identifiable group of descendants of the same ancestral entity may be separately represented before the ICC.[173]

The court recognized the ICC's authority to allow all interested parties, consisting of an identifiable group of Indians, to intervene or become parties to the suit.[174] The legislative purpose of complete and expeditious settlement of all Indian claims would be thwarted if the ICC denied intervention to descendants of the tribe which held the aboriginal title when the claim arose.[175] This conclusion, however, has not been interpreted to require the ICC to permit the intervention of all contesting tribal descendants. [176]

The ICC's broad group representation standards were flawed because Congress, in its attempt to prevent claims from unrepresented Indians, failed to foresee the possibility of competing interests within ancestral groups.[177] Thus, the group representation standards as drafted created problems for unrepresented descendant subgroups or individuals when they attempted to intervene later in the ICC proceedings. These problems are best illustrated by the lawsuits involving the Seminoles and the Six Nations Confederacy.

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[172] *Id.* at 392.

[173] *Id.* at 392. The court dismissed the ICC's reasoning that because only Congress had the authority to determine the individual Indians eligible to share in an ICC judgment, the ICC could not grant the petition to intervene. *Id.* at 386–88. The court reasoned that the petition to intervene did not require the ICC to make an ultra vires determination, but merely raised the issue of whether the petitioner had the exclusive right to prosecute the claim, or whether representatives of descendants of the entire Creek Nation were the proper claimants. *Id.* at 395.

[174] *Id.* at 394 (dicta).

[175] *Id.* at 395.

[176] Barsh, *supra* note 1, at 20. The intervenors in *McGhee* may be distinguished. They filed their motion to intervene in early 1951, months before the Act's deadline for filing claims. *See supra* note 168 and accompanying text.

[177] Indians filing claims before the ICC sought monetary compensation for their confiscated land; some Indians did not file claims, however, because they wanted to retain the land itself. The Act's legislative history indicates that Congress assumed the United States government had already paid some consideration for confiscated land involved in claims before the ICC. *See, e.g.*, House Committee on Indian Affairs, *supra* note 119, at 1355 ("[A]bout 95 percent of the land that has been brought under the control of the Federal Government from 1776 to the present day has been acquired by open sale and agreement from the Indian tribes. It is only the exceptional, rather than the normal, case that presents the situation of land taken by the United States without compensation fixed by formal agreement."). Based on this assumption, Congress did not expect Indians to have legitimate claims for the land itself. Barsh, *supra* note 1, at 21.

1. The Seminole Nation

Despite the court's decisions in *McGhee*[178] and *Turtle Mountain*,[179] once the representative of an identifiable group is recognized, this claimant group is the exclusive representative of all tribal descendants, even though not all of the competing interests are represented. This situation arises where Indians still occupy aboriginal land, and are therefore unlikely to file a claim with the ICC for lands to which they apparently still hold title.[180] Members who were displaced by the government from a portion of the tribal land, however, had a monetary incentive to include the entire ancestral parcel in their claim. Furthermore, Indians still living on aboriginal land may not have had notice that a separate descendant group claimed the extinguishment of aboriginal title. Then, when the Indians occupying aboriginal land attempted to intervene in the ICC proceedings, they were usually denied the right because the proceedings were at an advanced stage.[181] The Seminole Nation's claim is the earliest example of such conflicting interests within a tribal group.[182]

The Seminole Nation in Florida is divided into "reservation" Seminoles, and "traditional," or unaffiliated Seminoles, who continue to live on aboriginal land in the Everglades.[183] At the suggestion of the Bureau of Indian Affairs, a group of reservation Seminoles filed a claim for lands allegedly taken by the government.[184] This claim included the lands on which the traditional Seminoles continued to live. In 1954, the traditional Seminoles filed a motion to dismiss the reservation Seminoles' claim before the ICC.[185] In a summary proceeding, the ICC denied the motion and struck it from the record.[186]

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[178] 122 Ct. Cl. 380 (1952), *cert. denied*, 344 U.S. 856 (1952). *See supra* notes 165–76 and accompanying text.

[179] 490 F.2d 935 (Ct. Cl. 1974). *See supra* notes 147–58 and accompanying text.

[180] This is particularly troublesome because of the widespread Indian custom of registering disapproval of a certain tribal course of action by refusing to participate. P. MATTHIESEN, IN THE SPIRIT OF CRAZY HORSE 27 (1983).

[181] *See, e.g.*, statement of Robert Coulter, attorney for traditional Seminoles, in *Distribution of Seminole Judgment Funds: Hearings Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 61 (1978) [hereinafter cited as 1978 Hearings].

[182] *See* 1978 Hearings, *supra* note 181, at 61–127.

[183] *Id.* at 50.

[184] Billie v. United States, 146 F.Supp. 459, 459 (Ct. Cl. 1956), *cert. denied*, 355 U.S. 843 (1957).

[185] 146 F. Supp. at 460. Although the traditional Seminoles incorrectly filed a motion to quash, the court entertained the motion as a motion to dismiss. *Id.*

[186] *Id.* No reason was given for the denial. 1978 Hearings, *supra* note 181, at 61.

On appeal, the Court of Claims refused to review the ICC's decision because it did not constitute a final order.[187] The court added, however, that

> [i]t seems to be appellant's position that although it is not and does not wish to be a party to the suit, its title to part of the land which is the subject matter of the suit is paramount, and that a decree of the Indian Claims Commission establishing the rights of the original parties to that subject matter (land) would work an injustice and irreparable injury on the appellant. If appellant's title to the land which is the subject matter of the suit is indeed paramount, his paramount title will not be affected by the decree of the Commission as to the rights of the original parties since it will not purport to adjudicate appellant's title or right to the land in question.[188]

After another unsuccessful attempt to intervene in the ICC proceedings,[189] the traditional Seminoles contacted the Interior Department, the Bureau of Indian Affairs, members of Congress, and members of the Eisenhower Administration.[190] In response to their plea, President Eisenhower assigned a special representative to meet with the traditional Seminoles.[191]

The ICC proceedings continued, however, without the traditional Seminoles' participation, and in 1976 the ICC approved a compromise settlement of $16 million.[192] Once the judgment was rendered, the government broke off negotiations with the traditional group.[193] The Justice Department contended that by including the traditional Seminoles in a judgment, with or without the group's consent, the ICC settled all outstanding claims against the government.[194] It remains

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[187] 146 F. Supp. at 461.

