No. 13-2181

In the
United States Court of Appeals
For the Tenth Circuit

PUEBLO OF JEMEZ, a federal recognized Indian Tribe,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Mexico
1:12-CV-00800-RB-RHS
Robert C. Brack, District Judge

BRIEF OF *AMICI CURIAE*, THE NATIONAL CONGRESS OF AMERICAN INDIANS AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, IN SUPPORT OF THE PLAINTIFF-APPELLANT AND IN SUPPORT OF REVERSAL OF THE DECISION BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *amici curiae*, the National Congress of American Indians and the Association on American Indian Affairs, are not a corporation that issues stock or has a parent corporation that issues stock.

/s/ Kim Jerome Gottschalk
Counsel for the *Amici Curiae*

May 7, 2014

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AMICI CURIAE STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY[1]

The National Congress of American Indians (NCAI) is a membership organization of more than 250 Indian tribal governments founded in 1944 and dedicated to protecting the rights of Indian tribes, including title to Indian lands protected by the Nonintercourse Act, 25 U.S.C. §177.

The Eastern Association on Indian Affairs was started in New York in 1922 to assist a group of Pueblo people seeking to protect their land rights. In the following decades the organization grew and merged with other Indian affairs advocacy organizations and in 1946, it became the Association on American Indian Affairs (AAIA). AAIA's current programs focus on protecting tribal sovereignty, preserving indigenous culture and promoting the education and well-being of Native youth.

NCAI and AAIA are well-positioned to provide: 1) historical and legal background on aboriginal/original Indian title, and 2) deeper background on the Federal Indian law cases and statutes, which must be considered when determining

[1] Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no party or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or its counsel made a monetary contribution to the preparation or submission of this brief.

whether the district court properly dismissed for lack of subject matter jurisdiction, the tribe's present claim to quiet title to its aboriginal lands in the Valles Caldera.

Counsel for NCAI and AAIA has consulted with counsel for all parties to this appeal and none oppose NCAI and AAIA's filing of this brief. Therefore, NCAI and AAIA file this brief pursuant to Fed. R. App. P. 29 and 10th Cir. L.A.R. 29 without a motion for leave to file.

ARGUMENT

The district court granted the United States' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). The court erroneously held that the Indian Claims Commission Act (ICCA), Act of August 13, 1946, ch. 959, 60 Stat. 1049 (formerly 5 U.S.C. §70 *et seq*.) (repealed 1978), divests the court of jurisdiction over the aboriginal title claim of the Pueblo of Jemez (Pueblo), Mem., ECF No. 26, at 5-6, as the claim "fell within the exclusive jurisdiction of the [Indian Claims Commission] and it is barred by the statute of limitations contained within the ICCA." *Id*. at 11. The court explained that its ruling "is determined by binding Tenth Circuit precedent" established in *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987) (*Navajo*). *Id*. at 5. The district court's ruling is based on an erroneous expansion of the holding in *Navajo* that not only distorts that holding but also directly contravenes the ICCA, governing case law on aboriginal title, and congressional legislation.

I. An Understanding Of Aboriginal Title Is Crucial To The Proper Disposition Of This Case.

This case involves a claim by the Pueblo to land to which it has held aboriginal title for centuries. Even without a trial, the district court found facts nearly sufficient to legally conclude that the Pueblo has aboriginal title, but because of its reliance on *Navajo* did not grasp the import of aboriginal title on the

issues before it.[2] To fully appreciate the relevance of aboriginal title to this case, it is necessary to understand its origins, and its legal incidents.[3] From the beginning of European "discovery" of the Americas, respect for Indian possession was part of the international law of nations and became part of the law of the United States. Felix S. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 45 (1947). As eloquently stated by Chief Justice Marshall:

> It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Worcester v. Georgia, 31 U.S. 515, 543 (1832).

Thus, "[f]rom the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234-35 (1985) (listing cases) (Oneida II). The discovering nations had what has been variously called the "fee title" to Indian lands, or the right of preemption. *Oneida Indian Nation of*

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[2] Aboriginal title requires a showing of '"actual, exclusive, and continuous use and occupancy' for a long time." *Sac and Fox Tribe of Indians of Oklahoma v. United States*, 161 Ct. Cl. 189, 315 F.2d 896, 903 (1963). The district court opinion found all the necessary facts except exclusivity. Appellant Br. at 15-16.

[3] Much of the background on aboriginal title is set forth in a law review article by Felix S. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28 (1947) cited favorably in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-234 (1985). Felix Cohen was a great advocate and scholar of Indian law and one of the authors of the ICCA. Appellant Br. at 27-28.

New York v. County of Oneida, New York, 414 U.S. 661, 667-70 (1974) (Oneida I). This meant that the lands were "subject to the Indians' right of occupancy and use …[and] no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign." *Onieda II*, 470 U.S. at 234. The Indians had, under aboriginal title, "the 'unquestioned right'" … "to the exclusive possession of their lands." *Id*. at 235. The aboriginal title right of possession is perpetual and is as sacred as the fee simple. *Mitchel v. United States*, 34 U.S. 711, 746 (1835); *see Oneida II*, 470 U.S. at 235. Aboriginal rights exist independently of grants by the sovereign, and do not require an affirmative act of the sovereign for continued viability. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941); *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 494 (1967); Cohen, *supra*, 32 Minn. L. Rev. at 47.

Crucial to the present case, aboriginal title is consistent with the holding of the fee and the right of preemption by the United States. *Johnson v. M'Intosh*, 21 U.S. 543, 592 (1823) (aboriginal title is a right of occupancy that "is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment."); *cf. Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) ("The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians"); *Fletcher v. Peck*, 10 U.S.

(6 Cranch) 87, 143 (1810). In fact, the United States has a trust obligation to tribes to protect aboriginal title from illegal or improvident transfer. *Oneida II*, 470 U.S. at 236-240; *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *see also* 25 U.S.C. § 177 (Nonintercourse Act prohibits alienation of aboriginal title without "a treaty or convention entered into pursuant to the Constitution…").

Although aboriginal title is subject to extinguishment by the United States, extinguishment of aboriginal title "cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Santa Fe*, 314 U.S. at 354. As the Supreme Court stated in *Oneida II*:

> 'Absent explicit statutory language,' this Court accordingly has refused to find that Congress has abrogated Indian treaty rights….The Court has applied similar canons of construction in nontreaty matters. Most importantly, the Court has held that congressional intent to extinguish Indian title must be 'plain and unambiguous'… and will not be lightly implied….Relying on the strong policy of the United States 'from the beginning to respect the Indian right of occupancy,' the Court concluded that it '[c]ertainly' would require 'plain and unambiguous action to deprive the [Indians] of the benefits of that policy.'

470 U.S. at 247-48.

Felix Cohen was familiar with all of these principles and undoubtedly brought his knowledge to bear in the drafting of the ICCA. Congress also is presumed to have had knowledge of these principles when it passed the ICCA. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

These principles of aboriginal title are important for specific reasons as explained below, but they are also important in the general sense of Chief Justice Marshall's admonition in *Worcester*, 31 U.S. at 543, after he had reviewed the history of "discovery" and aboriginal title as background to deciding a question of state jurisdiction within Indian lands: "We proceed then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions." The pretension here, by the Appellee, is that the trustee, with the participation of Felix Cohen, while passing a remedial statute intending to address actual historical wrongs committed by the United States against the Indians, without notice, forced Indian tribes to prove up their present interests in aboriginal title, upon which there was no shadow of impediment, and accept money in exchange for their precious land, or be foreclosed from any later remedy against the United States, in any forum.[4]

[4] The international community, including the United States, has acknowledged and sought to correct past inappropriate pretensions in dealing with indigenous peoples with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, as the minimum standard "for the survival, dignity, and well-being of the indigenous peoples of the world." United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Art. 43, at 14, Annex, U.N. Doc. A/61/53 (Sept. 13, 2007) *available at*: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. This includes standards for the protection of aboriginal rights in land. *See Id.* at 10, *specifically* Arts. 25-28. It is appropriate for the Court to consider the Declaration. *Cf. Roper v. Simmons*, 543 U.S. 551, 561 (2005) (even though the United States is not a party to the Convention on the Rights of the Child, the Supreme Court took that

II. To Extend The Holding In *Navajo* To The Present Case Contravenes The ICCA, Distorts The Holding In That Case, And Is Inconsistent With Governing Case Law And Congressional Legislation.

A. The Pueblo's Aboriginal Title Did Not Constitute A Cause Of Action Under The ICCA.

The categories of claims authorized to be brought in the ICC were broad since it was a remedial act, but it must be remembered that the section relating to pre-1946 causes of actions was intended to provide a remedy for *historic* wrongs suffered by tribes at the hands of the United States.[5] The portion of the ICCA at issue here provides as follows:

> SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by

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Convention into account because of the "necessity of referring to 'the evolving standards of decency that mark the progress of maturing society.'").

[5] Section 24 of the ICCA refers to actions arising after that date. *See* Appellant Br. at 28.

> any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.
>
> ICCA, sec. 2, 60 Stat. 1049, 323-24.

Some things immediately jump out from the statute. There is no hint of an intent on the part of Congress to jeopardize a tribe's present interests. Canons of statutory construction favoring Indian tribes require that ambiguous provisions in statutes and treaties should be construed liberally in favor of tribes. *Choate v. Trapp*, 224 U.S. 665, 675 (1912). As previously noted, aboriginal title cannot be lost without a clear expression of intent by Congress. *Oneida II*, 470 U.S. at 247-48. And yet, the United States would have this court interpret an *unambiguous* statute, passed for the benefit of Indians, to require that they bring claims for present title, or lose the ability to assert that title in future proceedings against the United States, even though the statute does not put tribes on notice of that requirement or that danger to their title.

The clear language of the Act requires a claim "against the United States."[6] ICCA, Sec. 2, 60 Stat. 1049, 323-24. In other words, the United States must have done something giving rise to a cause of action, prior to August 13, 1946. *Osceola v. Kuykendall*, No. 76-942 (D. D. C. Mar. 11, 1977) (three judge court) at 9-10, *appeal dismissed for want of jurisdiction*, 434 U.S. 914 (1977) (copy attached). In

[6] Webster's dictionary defines "against" as "in opposition or hostility to." "against." *Merriam-Webster's Online Dictionary*. 2014. http://www.merriam-webster.com/dictionary/against (6 May 2014).

Osceola, Indians in present possession of lands for which the Seminole Tribe had been paid under the ICC, brought an action to establish their right to the land. *Id*. at 2-4. The United States had never taken action to dispossess the Indians and had no plans to do so. *Id*. at 8. The court held that the group had no claim in the ICC or against any agent of the United States, and therefore had no claim which was ripe. *Id*. at 9-10. The court stated:

> If in the future plaintiff's possessory interest is challenged, his claim of Indian title may become ripe for judicial consideration….It is undisputed that plaintiff is currently in possession of the land and that the United States has no impending plans to contest that possession. Thus plaintiff's complaint sets forth no concrete or current controversy and must be dismissed for failure to state a claim upon which relief can be granted.

Id.; *see also, Otoe and Missouria Tribe of Indians v. United States*, 131 F. Supp. 265, 283 (Ct. Cl. 1955) (reading the legislative history of the ICCA as requiring the United States to have committed a wrong). Like the Plaintiff in *Osceola*, the Pueblo here had no ripe claim against the United States in 1946.

The district court summarily stated, "if the Baca grant did not extinguish Plaintiff's aboriginal title, Plaintiff's claim existed prior to 1946 and Plaintiff had the opportunity to avail itself of the remedy afforded by the ICCA and such claim is now barred by the statute of limitations contained in the ICCA." Mem., ECF No. 26, at 9. The district court's failure to identify the provision of the ICCA

pursuant to which the Pueblo was supposed to have brought its claim for undisturbed aboriginal title before the ICC, is telling. The district court in its opinion essentially created an additional category of cause of action – a cause of action based solely on a tribe's possession of aboriginal title rights to land, prior to August 13, 1946. That is not a cause of action established by Congress in the ICCA.[7] When properly analyzed it is clear that the ICCA did not require the Pueblo to assert a bare claim of undisturbed aboriginal title. There is no indication in the ICCA of any intent to give the word "claim" the strange meaning of referring to a present interest in lands. The normal meaning of "claim" as a cause of action was obviously intended by the requirement that claims be "against" the United States. There is no indication of an intent to create new injustices by forcing tribes to surrender their existing aboriginal title for money. Nor is there a

[7] The district court then makes the following statement, which assumes the point at issue. "Plaintiff could have brought its claim for aboriginal title to the lands comprising the Valles Caldera National Preserve in the ICC, as demonstrated by Plaintiff's petition in the ICC that sought compensation for the taking of aboriginal title to other lands. (Doc. 14-1). Because Plaintiff did not comply with the requirements of the ICCA with respect to the subject property, its claim against the United States is barred by sovereign immunity." Mem., ECF No. 26, at 9-10. The court specifically states that "after extensive litigation, the ICC found that the Pueblos were deprived of aboriginal title to the lands claimed therein through the actions of the United States." *Id*. at 9 (citing *Pueblo de Zia v. United States*, 474 F.2d 639, 641 (Ct. Cl. 1973)). Because of its reliance on *Navajo* the district court did not attach importance to the fact that the Pueblo had been deprived of title to those other lands. The loss of title is what gave rise to the claims against the United States. The fact that title to the present lands was never lost is a crucial distinction.