[188] *Id.* The court then declared the issue not ripe for appeal. *Id.*

[189] 1978 Hearings, *supra* note 181, at 60.

[190] *Id.* at 58.

[191] *Id.* at 98.

[192] *Id.* at 2.

[193] Barsh, *supra* note 1, at 20.

[194] 1978 Hearings, *supra* note 181, at 58. Traditional Seminoles brought an action seeking an injunction to halt the distribution of the ICC's judgment in 1977. Osceola v. Kuykendall, 4 INDIAN L. REP. F-80 (AM. INDIAN LAW. TRAINING PROGRAM) (Mar. 11, 1977). A district court for the District of Columbia dismissed the claim, holding that the ICC proceedings did not threaten the Indians' possessory interest:

> Entry of the judgment will create no new property rights in the United States, for the United States already holds fee simple title to the land, subject only to any rights of possession which plaintiffs and others like him may have. Similarly, plaintiff's right of possession and occupancy will not be affected by the judgment.

Id. at F-82. The court observed that in the future, the traditional Seminoles might have to

unclear whether the claim of the traditional Seminoles is conclusively decided.[195]

2. Six Nations Confederacy

The ICC's recognition of a given claimant as the representative of an identifiable group presents another obstacle to the equitable resolution of claims. Such a policy does not preclude suits by subgroups on behalf of larger groups which have organized governing bodies, and which have refused to approve or ratify claims.[196] Instead, the ICC regulations permitted any member of a formally organized group to bring a claim on behalf of the group, providing the claimant could prove that the group officers had refused to bring suit.[197] Moreover, the ICC procedures do not require formal tribal representatives to testify about the reason for their refusal to file a claim. The ICC relies instead on the claimant group's proof that its request to the tribal entity to bring suit has been refused.[198] The problems engendered by the ICC's permissive allowance of claims, without regard for conflict within the tribal organization, are illustrated by the Six Nations Confederacy claim.

A group of Six Nations Indians filed a claim on behalf of the Six Nations in 1950,[199] even though the Six Nations' official leadership had denied the claimants' attorneys the authority to represent the Confederacy before the ICC.[200] In 1973 the ICC entered its final judgment.[201] The governing body of the Six Nations continued to assert that the claimants before the ICC were not authorized to represent the Six Nations. Rather than present his assertions to the ICC in its hearings on the disposition of the award, Chief Shenandoah contacted President Nixon and negotiated with the Department

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prove possession of Indian title and continuous use and occupancy of the land "to protect [their] rights against interference by the United States or third parties." *Id.* at F-83.

The traditional Seminoles also attempted to amend the bill authorizing the distribution of the judgment funds, with a provision reserving their aboriginal title to land and forestalling any res judicata effect the judgment might have. They were unsuccessful here as well. 1978 Hearings, *supra* note 181, at 56.

[195] The *Dann* decision provides precedent for the proposition that the Seminole claim can no longer be asserted. *See infra* notes 276–91 and accompanying text.

[196] Such a prohibition might have ensured fuller and fairer representation of the tribal group when differences within the group existed.

[197] 25 C.F.R. § 501(c) (1978).

[198] *Id.*

[199] Six Nations Confederacy v. Andrus, 447 F. Supp. 40, 41 (D.D.C. 1977).

[200] *Id.* at 42 n.5.

[201] *Id.* at 41.

of the Interior.[202] Despite these negotiations, the Department of the Interior submitted to Congress a plan for distribution of the ICC's judgment.[203] The plan became effective in 1977.[204] The Six Nations leadership sought redress in *Six Nations Confederacy v. Andrus*.[205] They claimed that payment of the award would irreparably impair the leadership's rights under certain treaties, and that such an impairment would be effected without due process.[206] The district court dismissed the Six Nations' claim because the ICC's judgment was final once reported to Congress, and could not be set aside.[207] The appellate court affirmed[208] on the grounds that the tribal leadership had forfeited their only remedy by not intervening before the ICC.[209]

The Six Nations Confederacy and Seminole examples illustrate that the ICC's narrow intervention standards foreclosed valid aboriginal title claims. This unanticipated effect occurred despite the ICC's broadly construed representation standards that were originally intended to allow fairer and fuller representation of Indian claims. In light of the breakdown of tribal structures, and the difficulty of ascertaining present-day tribal title and descendants, the ICC was an unsuccessful attempt by Congress to settle claims that arose at a time when Indian tribes were recognized as sovereign entities by the conquering European culture.

The ICC required claimants, as an initial matter, to prove that they were the successors-in-interest to the aboriginal title in question.[210] At this stage the ICC determined whether the Indian group was legally entitled to bring their claim.[211] The ICC established broad group representation standards in order to permit the maximum number of recoveries. The Court of Claims also interpreted these standards broadly.

Despite the ICC's permissive representation standards, however, complete representation of valid claims was limited by a restrictive

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[202] *Id.* at 42.

[203] *Id.*

[204] *Id.*

[205] 610 F.2d 996 (D.C. Cir. 1979) (per curiam), *cert. denied*, 447 U.S. 922 (1980).

[206] 447 F. Supp. at 42.

[207] *Id.* at 43.

[208] 610 F.2d at 998.