principled basis on which to cabin the logic that tribes were required to present claims for present interests. [8]

Finally, the ICCA provided jurisdiction to the ICC for causes of action accruing prior to August 13, 1946. ICCA Secs. 1-2, 60 Stat. 1049, 323-24. If, as the United States argues, and as the district court agreed, the ICCA required all aboriginal title claims to be presented as claims for money damages, then the ICCA itself would have created that claim and that would have happened on the date of the act. Claims based on present interests would not be pre August 13, 1946 claims and thus would not have been within the jurisdiction of the ICC at all. If that hurdle were somehow surmounted, then the date of valuation of the title to be surrendered would be August 13, 1946, but that date was never used for valuation purposes in any case in the ICC.

B. The Holding In *Navajo* Does Not Dictate The Outcome Of This Case. [9]

Navajo did not involve a present interest in aboriginal title.[10] Rather, it involved an interest in an Executive Order Reservation given and then taken away.

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[8] For example, did a claim under the ICCA extend to reservation interests? Water rights? Hunting and fishing rights? If not, what is the principle by which one determines which present interests had to be brought and which not?

[9] This panel can reverse the decision below consistent with *Navajo*. Assuming arguendo that the panel disagrees, then this brief demonstrates that *Navajo* was wrongly decided.

[10] The Navajo Tribe had previously brought a successful case before the ICC for the loss of aboriginal title to the very land at issue. 809 F.2d 1462,n. 14.

Navajo is not controlling because this court specifically determined that the Navajo Tribe[11] had a cause of action cognizable under Section 2(1) of the ICCA that arose prior to 1946. As this Court explained, "[t]he Tribes' claim was one 'arising under . . . Executive Orders of the President' under section 2[(1)] of the ICCA and therefore one within the jurisdiction of the [ICC] . . . ." 809 F.2d at 1471. This Court also determined that the claim accrued prior to 1946, as it accrued in 1908 and 1911 when the Executive Orders taking the land away were issued, or at least when the Tribe learned of the President's actions. *Id*. at 1470. This Court repeatedly referred to the ICCA as providing a forum for claims that "accrued" before August 13, 1946. *Id*. at 1460, 1461, 1464 (claim accrued when executive orders issued), 1465 (Congress provided a forum for all accrued claims). This Court cited the crucial language of the ICCA providing that the "Commission shall hear and determine the following claims **against** the United States…" (emphasis added). *Id*. at 1465. This Court spoke of the government's actions as being "inconsistent" with the Tribe's title, *id*. at 1469-1471, and as "blatantly inconsistent" with the Tribe's title, *id*. at 1470. In ICCA Section 2(1), Congress created a cause of action for bringing claims of this type against the United States – i.e., claims in law or equity arising under Executive Orders of the President – and

[11] The Navajo Tribe is now known as the Navajo Nation; we use the term Navajo Tribe in this brief only because that was the term used at the time of the opinion in *Navajo*.

Congress provided, in Section 12 of the ICCA, that any such claims not brought within the five-year timeframe would be barred. ICCA, secs. 2 &12, 60 Stat. 1049, 323-26. The Navajo Tribe's failure to bring its claim within this time resulted in it being barred. The district court erred below by failing to find a basis for the Pueblo's claim in the ICCA and by failing to find any time at which the Pueblo's claim accrued.

The district court felt compelled to rule the way it did by the broad dictum concerning the legislative history in *Navajo*. Mem. ECF No. 26, at 5-9. However, all of the broad language in the legislative history of the ICCA about intending to resolve all claims is in the context of wrongs committed and injustices historically suffered by the Indians. *Navajo*, 809 F. 2d at 1465. Thus, even the dictum of *Navajo* does not support the district court's ruling.

C. The Baca Family's Title Was Subject To The Pueblo's Aboriginal Title.

It is unclear what the district court was deciding as to the grant from the United States to the Bacas. Here is what the court said:

> Plaintiff cannot have it both ways. Either Defendant's grant to the Baca family extinguished aboriginal title or not. If the Baca land grant extinguished Plaintiff's aboriginal title, then aboriginal title was extinguished in 1860 and Plaintiff cannot claim aboriginal title now. On the other hand, if the Baca grant did not extinguish Plaintiff's aboriginal title, Plaintiff's claim existed prior to 1946 and Plaintiff had the opportunity to avail itself of the remedy afforded by the ICCA and such claim is now barred by the statute of limitations contained in the ICCA.

Mem., ECF No. 26, at 8-9. That language does not seem to constitute a holding that the Baca grant extinguished the Pueblo's aboriginal title.

If the district court did intend to hold that the Baca grant extinguished the Pueblo's title, that is clear error as shown by the previous discussion of the principles governing aboriginal title. *See* Sec. I, *supra*. Under those principles, in 1946, the United States had no adverse interest to the Pueblo's aboriginal title. *Id*. Nor had it granted any interest to any third party that was adverse to the Pueblo's title. *Id*. The United States held the right of preemption, which it had not exercised, and the Baca family, or their successors in interest, held the naked fee, subject to the Pueblo's right of occupancy. *Id*. Neither of these interests was inconsistent with the Pueblo's title. *Id*.; *see also, Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55, 66 (1886) ("The grant conveyed the [Railroad's'] fee subject to this [Indian] right of occupancy."); *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 642 (9th Cir. 1986) ("land grants were valid to convey the fee, but that the grantee took title subject to the Indians' right of occupancy"); *United States v. Pend Oreille County Public Utility Dist. No. 1*, 585 F.Supp. 606, 609 (E.D. Wash. 1984) ("A mere conveyance of lands subject to aboriginal title does not extinguish tribal title."). Therefore, the district court's allusion to the possibility that the Baca grant may have terminated aboriginal title is contrary to an unbroken body of governing case law.

D. Governing Case Law And Congressional Legislation Demonstrate That Existing Title Was Not Affected By The Running Of The ICCA's Statute of Limitations.

1. Courts Have Upheld The Bringing Of Aboriginal Title Cases Arising After The Running Of The ICCA's Statute Of Limitations.