[209] *Id.*

[210] 1971 *Indian Claims Commission* 1–2. The second, or valuation, stage determined the liability of the government, which was computed by subtracting any previously paid compensation from the value of the acreage in question at the time of extinguishment. *Id.* In the third stage, the ICC offset gratuitous payments by the government against the amount owed. *Id.*

[211] *Id.*

intervention standard. Many Indians no longer live in their ancestors' tribal groups since, through forcible or gradual dispersal, tribes have splintered into subgroups.[212] The ICC's narrow intervention policy provided that once a subgroup filed a claim with the ICC on behalf of the entire ancestral group, other subgroups that had not filed during that period were excluded from representation.[213] Non-claimant subgroups thus were not permitted to intervene; there were no provisions for the possibility that conflicting subgroups may not have filed as claimants, either because they believed that the claim filed would fairly represent their interests, or because their claims were addressed to other branches of the federal government.[214] By adhering to a strict group representation standard without a correspondingly lenient intervention policy, the ICC may have violated the procedural due process rights of unrepresented individuals.[215]

IV. *UNITED STATES V. DANN*

The difficulties inherent in the ICC's permissive representation and strict intervention standards that were discussed above, compounded the problems of compensating non-affiliated Indians for aboriginal lands taken by the government. The inadequacies of both the outmoded definition of aboriginal title rights and the ICC's representation standards, culminated in the case of *United States v. Dann*.[216] In *Dann*, the federal district court in Nevada held that aboriginal title was extinguished on the date when the ICC's judgment became final, which was more than a century *after* the date of extinguishment used by the ICC to value the claim.[217] The court's decision in *Dann* presented a welter of overlapping legal, moral, and constitutional issues that plagued ICC proceedings since 1946. The history of the case itself is a tangled web of litigation.

A. The Western Shoshone Claim

The Western Shoshone Indians were a tribe comprised of smaller groups or bands who occupied territories in the present-day states

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[212] Weatherhead, *What is an Indian Tribe? — The Question of Tribal Existence*, 8 AM. IND. L. REV. 1, 43 (1980) ("the social fact of assimilation — intermarriage, loss of tribal custom, adoption of Western life-styles, 'checkerboarding' of reservations").

[213] *See supra* notes 178–82, 196–210 and accompanying text.

[214] *See supra* notes 190–92, 203 and accompanying text.

[215] *See infra* notes 292–323 and accompanying text.

[216] Civil No. R-74-60 (Apr. 25, 1980), *rev'd*, 706 F.2d 919, 926 (1983), *cert. granted*, 52 U.S.L.W. 3763 (U.S. Apr. 17, 1984), *rev'd*, 53 U.S.L.W. 4169, 4171 (U.S. Feb. 20, 1985).

[217] 706 F.2d at 923.

of Nevada and California.[218] Some groups of Western Shoshone Indians have continuously asserted that there has been no government action to extinguish their aboriginal title.[219] A year after the ICC was created, the Temoak band of the Western Shoshone Indians initiated the claims procedure by approving a claims attorney contract.[220] The contract was also approved by the Secretary of the Interior, as required by ICC regulations.[221] The Temoak band's attorney filed a claim with the ICC in 1951, seeking compensation for confiscated lands on behalf of the Western Shoshone tribe.[222] Their complaint alleged that "from time to time," the federal government had extinguished the Western Shoshone's aboriginal title by confiscation.[223] The Temoak band council did not object to the characterization of the claim as one for compensation for extinguished title because its attorney repeatedly assured the council that the ICC proceeding would have no effect on present Western Shoshone title or possessory rights.[224] In 1962, the ICC found that the Western Shoshone tribe had held aboriginal title to a total of 24,396,403 acres in Nevada, and that their title to most of this land was extinguished over an unspecified period of time by gradual encroachment of both the federal government and third parties.[225] Four years later, the Temoak claimants, and the government, agreed to stipulate an average extinguishment date in order to determine the amount of compensation due. The ICC approved the agreed upon date.[226]

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[218] Steward, *The Foundations of Basin-Plateau Shoshonean Society*, in LANGUAGES AND CULTURES OF WESTERN NORTH AMERICA 113 (E. Swanson ed. 1970).

[219] *See, e.g.*, Western Shoshone Legal Defense & Educ. Ass'n v. United States, 531 F.2d 495, 499 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 885 (1976) (unsuccessful attempt to intervene in ICC proceedings to remove certain lands from pending claim); Temoak Band of W. Shoshone Indians v. United States, 593 F.2d 994 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 973 (1979) (unsuccessful attempt to stay ICC award).

[220] *See supra* notes 106–07 and accompanying text.

[221] *Id.*

[222] Shoshone Tribe v. United States, 11 I.C.C. 87 (1962).

[223] *Id.*

[224] Transcript, Oral Argument, Temoak Band of W. Shoshone Indians v. United States, I.C.C. Docket No. 326-K, at 21, 25–26 (Nov. 14, 1974). The claims attorney for the Temoak band stated:

> I've met with the Indians many times to determine these problems and have sought guidance. And the question has been raised, well, we want our land. We don't want termination . . . . This litigation means we are selling our land. And the answer is very simple. You are not selling your land. Anything that has been taken has been taken. This lawsuit is for compensation. It doesn't change your title one bit.

Id. at 21.

[225] *Shoshone Tribe*, 11 I.C.C. at 413–14, 416.

[226] *Temoak Band*, 593 F.2d at 996.

The Temoak band council allowed its claims attorney contract to expire in 1968.[227] The attorney continued to represent the Temoak claim before the ICC, however, by consulting with a group of Temoak Indians who called themselves the "Western Shoshone Claims Commission," even though the Temoak band council was named as both the official representative of the Western Shoshone identifiable group, and as the client in the approved claims attorney contract.[228]

During this period, the Dann band of Western Shoshone still lived on several of the 24,000,000 acres involved in the Temoak's claim. The Western Shoshone Legal Defense and Education Association, with which the Dann band was affiliated, attempted to intervene in the ICC proceedings.[229] The Association argued that any lands to which it claimed aboriginal title should be excluded from the determination of the final award. The ICC denied their motion to intervene on the ground that the issue of title extinguishment had been decided in an earlier ruling.[230] The Court of Claims affirmed.[231] The court held that in light of the lateness of the Association's motion, the petitioners failed to make a showing sufficient to require their participation in the ICC proceedings.[232] The court distinguished the *Turtle Mountain*[233] decision on the basis that both subgroups in that case had participated in the ICC proceeding from the beginning.[234] The Association's petition for certiorari to the United States Supreme Court was denied.[235]

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[227] *Id.* at 997.

[228] *Id.*

[229] Western Shoshone Legal Defense & Educ. Ass'n v. United States, 531 F.2d at 497 (Ct. Cl. 1976).

[230] 35 I.C.C. 457 (1955).