A tribe with aboriginal title may bring a federal common law action to vindicate its rights after the running of the statute of limitations in the ICCA. *Oneida II*, 470 U.S. at 236; *cf. Alabama Coushatta Tribe of Texas v. United States*, 2000 WL 1013532 at *3-83 (Fed. Cl. 2000) (Art. I court) (aboriginal title survives passage of ICCA even when the cause of action brought against the United States under the ICCA was for failure to protect the tribe in peaceful enjoyment of its aboriginal title.)

The district court references cases holding that the ICCA is the exclusive remedy for claims that could have been brought in the ICC and then states incorrectly that "Plaintiff does not distinguish these authorities and relies on inapplicable cases involving claims for aboriginal title against parties other than Defendant." [12] Mem., ECF No. 26, at 8. There are several problems with the court's assertion. First, all of the cases referenced by the district court involve claims against the government where adverse federal action resulted in the loss of aboriginal title and money was paid for that loss or the claim for that loss was

[12] Use of the term "exclusive remedy" is misleading. If there is no cause of action, there is no remedy, much less an exclusive one.

barred by the running of the statute of limitations in the ICCA. *Id*. at 7. There was no such adverse action here and no loss of aboriginal title. The district court and the United States fail to take into account this crucial difference.

Second, the district court misses the point when it says the cases against third parties, many joined by the United States on behalf of tribes, are not relevant here. They are most relevant. The district court misses their relevance because it misapprehends the United States' present posture *vis-a-vis* the Pueblo's lands.[13] The United States, by purchasing the land at issue in 2000, is now in the same posture as those other third parties; as it claims absolute fee title to the Pueblo's land and is interfering with use of that land. The third party cases of which the district court was so dismissive are directly on point.

Third, tribes have brought aboriginal title cases against the United States after the running of the statute of limitations in the ICCA. In *Eyak Native Village v. Daley*, 375 F.3d 1218 (9th Cir. 2004), the Ninth Circuit *en banc* vacated a district court opinion that found the federal paramountcy doctrine, which applies to the

[13] As stated, in 1946 the United States had not taken any action inconsistent with the Pueblo's title because the fee granted to the Baca family was subject to the Pueblo's aboriginal title. Had the Bacas or their successors in interest interfered with the Pueblo's peaceful enjoyment of its aboriginal title, the Pueblo would have had two causes of action. They could have sued the United States in the ICC for failure to protect the Pueblo in its peaceful enjoyment of its aboriginal title, *Alabama Coushattta Tribe of Texas*, 2000 WL 1013532, *supra*, and second, sued the Baca family or their successors for ejectment, a claim in which the United States might well have joined. *See e.g.*, *Oneida II*, 470 U.S. at 236-40.

outer continental shelf, was inconsistent with non-exclusive aboriginal title. The court, however, did not find that aboriginal title was a claim that had to have been brought in the ICC. The case was sent back to district court for a trial on whether aboriginal title could be established – an order totally inconsistent with the notion that the chance to prove up the title had been lost because not brought in the ICC. When the *Eyak* case came back up *en banc*, the Ninth Circuit ruled 6-5 against the Villages on the merits of the aboriginal title claim rather than dismissing it for lack of jurisdiction. *See Native Village of Eyak v. Blank,* 688 F.3d 619 (9th Cir. 2012) *cert denied*, 134 S.Ct. 51 (2013).

In *People of the Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1987) (Gambell III), the Court specifically found, in a case against the United States, that "the federal government's paramount interests in the [outer continental shelf] do not extinguish the asserted aboriginal rights of the Villages." 869 F.2d at 1277. The Court in *Gambell III*, despite its obligation to address its own jurisdiction, did not dismiss the matter for lack of jurisdiction based on the ICCA. Nor did the United States in *Eyak* or *Gambell III* argue that the ICCA converted aboriginal title into claims for money damages that had to be brought in the ICC or lost. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 555 (1987) (remanding the aboriginal title issue to the Court of Appeals rather than dismissing it for lack of jurisdiction under the ICCA); *United States v. Atl. Richfield Co.,* 612

F.2d 1132, 1134 (9th Cir. 1980) (United States instituted the aboriginal title suit against the private defendants for pre-Alaska Native Claims Settlement Act (ANCSA) trespasses in the belief that neither the ICCA nor ANCSA had extinguished such claims).

2. Congress Has Passed Legislation Acknowledging The Continued Existence Of Aboriginal Title After The Running Of The Statute Of Limitations Of The ICCA.

a. ANCSA Demonstrates That Aboriginal Title Was Not Affected By The Running Of The ICCA Statute Of Limitations

An important indication that the ICCA was not intended by Congress to include claims of unextinguished aboriginal title, and that the running of the statute of limitations under the ICCA does not bar raising present claims of aboriginal title against the United States, is ANCSA, 43 U.S.C. § 1601 *et seq*. When oil was discovered on the North Slope in Alaska virtually the entire state was still subject to aboriginal title. *Bills to Provide for the Settlement of Certain Land Claims of Alaska Natives, and for Other Purposes: Hearing Before the Sen. Comm. on Interior and Insular Affairs*, 92nd Cong. 170, 22 (1970) (Senate Hearings). The Federal Government was the "principal land owner" in Alaska at the time ANCSA was passed. *Id*. at 566. In ANCSA, Congress recognized the need to settle the Alaska "aboriginal land claims" in a rapid manner, and acknowledged that the claims would be extinguished by the act. 43 U.S.C. § 1601. This was despite the

fact that the ICCA had specifically allowed Alaska Natives to bring claims against the United States. *See* ICCA, sec. 2, 60 Stat. 1049, 323-24.

The statute of limitations in the ICCA bars accrued claims not brought within the five year window of the waiver of sovereign immunity, and provides further that any claim required to be brought, that was not brought within that time frame, "could not be entertained by the Congress." ICCA, sec. 12, 60 Stat. 1049, 326. Had Congress believed that the ICCA provided the exclusive avenue to assert an interest in property based on aboriginal title that existed prior to 1946 against the United States, then presumably Congress would not have agreed to pay nearly a billion dollars for something it understood to be foreclosed or without merit. *See generally* 43 U.S.C. § 1601 *et seq*.

The legislative history of ANCSA shows definitively that Congress in enacting the ICCA believed that the Act did not "define, confirm, deny, or extinguish" aboriginal title. S. Rep. No. 92-405 at 76 (1971) (expressing Congress' belief that up until October 21, 1971 it had "declined" to take such actions). Likewise, an extensive analysis by the Federal Field Commission, a commission created to study land title in Alaska, also concluded that the "Alaska Natives have a substantial claim upon all the lands of Alaska by virtue of their aboriginal occupancy . . ." Senate Hearings at 303 (statement of Donald Wright, President, Alaska Federation of Natives). Additionally, Senator Stevens clarified

that if Congress did not confirm and settle the Alaska Native aboriginal title claims in ANCSA, it "would be creating a claim against the United States by the taking of those villages that are being occupied[.]" Senate Hearings at 459 (statement of Sen. Stevens); *see also id.* at 473 (statement of Sen. Stevens) (confirming, after a discussion about valid aboriginal title, that the Alaska Natives have valid aboriginal rights). This indicates that the Natives' claims to land survived the ICCA.

ANCSA and its legislative history show that Congress did not believe the ICCA converted then-existing aboriginal title rights that had not been interfered with into claims for money damages against the United States that had to be brought in the ICC or be forever barred.

b. Congress Has Indicated That Claims For Title Adverse To Tribes Are Not Barred By The Running Of Any Statute Of Limitations.

i. The Indian Claims Limitation Act Protects All Aboriginal Title Notwithstanding The Running Of Any Statute Of Limitations.

The Indian Claims Limitation Act (ICLA), 28 U.S.C. § 2415(c), protects title claims brought by the United States on behalf of Indians from the running of any statute of limitations. Nor is there a statute of limitations for claims brought by Indian tribes for title to land. *Oneida II*, 470 U.S.at 241-42. *Id.* (the legislative history of amendments to the ICLA "demonstrates that Congress did not intend § 2415 to apply to suits brought by the Indians themselves, and that it assumed that

the Indians' right to sue was not otherwise subject to any statute of limitations.") The ICLA affirms the proposition that claims to aboriginal title were not affected by the running of the statute of limitations in the ICCA.

ii. 25 U.S.C. § 233 Protects Aboriginal Title Claims In New York, Notwithstanding The Running Of Any Statute Of Limitations..

25 U.S.C. § 233 grants the courts of New York civil jurisdiction over actions involving Indians. Nevertheless that statute provides that nothing in the statute "shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York' or as 'conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." *Oneida I,* 414 U.S. at 680. This preserved any claims the tribes may have had against third parties for federal courts. Further, the Supreme Court in *Oneida I* makes clear that it was Congress' intent to preserve these claims quoting Congressman Morris as saying, '"this just assures the Indians of an absolutely fair and impartial determination of any claims they might have had growing out of any relationship they have had with the great State of New York in regard to their lands. I think there will be no objection to that; they certainly ought to have a right to have those claims properly adjudicated.

. . .'" *Id*. at 681. The Court in *Oneida II*, further clarified that Sec. 233 exemplifies the "congressional policy against the application of state statutes of limitations in the context of Indian land claims." 470 U.S. at 241.

These statutes indicate that in general, no statute of limitations runs against those claiming fee simple absolute contrary to tribes holding aboriginal title. Since purchasing the Valles Caldera from the Baca successors, the United States is claiming a fee simple absolute title adverse to the Pueblo and using that claim to interfere with the Pueblo's right to occupancy. Prior to selling the land, the Baca successors clearly could have been sued had they interfered with the Pueblo's right of occupancy, and would have had no statute of limitations defense. The United States has now stepped into their shoes. The only difference is the sovereign immunity of the United States, but that has been waived in the Quiet Title Act to provide a twelve-year window for suit and the Pueblo filed within that window. The Pueblo's suit to quiet title should be allowed to proceed because the Pueblo's cause of action against the United States did not accrue until at least 2000.

III. The Pueblo's Title Claim Is Properly Made Under the Quiet Title Act.

A. The Purchase Of The Baca Grant By The United States In 2000 And The Restrictions It Placed On The Pueblo's Use Of Its Land Required The Pueblo For The First Time To Assert Its Aboriginal Title, Which It Properly Did Under The Quiet Title Act.

There was no jurisdiction in the ICC over a claim to existing title, much less a requirement that the Pueblo file such a claim in the ICC regarding its present interest in its aboriginal lands. The need for the Pueblo to protect its title arose for the first time when the United States bought the land from the Bacas, subject to the Pueblo's right of occupancy, and then interfered with the Pueblo's use of their land. The Pueblo filed the present action within the governing statute of limitations. This does not constitute a second bite at the apple; it is the exercise of a right intended by the Quiet Title Act's waiver of sovereign immunity. As Congress made clear when it was considering the Act, "because of the common law doctrine of 'sovereign immunity,' the United States cannot now be sued in a land title action without giving its express consent." S. Rep. No. 92-575, at 1 (1971). "The statute was designed to remedy the problem then existing that unless and until the United States voluntarily brought a quiet title or similar action, disputes regarding title to real property between the Government and other parties could not be determined, and it was impossible for claimants to have their rights adjudicated." *United States v. Gammache*, 713 F. 2d 588, 591 (10th Cir. 1983). It is especially inappropriate for the United States to hide behind sovereign immunity to avoid a legitimate claim by a Pueblo whose rights the United States is obligated to protect as the case law and statutes cited have made clear.

B. The District Court And The United States Agree That Failure To Bring The Claim In The ICC Did Not Extinguish The Pueblo's Aboriginal Title; Therefore, The Pueblo Can Now Bring Its Claim Under The Quiet Title Act.

The district court did not hold, nor does the United States maintain, that the Pueblo's failure to file a claim for money damages in the ICC for the land at issue here, resulted in a loss of title. Mem. ECF No. 26, at 8-9. The United States agrees that, "a Tribe's failure to avail itself of the ICCA did not effectuate an extinguishment." Def. Reply Br., ECF No. 25, at 7.

Thus, even assuming arguendo that the district court were correct that the Pueblo could have asserted an interest in aboriginal lands in a claim presented before the ICC, the situation is similar to that in *Block v. North Dakota*, 461 U.S. 273 (May 2, 1983). The Supreme Court in *Block* found it important that legal title was not lost as an opportunity might arise for making the claim in the future. 461 U.S. at 291-292. The Court stated:

> Section 2409a(f), however, does not purport to strip any State, or anyone else for that matter, of any property rights. The statute limits the time in which a quiet title suit against the United States can be filed; but … does not purport to effectuate a transfer of title. If a claimant has title to a disputed tract of land, he retains title even if his suit to quiet title is deemed time-barred under § 2409a(f). A dismissal pursuant to § 2409a(f) does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits.

Id.

This Court has itself dealt with the situation foreseen in *Block*. *Gammache*, 713 F. 2d 588 (person barred by Quiet Title Act statute of limitations can quiet title when government sues him, just as the Supreme Court suggests in *Block*). As foreseen by the Supreme Court in *Block*, and as eventuated in *Gammache*, when title survives, later events may allow the assertion of that title. Here, the passage of the Quiet Title Act provides the Pueblo with a basis for bringing this suit now.