[231] *Western Shoshone Legal Defense & Educ. Ass'n*, 531 F.2d at 497.

[232] *Id.* at 503 ("The hour is very late and the showing is not strong.").

[233] 490 F.2d 935 (Ct. Cl. 1974); *see supra* notes 147–58 and accompanying text.

[234] 531 F.2d at 504 n.18.

[235] 419 U.S. 855 (1976). The litigation did not end there. In support of the Association, the Temoak claimants obtained new counsel and filed new pleadings that adopted the Association's position. The reformulated claim asserted that aboriginal title to the lands in question had never been extinguished. *Temoak Band*, 593 F.2d at 997. The new pleadings also asserted that the Temoak band's previous attorney had not presented them with the choice of whether to include all ancestral lands in the claim, or to assert that title to a portion of the land was not extinguished. *Id.* The Temoaks' new attorney filed a motion to stay the ICC proceedings, pending a determination by the Department of the Interior on their newly endorsed title claim. The ICC denied the stay, however, and entered a final judgment. 40 I.C.C. 305 (1977). The Court of Claims affirmed the ICC's ruling on appeal, reasoning that it was too late for the claimants to reverse their litigation strategy. 593 F.2d at 996. The court suggested that the Temoak claimants could petition Congress for relief from the ICC's final judgment. *Id.* at 999.

B. United States Government Claim Against the Dann Band

The claims in *United States v. Dann*[236] were entirely separate from ICC proceedings involving the Western Shoshone claim. The federal government filed suit against the Dann band in district court in 1974, alleging that the Dann band was grazing its livestock on public land without a permit.[237] The Danns asserted that the grazing lands were not public, but were lands to which they held unextinguished aboriginal title.[238] Summary judgment was granted for the government, on the grounds that the Danns were collaterally estopped by the ICC's 1962 decision that the United States had acquired all twenty-two million acres of Western Shoshone land.[239]

In *United States v. Dann (Dann I)*,[240] the Ninth Circuit reversed. The court held that collateral estoppel did not preclude litigation of the issue of extinguishment of aboriginal title because that issue had not been actually litigated before the ICC.[241] Neither res judicata nor collateral estoppel applied because the ICC's award had not yet been paid to the Western Shoshone.[242]

On remand, the district court ignored the appellate court's decision and enjoined the Dann band from grazing their livestock on the lands in question.[243] The court reasoned that its final judgment for the Western Shoshone rendered the award final for purposes of res judicata and collateral estoppel.[244] The Western Shoshone's aboriginal title was held to be extinguished on the date the award was certified.[245]

In *United States v. Dann (Dann II)*,[246] the Ninth Circuit again reversed the district court's holding.[247] Relying on its holding in *Dann I*,[248] the Ninth Circuit reiterated that the Dann band was not collaterally estopped from raising aboriginal title as a defense in the present proceedings because the issue of extinguishment of title was not actually litigated before the ICC.[249] The court also held that the

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[236] 53 U.S.L.W. 4169 (U.S. Feb. 20, 1985).
[237] *Dann I*, 572 F.2d at 223.
[238] *Id.*
[239] *Id.* at 223.
[240] 572 F.2d 222 (9th Cir. 1978).
[241] *Id.* at 226.
[242] *Id.*
[243] *Dann II*, 706 F.2d at 923.
[244] *Id.*
[245] *Id.*
[246] 706 F.2d 919 (9th Cir. 1983).
[247] *Id.*
[248] *See supra* notes 240–42 and accompanying text.
[249] 706 F.2d at 924. The court also denied that the ICC's decision had any res judicata effect

Western Shoshone's aboriginal title had never been extinguished.[250] Title had not been extinguished by prior application of public land laws or by creation of a Western Shoshone reservation because these actions did not evince a clear indication of congressional intent to extinguish aboriginal title.[251] Furthermore, despite the statutorily mandated finality of its judgment, the ICC itself did not have the authority to extinguish aboriginal title.[252]

1. The Supreme Court's Decision

When the United States Supreme Court granted the ICC's petition for certiorari,[253] the question before the Court was whether one group of Indians could assert in collateral litigation that aboriginal title was not extinguished, despite the entry by the ICC of a final judgment to compensate them for extinguishment of that title, when the judgment fund had not yet been distributed.[254] The resolution of this legal issue would decide the underlying question of whether an ICC decision may extinguish aboriginal title.

The government's primary claim was that a provision of the Indian Claims Commission Act[255] barred the Danns' assertion of any retained interest in the lands covered by the judgment.[256] The government presented three supporting arguments. First, since the ICC's judgment fund is in trust for all descendants of the Western Shoshone tribe, the government has paid the claim under the Act. Actual distribution of the funds to individual Western Shoshone descendants was not necessary to constitute payment under the Act because the claim at issue was tribal, not individual.[257]

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under the statutory provision that states that payment of any claim decided by the ICC would discharge the United States from any further claims. *Id. See also* 25 U.S.C. § 70u (1976). Only congressional approval of the award distribution plan constitutes payment within the meaning of the Act. 706 F.2d at 925–26. The court thus distinguished *Six Nations Confederacy*, because in that case Congress had already approved a plan for distribution of the award. *Id.* at 927 n.6; *see supra* notes 205–09 and accompanying text.

[250] 706 F.2d at 928.

[251] *Id.* at 929–31.

[252] *Id.* at 928.

[253] 52 U.S.L.W. 3763 (U.S. Apr. 17, 1984).

[254] *Id.*

[255] 25 U.S.C. § 70u (1976).

[256] Brief for the United States at 22, United States v. Dann, 53 U.S.L.W. 4169 (U.S. Feb. 20, 1985) [hereinafter cited as Brief for the United States]. The government cited a provision of the Act which reads:

> The payment of any claim, after its determination in accordance with this [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

25 U.S.C. § 70u (1976), *cited in* Brief for the United States, *supra*, at 2.

[257] Brief for the United States, *supra* note 256, at 26.