CONCLUSION

The district court erred in dismissing the Pueblo's claim for lack of subject matter jurisdiction based on the sovereign immunity of the United States. The holding in *Navajo* does not support, much less dictate that result. The ICCA did not convert present interests in aboriginal title into claims for wrongs against the United States. The language of the ICCA, the case law, Congressional legislation, and suits brought by and defended by the United States, all confirm this proposition. As the Pueblo's cause of action against the United States did not accrue until at least 2000, the Pueblo may avail itself of the waiver of sovereign immunity in the Quiet Title Act.

May 7, 2014

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that pursuant to Fed. R. App. 32(a)(7)(C) and the Tenth Circuit Rule 32, the attached amici brief is proportionally spaced, has a typeface of 14 points and contains 6,942 words.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

(2) the hard copies submitted to the clerk are exact copies of the ECF Submission;

(3) The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program Microsoft Security Essentials Virus Definition 1.161.904.0, and Malwarebytes Anti-Malware Version 2013.10.28.10 and according to these programs is free from viruses.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on May 7, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also hereby certify that I have transmitted seven (7) hard copies of the foregoing to the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit on May 7, 2014.

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ATTACHMENT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY OSCEOLA,

Plaintiff,

v.

JEROME K. KUYKENDALL, et al.,

Defendants.

Civil Action No. 76-492

FILED

MAR 11 1977

JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

In this action for declaratory and injunctive relief, plaintiff alleges that the Act creating the Indian Claims Commission, 25 U.S.C. §§70-70v, is unconstitutional on its face and as applied to plaintiff. The matter first came before the court on plaintiff's motion for a temporary restraining order, which was denied in an order of April 7, 1976.[1/] Subsequently, a three-judge court was convened to hear the merits of plaintiff's claim, pursuant to 28 U.S.C. §2284. Now before this three-judge court is defendants' motion to dismiss. Also currently pending is plaintiff's motion for certification of a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 1-13(b) of the local rules of court.

Plaintiff Guy Osceola is an Indian residing in the state of Florida on an unspecified tract of land which he terms part of the "territory of the Seminole Nation." He purports to represent a separate and distinct group of Seminoles known as the Everglades Miccosukee Tribe of Seminole Indians. The complaint alleges that plaintiff "is a direct descendant of those Seminole people, members of the Seminole Nation, who have never been militarily defeated, have never signed a written treaty of peace, and have never ceded nor given over their right to freely live upon and utilize their aboriginal territory in what is now known as Florida." The Seminoles whom plaintiff seeks to represent number from one to two hundred persons, many of them living in remote reaches of the Everglades and not speaking English.

Underlying plaintiff's claim is a rather complicated procedural history which begins in 1950, when the Indian Claims Commission received a petition

1/ The court's order denying the temporary restraining order was based on the failure of plaintiff to show that he and his class were in imminent danger of irreparable injury, as is required by Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

on behalf of the "Seminole Indians of the State of Florida." The petition sought compensation for unfair dealing in the two treaties which resulted in the Indians' relinquishment of Florida and their eventual relocation on an Oklahoma reservation: (1) the 1823 Camp Moultrie Treaty under which the Indians relinquished "all claim or title which they may have to the whole territory of Florida" in return for the promise of a Florida reservation and further consideration totaling $152,500; and (2) the 1832 Treaty of Payne's Landing which relocated the Seminoles from the Florida reservation to the Indian Country in Oklahoma. In 1953 the petition, Docket No. 73 before the Indian Claims Commission, was consolidated with a petition for an overlapping claim by the Seminoles of Oklahoma, Docket No. 151.

The persons filing the 1950 petition claimed to be acting for the Seminole tribal organization, though at that time there was no such tribal organization recognized by the Secretary of the Interior. Plaintiff in the instant case alleges that those persons acted without authority from the class of Indians which plaintiff seeks to represent. Plaintiff differentiates his claim from that of the Seminoles who filed the 1950 petition by noting that they have requested only money relief, which is apparently the only sort of relief the Indian Claims Commission is empowered to grant. In contrast, plaintiff speaks for a group of Indians now possessing "Seminole land" and desiring to remain in possession of that land.

Fearful that the proceedings before the Indian Claims Commission would somehow affect their interest in the land which they occupy, plaintiff and his predecessors in interest have embarked on an extended, if sporadic, campaign to keep the petitioners in Docket No. 73 from obtaining a judgment from the Commission. In 1954 a group calling itself the General Council of the Miccosukee Seminole Nation filed a "motion to quash" the 1950 petition. That motion was struck from the record in an order of April 8, 1955, by the Indian Claims Commission. On appeal from that action by the Commission, the Court of Claims dismissed the appeal on the ground that the order denying the motion was not a final order and therefore was not appealable. Billie v. United States, 146 F.Supp. 459, 137 Ct.Cl. 161 (1956), cert. denied, 355 U.S. 843 (1957). In dictum the Court of Claims made comments which appear relevant to the instant suit:

> It 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.

146 F.Supp. at 461. The same group that filed the motion to quash in 1954 also filed a motion to dismiss the pending petition in 1961; that motion was denied by the Indian Claims Commission on the day it was filed. Plaintiff associates himself and the group he seeks to represent with the group which filed the 1954 and 1961 motions.

On May 8, 1964, the Commission entered an interlocutory order finding that petitioners in Docket Nos. 73 and 151 had established "Indian title" to all of the present state of Florida with the exception of certain limited areas which had been disposed of by the Seminoles prior to 1823. That ruling was affirmed by the Court of Claims in United States v. The Seminole Indians, 180 Ct.Cl. 375 (1967). The Commission made a final award of $12,262,780.63 on October 22, 1970. The United States appealed the award to the Court of Claims, and the Court of Claims remanded the case to the Commission for more specific findings and reasoning as to the value of the land involved. Seminole Indians v. United States, 455 F.2d 539, 197 Ct.Cl. 350 (1972).