Second, the government relied on the language, legislative history, and purpose of the Act to show that Congress intended appropriation of the judgment fund to constitute final payment.[258] The government asserted that the legislative history of the Act indicated that by creating the ICC, Congress intended to delegate final responsibility for Indian claims against the government to the ICC, and did not intend to retain any authority over the finality of claims determined by the ICC.[259]

Finally, the government argued that the claimants could have appealed to Congress at any time during the claims process.[260] The Court's duty was to apply the Act as written, and then to wait for Congress to decide whether to address particular claims in future legislative action.[261]

In response, the Danns presented three arguments to support their claim that aboriginal title in the land on which they live was not precluded, regardless of whether the ICC judgment was paid. First, the Danns asserted that the language of the Act did not support the government's attempt to seek, in effect, a federal court order to take Indian lands for the first time.[262] This argument presumed that aboriginal title to the land which the Dann band continued to occupy had not yet been extinguished, even though the ICC judgment in part compensated for the extinguishment of their title.[263] The Danns relied on the decision in *Osceola v. Kuykendall*[264]

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[258] *Id.* at 30–31.

[259] *Id.* at 33. The government also argued that subsequent legislation that authorized automatic appropriation and distribution of judgment funds further evidenced Congress' intent to eschew any final veto over the resolution of a claim before the ICC. *Id.* at 44. The government contended that by requiring in 1965 congressional authorization of distribution plans recommended by the Secretary of the Interior, Department of the Interior & Related Agencies Appropriation Act, Pub. L. No. 88–356, 78 Stat. 276 (1965), Congress intended only to oversee the Secretary's performance of his fiduciary duty to manage tribal property. Brief for the United States, *supra* note 256, at 40. In 1973, the Distribution of Judgment Funds Act, 25 U.S.C. §§ 1401–1408 (1983 & Supp. 1985), removed this requirement because Congress recognized that the 1965 authorization requirement created too heavy a legislative burden. Brief for the United States, *supra* note 256, at 41. Congress amended other existing statutes in 1977 and 1978 in order to eliminate legislative authorization of appropriation of funds. *Id.* at 44.

[260] *Id.* at 46–47.

[261] *Id.*

[262] Brief for the Danns, *supra* note 18, at 25–26.

[263] *Id.* at 26–27. This argument reasoned further that the Danns' assertion of unextinguished aboriginal title in the present case was not a claim or demand discharged by operation of the Act, but merely a defense. *Id.* at 27.

[264] 4 INDIAN L. REP. F-80 (AM. INDIAN LAW. TRAINING PROGRAM) (Mar. 11, 1977), *cited in* Brief for the Danns, *supra* note 18, at 28. In *Osceola*, the traditional Seminole Indians in possession of aboriginal lands in the Everglades brought an action to restrain the ICC from processing a claim, brought by reservation Seminoles, for the extinguishment of all Seminole

to argue that the ICC judgment for the Western Shoshone did not affect the Danns' present possession of aboriginal title, and that therefore the Danns should have had the opportunity to prove present possession of aboriginal title as a defense in this action.[265]

The Danns' second argument was a constitutional one. The Danns claimed that to bind them to the ICC's decision as to the Western Shoshone claim deprived them of due process because they were not adequately represented by the Western Shoshone band.[266] Due process required verification that the representative claimant adequately represented the affected parties.[267] In the Western Shoshone claim before the ICC, however, the Danns asserted that the Temoak band, which sought compensation for extinguished aboriginal title, did not adequately represent those Western Shoshone who, like the Danns, would claim that the tribe's aboriginal title was not extinguished.[268]

Finally, the Danns asserted their individual rights of use and occupancy that survived abandonment by the Western Shoshone tribe.[269] The Danns relied on *Cramer v. United States*,[270] where the Court held that individual Indian occupancy is entitled to the same protection as tribal rights of occupancy.[271] Furthermore, the Court in *United States v. Santa Fe Pacific Rail Road Company*[272] held that any individual rights of occupancy such as those recognized in *Cramer* would not be affected by a finding that a tribe had relinquished its tribal claim to land.[273]

In the alternative, the Danns resorted to the claim that had been unsuccessful below: even if the ICC judgment for the tribe precluded the Danns' defense of aboriginal title, it did not discharge their claim because there has been no payment of the ICC's award within the meaning of the Act.[274]

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aboriginal title in Florida. Brief for the Danns, *supra* note 18, at 28. The district court in *Osceola* dismissed the traditional Seminoles' complaint, reasoning was that the traditional Seminoles had asserted aboriginal title, which confers the right of possession; that the traditional Seminoles were currently in possession of the lands in question; and that the government did not contest their possession. *Id.*

[265] *Id.* at 27.

[266] *Id.* at 29.

[267] *Id.* at 30.

[268] *Id.* at 32–33.

[269] *Id.* at 33.

[270] 261 U.S. 219 (1923). *See supra* notes 68–74 and accompanying text.

[271] *Id.* at 227.

[272] 314 U.S. 339 (1941). *See supra* notes 41–47 and accompanying text.

[273] *Id.* at 357–58 n.23.

[274] Brief for the Danns, *supra* note 18, at 38. The Danns asserted first that an existing statute, 25 U.S.C. § 118 (1983), implicitly defined payment to Indians as final distribution

The Danns' arguments failed to sway the Court. In a unanimous decision authored by Justice Brennan, the Court held that the certification and appropriation of the ICC's award to a trust fund held for the benefit of the Western Shoshone tribe, constituted "payment" under the Act, and thus discharged all claims and demands involving the Western Shoshone land claim.[275] The Court looked to the legislative purposes behind the Act and concluded that Congress intended to dispose of all Indian claims with finality.[276] Congress drafted the Act so that when the ICC filed a report with Congress determining that a claimant is entitled to recover, that report had "the effect of a final judgment,"[277] and this payment of a claim would fully discharge the United States from further claims and demands involving any matter resolved by the ICC.[278] Congress intended to relieve its own burden of responding to particularized Indian petitions with special jurisdictional acts.[279] Before the statute was enacted, Congress debated whether to delete the finality language in the Act, so that Congress would have final authority over claims brought before the ICC.[280] This suggestion was ultimately discarded.[281] The Court reasoned, therefore, that the lower court's justification for making payment contingent on Congress' approval of a final distribution plan, which was to give Congress a final opportunity to review ICC claims on the merits, conflicted with the congressional purpose of alleviating its burden of enacting special jurisdictional statutes.[282]

The Court further reasoned that the definition of "payment" applied by the Ninth Circuit conflicted with the common law usage of

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from the trust, not appropriation to the trust. Brief for the Danns, *supra* note 18, at 39. Second, the Danns argued that the Distribution of Judgment Funds Act provided the Indian claimants in an ICC proceeding with two ways to delay or halt payment after appropriation to the trust. *Id.* at 40. In the present case a significant number of Western Shoshone people resisted acceptance of a money judgment, causing the Department of the Interior to postpone distribution. *Id.* As a result, Congress must now pass legislation specifically authorizing a distribution plan for the ICC judgment. *Id.* Statements by members of Congress indicated that they thought the outcome of the *Dann* case would have a strong bearing on any action Congress might take to authorize a distribution plan for the Western Shoshone award. *Id.* at 40–41. Congress had deliberately postponed any action which would affect the final payment. *Id.* at 41. The Danns argued that by exercising this "pocket veto," Congress prevented the ICC judgment from precluding their present assertion of aboriginal title. *Id.* at 46–47.

[275] United States v. Dann, 53 U.S.L.W. 4169, 4171 (U.S. Feb. 20, 1985).

[276] *Id.*

[277] *Id.* (quoting 25 U.S.C. § 22a (1983)).

[278] 53 U.S.L.W. at 4171.

[279] *Id.*

[280] *Id.* (quoting 92 CONG. REC. 5311 (1946)).

[281] 53 U.S.L.W. at 4172 (quoting H.R. CONF. REP. No. 2693, 79th Cong., 2d Sess. 8 (1946)).

[282] 53 U.S.L.W. at 4172.

the word, in which payment may be satisfied if the funds are transferred to a trustee or agent of the creditor.[283] The Court concluded that, in accordance with a previous case involving payment between the government and Indians,[284] the common law definition of "payment" should apply when interpreting the Act.[285] In the *Dann* case, then, the government, as debtor, paid the ICC judgment to the government as trustee for the Western Shoshone beneficiaries.[286] Thus, payment within the context of the Act had occurred, fully discharging the United States of all claims relating to Western Shoshone title.[287]

The Court refused to address the Danns' claim of individual aboriginal title rights, as supported by the precedent in *Cramer*,[288] because that issue had not been addressed by the lower courts.[289] The Court then remanded the case to the Ninth Circuit.[290]

2. Analysis of *U.S. v. Dann*: Due Process Implications

When the Court framed the issue in *Dann* as whether "payment" had been made within the terms of the Act, it circumvented the constitutional issue regarding the ICC's procedures.[291] The due pro-

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[283] *Id.*

[284] *Id.* (citing Seminole Nation v. United States, 316 U.S. 286, 296 (1942)).

[285] *Id.* at 4172.

[286] *Id.*

[287] *Id.* at 4171.

[288] *See supra* notes 68–74 and accompanying text.

[289] *Id.*

[290] *Id.* In turn, the Ninth Circuit remanded the case to the district court for further proceedings concerning the Danns' assertion that they held unextinguished individual aboriginal title. United States v. Dann, 763 F.2d 379 (9th Cir. 1985). *See supra* notes 269–73 and accompanying text.

[291] *See supra* notes 266–68 and accompanying text. Refusal to address the constitutional issue may be traced to a traditional judicial reluctance to set aside an agency action when it does not violate the terms of the agency's statute. J. NOWAK, R. ROTUNDA, & J.N. YOUNG, CONSTITUTIONAL LAW 557 (1983). For example, in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc., 435 U.S. 519 (1978), the Court reversed a lower court's erroneous invalidation of an agency's rule. *Id.* at 525. The Court explained:

> [a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

Id. at 524. The Court goes on to describe those rare circumstances as "constitutional constraints or extremely compelling circumstances." *Id.* at 543. Despite the Court's specific holding in *Dann*, because the Danns face both constitutional constraints and extremely compelling circumstances, they should be permitted to assert unextinguished aboriginal title as a defense against the government's claim.

cess clause of the fifth amendment provides that: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[292] In Indian claims cases, the Indians who claimed their aboriginal title was not extinguished suffered a deprivation of this constitutionally protected right. Such deprivations resulted because often their claims were not even heard by the ICC. The tribal nature of aboriginal title,[293] and the ICC's permissive claimant standards combined with their restrictive intervenor standards,[294] were to blame for this situation. Thus, one of Congress' purposes in passing the Act — to grant Indians the procedural due process they had been denied — was frustrated by the inadequacy of the ICC's forum.

In its report, the House Committee on Indian Affairs expressed concern that "Indians have been denied free and equal access to the courts,"[295] and then reiterated that the Act was "primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted."[296] Thus, when it stressed the two other congressional purposes for the ICC, the Court in *Dann*[297] overlooked the ICC's most significant purpose: to grant Indians the procedural due process they had been denied since they had been granted citizenship.

In recognition of the collective nature of aboriginal title, [298] Congress provided that the ICC would establish very loose requirements for claimants to bring what in essence were class actions.[299] A claim for extinguished aboriginal title before the ICC shared many of the characteristics of a class action suit.[300] And, as does the judgment in a class action suit, the ICC's decision in an Indian claim bound all members of the class.[301] A claimant before the ICC, like the complainant in a class action, held himself out "as representing the legal rights of absent parties."[302] If the claimant lost, the absent, but represented, parties lost rights that they never personally as-

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[292] U.S. CONST. amend. V.

[293] *See supra* notes 24–83 and accompanying text.

[294] *See supra* notes 137–215 and accompanying text.

[295] House Committee on Indian Affairs, *supra* note 119, at 1349; *see supra* notes 120–21 and accompanying text.

[296] *Id.* at 1347.

[297] 53 U.S.L.W. 4169 (U.S. Feb. 20, 1985).

[298] *See supra* notes 60–67 and accompanying text.

[299] *See supra* notes 138–42 and accompanying text.

[300] *See* Butzel, *Intervention and Class Actions Before the Agencies and the Courts*, 23 AD. L. REV. 135, 145 (1973) (description of theoretical underpinnings of class action suits).