After negotiations and approval by all the parties, a joint motion for entry of a final judgment in the amount of $16,000,000 was filed with the Commission on March 17, 1976. The Commission held a hearing on that motion March 26, 1976. Plaintiff contends that he and the members of his proposed class received no formal notice of the hearing and had no opportunity to be heard and that the hearing was held in violation of the Commission's own rules regarding the scheduling of such hearings. Thus the hearing is said to violate plaintiff's right to due process of law. Plaintiff further alleges that his due process rights were infringed by inadequate notice concerning a meeting

which was held January 22, 1976, at Hollywood, Florida, for the purpose of discussing the proposed settlement.[2/]

As the petitioners' claim slowly made its way toward final judgment, yet another group of Seminoles appeared before the Commission seeking to be heard. In 1968 a group called the Miccosukee Tribe, federally recognized since 1962, filed a motion to intervene in the proceedings before the Commission. The motion was denied on the ground that the proposed intervenor was already adequately represented by the original petitioners; no appeal was taken from that denial. Plaintiff and his group are not members of the federally recognized Miccosukee organization, and they disavow that organization's attempt to share in any monetary settlement of the claims before the Commission. Similarly, the federally recognized Miccosukees disclaim any association with plaintiff and his predecessors in interest who have sought to halt the Commission's consideration of the Seminole land claim. In its 1968 motion to intervene in the Commission proceedings, the federally recognized Miccosukee Tribe referred to the 1954 motion to quash as "ill-advised" and to the 1961 motion to dismiss as filed "by a lawyer unauthorized to act on [the Miccosukees'] behalf."

Plaintiff's primary concern in this suit for declaratory and injunctive relief is that his property rights and those of the Indians he represents will be undermined by the adjudication before the Indian Claims Commission--an adjudication in which they have been denied effective participation. In an attempt to bar the entry of a final judgment by the Commission, plaintiff argues that the entire statutory scheme of the Indian Claims Commission Act, 25 U.S.C. §§70-70v, operates to deprive him and his proposed class of the due process of law guaranteed by the fifth amendment. The alleged constitutional violation springs from the Commission's adjudication of plaintiff's property rights without notice and opportunity to be heard and without opportunity to exclude himself from the effects of a judgment. More specifically, plaintiff contends that §70i of the Act is unconstitutional because it delegates to the Secretary of the Interior the authority to determine, without appropriate standards, who may proceed as a tribal representative before

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2/ In its findings of fact concerning the compromise settlement of $16,000,000, issued April 27, 1976, the Indian Claims Commission found that the notice for the January 22, 1976, meeting had been adequate.

the Indian Claims Commission. Plaintiff also alleges, as a secondary matter, that the Act deprives him and his proposed class of the equal protection of the law since it requires Indians to assume heavier burdens than other racial or ethnic groups in the assertion and protection of their property rights.

Stripped to its bare essentials, plaintiff's claim is that he and his group hold "Indian title" to the land on which they reside by virtue of their aboriginal possession of it--a possession which continues to this day. Plaintiff contends that this Indian title was not disturbed by the treaties of 1823 and 1832 because his ancestors were not allowed meaningful participation in those agreements and that, in fact, his ancestors' rights in the land were recognized by the United States in an oral treaty of 1842. Defendants' motion to dismiss is based primarily on the arguments that the property rights claimed by plaintiff are not protected by the fifth amendment because Congress has never recognized any Indian rights in the disputed land and that, in any event, any rights which plaintiff may have in the subject territory will be unaffected by the award of the Indian Claims Commission which is sought to be enjoined by this suit.[3/]

Resolution of this conflict requires examination by the court of the concept of original Indian title,[4/] a legal doctrine dating from the opinion of Chief Justice Marshall in Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). In that case the Supreme Court indicated that the sovereign held exclusive title to all aboriginal Indian lands, subject to a right of occupancy in the Indians still residing there. Thus the Indian title claimed by plaintiff cannot be a fee simple absolute as the use of the term "title" might imply; rather, if

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3/ In their motion to dismiss, defendants have argued that this court lacks jurisdiction over plaintiff's claim and that plaintiff should take his case to the Court of Claims. Such an argument ignores the fact that plaintiff seeks an injunction and a declaratory judgment, relief which the Court of Claims is not empowered to grant. See United States v. King, 395 U.S. 1 (1969). Plaintiff's claim is clearly one "arising under" the Constitution and laws of the United States, and this court thus has jurisdiction over it pursuant to 28 U.S.C. §1331.

4/ The law of Indian title prior to the decision of the Supreme Court in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), is examined in Cohen, "Original Indian Title," 32 Minn. L. Rev. 28 (1947). See also "The Supreme Court, 1954 Term," 69 Harv. L. Rev. 119, 147-51 (1955); Note, "Systemic Discrimination in the Indian Claims Commission: The Burden of Proof in Redressing Historical Wrongs," 57 Iowa L. Rev. 1300, 1304-06 (1972); Comment, 26 Rutgers L. Rev. 909, 913-16 (1973).

plaintiff in fact holds Indian title to the subject territory because of continued possession since aboriginal times, that Indian title conveys no more than a right to use and occupy the land at the will of the United States.

The relatively narrow view of Indian property rights embodied in Johnson v. M'Intosh was reaffirmed in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), the most recent case in which the Court has fully considered the question of Indian title. The Tee-Hit-Tons, an Alaskan Indian tribe, argued that their rights under the fifth amendment were violated by the refusal of the United States to compensate them for a taking of timber from land allegedly owned by the tribe. Like plaintiff in this case, they contended that their "tribal predecessors have continually claimed, occupied and used the land from time immemorial." Id. at 277. The government urged that the Indians had no compensable interest in the land because Congress had not recognized any property right in the Indians. The Supreme Court accepted the government's argument, holding that congressional recognition of Indian property rights "may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." Id. at 278-79.

With respect to the Tee-Hit-Tons' claim of aboriginal title arising from the tribe's longstanding occupation of the territory in question, the Court said:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty", as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Id. at 279.

After a review of the prior cases which were considered relevant to the facts presented in Tee-Hit-Ton, the Court added:

> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.

Id. at 281-82. The Court concluded that the taking by the government was not compensable "because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." Id. at 285.

Clearly emerging from the holding of the Court in Tee-Hit-Ton are several principles which have a direct bearing upon this case: (1) fee title to the Indians' aboriginal land is vested in the United States even if an Indian tribe can claim that it originally held Indian title to the land; (2) any right which Indians of today have in such former Indian territory is a mere right of possession or occupancy, subject at any time to taking or extinction by Congress; and (3) recovery for past wrongs to the Indians who were deprived of their lands is a matter of legislative grace rather than legal liability on the part of the United States. Harsh as these rules may seem, they remain the law applicable to plaintiff's claim. In a much more recent decision than Tee-Hit-Ton, the Court noted in dictum the salient aspects of the law of Indian title:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign--first the discovering European nation and later the original States and the United States--a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act.... Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974).