[301] *See id.*

[302] *Id.* (emphasis omitted).

serted.[303] Courts have been reluctant to entertain class actions on a broad scale because of the potential for wrongfully binding unrepresented claimants to a judgment.[304] Congress, apparently unaware that the same considerations existed in Indian claim actions, created a forum which heard claims that were exclusively class actions, in form, if not in name.

The Court of Claims addressed this class action analogy in *Western Shoshone Legal Defense and Educational Association v. United States*:[305] "[a]n Indian claim under the Act is unlike a class suit in that there is no necessity that the position of each individual member of the group be represented; it is only the group claim which need be put forward."[306] In so concluding, the court failed to recognize that constitutional due process necessitates such complete representation. To insist upon enforcing a class action type of judgment upon all reputed members of the class, even when those members' interests are in conflict, would result in a violation of procedural due process comparable in nature to the violation disallowed in the landmark case of *Hansberry v. Lee*.[307]

In *Hansberry*, the plaintiffs sought to enjoin the defendants from violating an agreement restricting the use of both parties' land in Chicago.[308] The Illinois Supreme Court held that, although the stipulation proved false, the defendants were bound by the previous judgment because they were members of the class of landowners represented in the earlier suit.[309]

The United States Supreme Court reversed, and held that the defendants had been deprived of their constitutionally-protected procedural due process.[310] The Court reasoned that the several landowning parties purportedly bound by the earlier decision did not constitute a class because the individual members had conflicting

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[303] *Id.*

[304] *Id.*

[305] 531 F.2d 495 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 885 (1976).

[306] 531 F.2d at 504.

[307] 311 U.S. 32 (1940).

[308] *Id.* at 37. When defendants countered that the agreement, which disallowed the use of the land by blacks, was invalid because it had not been signed by the requisite percentage of landowners, the plaintiff countered by citing an earlier case as the final determination regarding the agreement's validity. *Id.* at 38 (citing Burke v. Kleiman, 277 Ill. App. 519 (1934)). *Burke* was also a suit to enjoin the violation of a restrictive covenant, in which the class of landowners had been represented by the litigants, and the parties had stipulated that the agreement was valid. *Id.*

[309] *Id.* at 39–40.

[310] *Id.* at 44.

interests.[311] The Court refused to permit those members of the landowners' group who sought to enforce the agreement to represent the members who later sought to dispute the validity of the agreement.[312] Similarly, to allow the Temoak band in the *Dann*[313] case to represent all the descendants of the Western Shoshone ancestral group did not afford protection to the Dann band adequate to satisfy the constitutional requirements of due process. The Temoak band had an interest in pursuing the ICC claim and thus receiving a substantial monetary compensation.[314] The Dann band, however, had a conflicting interest in maintaining their ranch;[315] and as in *Hansberry*,[316] this conflicting interest was not adequately represented.

Even if the Temoak and Dann bands had substantially the same interests regarding the outcome of the claim before the ICC, the Temoak band, as an entity separately organized from the Dann band, could not adequately represent the Dann band. In *McGhee v. Creek Nation*,[317] the Court of Claims refused to permit an organized entity of the ancestral Creek Nation to represent all Creek Indians.[318] Even though the organized body was recognized by the Department of the Interior, and it had authority to represent all the members of that body, it did not have the necessary authority to represent the unorganized Eastern Creeks.[319] Therefore, the Court ruled that the Eastern Creeks were "entitled to be represented separately by representatives of their own choosing."[320]

This same reasoning is applicable to the claims in the *Dann* case. There are two distinctly organized bodies, and the Temoak band had no authority to represent the Dann band before the ICC. The Department of the Interior's recognition of the Temoak band[321] merely

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[311] *Id.*

[312] *Id.* The Court held that the "selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id.* at 45.

[313] 53 U.S.L.W. 4169 (U.S. Feb. 20, 1985).

[314] *See supra* notes 224–29 and accompanying text.

[315] *See supra* notes 229–30 and accompanying text.

[316] 311 U.S. 321 (1940); *see supra* notes 308–12 and accompanying text.

[317] 122 Ct. Cl. 380 (1952); *see supra* notes 165–76 and accompanying text.

[318] 122 Ct. Cl. at 394.

[319] *Id.* ("The Creek Nation in Oklahoma has only been recognized by the Secretary of Interior as having authority to represent the Creek Indians in Oklahoma. It has never been recognized as having authority to represent the unorganized but identifiable group of Creeks east of the Mississippi, and therefore is not entitled under the Indian Claims Commission Act to the exclusive right of representing such Eastern Creeks.")

[320] *Id.* at 394–95.

[321] *See supra* notes 221–23 and accompanying text.

authorized that band to represent its own membership. Thus, the Danns' constitutional argument before the Court, that the ICC did not adequately verify that the Temoak band represented all the interested parties, should have succeeded.[322] Neither the common law doctrine of aboriginal title, nor the statutorily-created ICC, were adequate to protect procedural due process for all tribal descendants eligible to participate in aboriginal title claims before the ICC.

3. Alternative Remedies

As a result of the Court's decision in *United States v. Dann*,[323] Indians like the Danns, who continue to live on aboriginal title land, are estopped from proving in collateral litigation that title is not extinguished when a prior ICC judgment allegedly compensated them for their land. Indians in the Danns' position, however, may pursue several alternatives to obtain relief from the ICC judgment. The two best alternatives involve petitioning to Congress for statutory relief, or seeking appellate review of the ICC's decision by the Court of Claims.

The Danns could petition Congress to enact a statute providing for review by the Claims Court as to the issue whether extinguishment could be stipulated before the ICC. Such a statute would have to disregard the principles of res judicata. Congress enacted a similar statute in 1978, which authorized the Court of Claims to review the merits of the Sioux Indians' Black Hills claim.[324] Such a statute would

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[322] Another procedural due process violation could be charged against the ICC's statute itself. The Act denied parties whose rights were affected the opportunity to protect their interests, by delegating unconstitutional authority to the Secretary of Interior to determine who may appear before the ICC.

[323] *See supra* notes 275–90 and accompanying text.