Assuming arguendo that plaintiff could demonstrate that he and his group hold Indian title to the land in question, the most which that Indian title could give him, under numerous decisions of the Supreme Court,[5] is a right to possession and occupancy. Regardless of the judgment entered in Docket Nos. 73 and 151 by the Indian Claims Commission, plaintiff's right to possess the land may be terminated at any time by the United States. The decision by the Commission represents its finding that the Seminoles held Indian title to most of the state of Florida prior to the 1823 treaty and that the compensation which they received for ceding that land to the United States was inadequate. The judgment in Docket Nos. 73 and 151 is a means of providing additional compensation to the Seminoles' descendants--compensation granted by Congress as an act of legislative grace. 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 plaintiff and others like him may have.[6] Similarly, plaintiff's right of possession and occupancy will not be affected by the judgment.

Since plaintiff's claim of Indian title gives him nothing more than a mere right of possession of the land, it is difficult to see how plaintiff could assert a cause of action against the Indian Claims Commission or any other agent of the United States until that possession is disturbed. Plaintiff's complaint clearly indicates that he and his group remain in possession of the land to which they claim Indian title. Furthermore, counsel for defendants represented to the court during oral argument that the United States contemplated no action of any sort against plaintiff or his class.[7]

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[5] See cases discussed in Cohen, "Original Indian Title," 32 Minn. L. Rev. 28 (1947).

[6] The Tee-Hit-Ton Court held that ownership vested in the United States by virtue of its conquest of the Indians:

> This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained.

348 U.S. at 279. Defendants in this case argue that the United States holds title based on the Seminoles' cession of the territory under the treaties of 1823 and 1832. Under either theory, it is clear that fee simple title to the land in question is now in the United States.

[7] This representation was made during oral argument on plaintiff's motion for a temporary restraining order in April 1976. Ostensibly nothing has happened since that time to change the government's position.

Under such circumstances, the court must conclude that plaintiff's complaint is premature. Plaintiff's possessory rights, which are the only rights available to him under a claim of Indian title, are not presently threatened, and they may never be. As one commentator has observed, "[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." K. Davis, Administrative Law Text 396 (3d ed. 1972). See International Longshoremen's and Warehousemen's Union v. Boyd, 347 U.S. 222 (1954).

If in the future plaintiff's possessory interest is challenged, his claim of Indian title may become ripe for judicial consideration. At that time he may be able to establish that he and the group he represents hold Indian title to their land by showing "actual, exclusive, and continuous use and occupancy 'for a long time'" prior to the challenge. Sac & Fox Tribe v. United States, 315 F.2d 896, 903, 161 Ct.Cl. 189, 201-02, cert. denied, 375 U.S. 921 (1963). If Indian title is proven, then the right of occupancy can be extinguished only by "plain and unambiguous" act of Congress. United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 346-47 (1941). When the right of occupancy is so extinguished, no compensation is available to the Indians unless their Indian title has been "recognized."[8/] Tee-Hit-Ton Indians v. United States, supra, 348 U.S. at 281-85. And such recognition, like extinguishment of Indian title, must be by unequivocal act of Congress:

> Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. Mere executive "recognition" is insufficient, as is a simple acknowledgment that Indians physically lived in a certain region. There must be an intention to accord or recognize a legal interest in the land.

Sac & Fox Tribe v. United States, supra, 315 F.2d at 897.

8/ Plaintiff relies upon Mitchel v. United States, 9 Pet. 711 (1835), for the proposition that the Seminoles held recognized, treaty-guaranteed title to their Florida land. Defendants contend that Mitchel is inapposite to the instant case because it dealt with the narrow issue of title to a specific tract of land. The court need not consider at this time the impact of the Mitchel holding upon plaintiff's rights since any claim which plaintiff might have is not yet ripe. In light of Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), and other cases subsequent to Mitchel, it appears that the question of whether plaintiff's right of occupancy is recognized by treaty would arise only upon extinguishment of that right by the United States and then only in order to determine whether plaintiff was entitled to compensation.

Eventually plaintiff may be required to prove certain of the allegations of his complaint in order to protect his rights against interference by the United States or third parties.[9/] For the present, however, the most he claims is recognized Indian title and the most to which he would be entitled under that claim is a right of possession and perhaps of compensation should that possession be disturbed in the future.[10/] It is undisputed that plaintiff is currently in possession of the land and that the United States has no impending plans to contest that possession. Thus plaintiff's complaint sets forth no concrete or current controversy and must be dismissed for failure to state a claim upon which relief can be granted.

9/ If plaintiff's claim of recognized Indian title should become ripe at some future time, the appropriate forum in which to assert that claim would be the Court of Claims rather than federal district court. The Court of Claims has jurisdiction over such actions by the terms of 28 U.S.C. §1505, which provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

10/ Plaintiff attempts to avoid the holding of the Tee-Hit-Ton case by noting that there the Indians' rights were extinguished by Congress, as it clearly has the power to do, whereas here it is the members of the Indian Claims Commission who threaten an "unconstitutional taking or interference" with Indian land. Plaintiff's Memorandum in Opposition to Motion to Dismiss at 12. The court, however, does not believe that there has been an interference with any right possessed by plaintiff. In any event, the comments of the Tee-Hit-Ton Court concerning the nature of Indian title remain unaffected by the distinction which plaintiff seeks to draw between his case and that of the Tee-Hit-Tons.

In the alternative, plaintiff suggests that the court consider the Tee-Hit-Ton decision to have been overruled by subsequent cases such as Goldberg v. Kelly, 397 U.S. 337 (1969), which establish rights of procedural due process under the fifth amendment. Those cases are not relevant to the issues raised in Tee-Hit-Ton, and the continuing validity of the Tee-Hit-Ton view of Indian title is clearly suggested by the Court's remarks in Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974).

An appropriate order accompanies this memorandum opinion.

Malcolm R. Wilkey
UNITED STATES CIRCUIT JUDGE

Joseph C. Waddy
UNITED STATES DISTRICT JUDGE

Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUY OSCEOLA, et al.,

Plaintiffs,

v.

JEROME K. KUYKENDALL, et al.,

Defendants.

Civil Action No. 76-492

FILED

MAR 11 1977

JAMES F. DAVEY, Clerk

ORDER

This matter came before the court on defendants' motion to dismiss. Upon consideration of the motion, memoranda submitted in support thereof, opposition thereto, oral argument thereon, and the entire record herein, and for the reasons set forth in the accompanying memorandum opinion, it appears to the court that plaintiff's claim, if such claim exists, is premature and not ripe for adjudication. Accordingly, it is by the court this 11th day of March, 1977,

ORDERED that defendants' motion to dismiss be, and the same hereby is, granted; and it is further

ORDERED that this action be, and the same hereby is, dismissed with prejudice.

Malcolm R. Wilkey
UNITED STATES CIRCUIT JUDGE

Joseph C. Waddy
UNITED STATES DISTRICT JUDGE

[illegible]
UNITED STATES DISTRICT JUDGE