[324] 25 U.S.C. § 70s(b) (1976). That statute, which amended the Indian Claims Commission Act, states:

> Notwithstanding any other provision of law, upon application by the claimants within thirty days from March 13, 1978, the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo.

Id. Pursuant to this statute, the Court of Claims affirmed the ICC's holding that the congressional act of 1877 effected a taking, compensable by the value at the date of taking plus interest. Sioux Nation of Indians v. United States, 601 F.2d 1157, 1159 (Ct. Cl. 1979). In United States v. Sioux Nation of Indians, 448 U.S. 371, 407 (1980), the Court upheld the

allow the introduction of additional evidence, and permit the representation of all the competing interests involved before the Claims Court. In the subsequent review, the Danns could introduce evidence refuting the stipulated extinguishment.

A second possible avenue for alternative relief from an ICC judgment is the filing of a motion to reopen the case in the Claims Court, "an independent motion," pursuant to Federal Rules of Civil Procedure 152(b).[325] The Federal Rule provides:

> [t]his rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.[326]

To entertain such an independent action to reconsider a decision, the court must have equity jurisdiction, and if there had been no previous judgment, must have subject matter jurisdiction.[327]

Authority for the filing of such an independent action derives from the decision in *United States v. Andrade*.[328] In *Andrade*, the Court of Claims assumed, without deciding, that it had jurisdiction to entertain an independent action to reconsider an ICC judgment.[329] The court reasoned that it possessed the necessary equity jurisdiction to hear an independent action because it has the authority to reopen its own judgment. Therefore, since the Indian Claims Commission Act provides that an ICC judgment has the same effect as a judgment of the Court of Claims, it should similarly be authorized to reopen an ICC judgment.[330] The court also ruled that it possessed original subject matter jurisdiction over a claim to reopen an ICC proceeding because the Act provides that the Court of Claims can entertain Indian claims accruing after 1946.[331]

The court dismissed the claim in *Andrade*,[332] however, because the plaintiffs did not carry their burden of proving that the ICC's

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statute's constitutionality against a charge that it impermissibly violated the doctrine of separation of powers. *Id.* at 407.

[325] FED. R. CIV. P. 152(b).

[326] *Id.*, *cited in* Andrade v. United States, 485 F.2d 660, 663 (Ct. Cl. 1973) (per curiam), *cert. denied sub nom* Pitt River v. United States, 419 U.S. 831 (1974).

[327] 485 F.2d at 663–64.

[328] 485 F.2d 660 (Ct. Cl. 1973).

[329] *Id.* at 663.

[330] *Id.* at 664 (citing 25 U.S.C. § 70u (1976)).

[331] 485 F.2d at 664 (citing 28 U.S.C. § 1505 (1982)). (Any action which would subject a judgment of the ICC to reconsideration must occur, by definition, after the date the ICC was founded.)

[332] 485 F.2d at 664–65.

judgment was manifestly unconscionable — a burden that was heavier because the plaintiffs could have brought suit eight years earlier. In a situation like the Danns' case, however, their prior attempts to intervene,[333] and the due process component[334] of their claim, should meet this stringent proof requirement and allow their claim to be heard.[335]

V. CONCLUSION

Decisions by the Indian Claims Commission in aboriginal title extinguishment cases may have violated the due process rights of individual Indians still living on aboriginal lands. However, the Court's conflicting pronouncements on the question of the scope of

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[333] *See supra* notes 230–36 and accompanying text.

[334] *See supra* notes 266–68 and accompanying text.

[335] Other available alternatives seem unlikely to succeed. First, disputants could petition Congress for an act declaring their aboriginal title unextinguished despite the ICC judgment, or for a grant of the same parcel of land to which aboriginal title had been declared extinguished. Congressional approval is unlikely, however, because either proposal may violate the separation of powers doctrine. *Andrade*, 485 F.2d at 663.

Second, the Danns could seek an executive initiative to regain their ancestral land, either formally with an executive order, or informally by provoking executive lobbying in Congress. Two Indian groups successfully used both these alternatives during the Nixon Administration. Note, *supra* note 23, at 393. In 1972, Nixon signed an executive order providing for the return to the Yakima Indians of Mount Adams, a sacred mountain which had been confiscated and declared public land. Exec. Order No. 11,670. The Nixon Administration also pushed legislation through Congress to return the Blue Lake shrine to the Taos Pueblo Indians, over the objections of the Senate Interior & Insular Affairs Committee. The Administration did not set a precedent for the return of aboriginal lands, however, because it stressed that it was acting out of respect for Indian religious beliefs. 116 CONG. REC. 23131, 23133 (1970). More recent appeals to the executive branch have failed. 1978 Hearings, *supra* note 181, at 503–15 (appeals to Vice President and Secretary of Interior). Given such limited past success with executive intervention, and more recent failure, an appeal to the current administration seems unlikely to succeed.

Third, Indians disputing an ICC judgment could assert adverse possession as a defense in an action brought against them by the government. The Quiet Title Act, 28 U.S.C. § 2409a (1972), which enables citizens to bring suits to quiet title against the government, clearly states that sovereign immunity is not waived to permit suits against the government based on adverse possession. *Id.* at § 2409a(g). Despite this limitation, Indians may claim adverse possession as a defense in a suit brought by the government, such as the claim against the Danns. However, in such a case the requisite adverseness of possession may be disqualified by the government's acquiescence in knowingly permitting the Indians to continue occupying the land. *See also* Turtle Mountain Band, 490 F.2d at 942 ("Defendant [government] invokes the traditional doctrine that land interests cannot normally be acquired against the sovereign by adverse possession or lapse of time. But that very same principle was applied by the predecessor sovereigns, and if it were to be allowed to affect Indian title (in the way the Government seeks) no aboriginal title could have been obtained at any time after assumption of sovereignty on this continent by the first European powers. Of course, this has never been the rule for Indian ownership." (citations omitted).

individual rights in the area of aboriginal title lands makes this issue unclear. Since the Court refused to recognize a violation of the Dann band's due process rights in *United States v. Dann*, individual Indians who maintain that their aboriginal title to lands is not yet extinguished must pursue other avenues to vindicate their title rights. This controversy will continue until the last acre of aboriginal title land in the United States is converted into fee simple title.