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Article

"I Didn't Know That a Patent Was a Dangerous Thing": Forced Fee Patents, Native Resistance, and Consent

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Between 1906 and 1920 the Bureau of Indian Affairs (BIA) issued more than 32,000 fee patents, covering 4.2 million acres of land. More than half of the patents were issued between 1917 and 1920. The BIA forced many of these patents upon Native people without their consent. When individually allotted land went from trust to fee, the land was taxed and could be sold. The consequences were devastating. Was this legal? Many Native people protested their fee patents, but others did not. Indeed, protesting dispossession was an act of courage and defiance. Native protest led to a legal precedent that had an impact across Indian country: consent was required. But was compliance synonymous with consent? Must one resist a policy found to be illegal in order for it not to apply? For a time, the answer was yes. Ideas about consent began to change leading to another series of legal challenges to the Bureau's forced fee patent policy.

Between 1906 and 1920 the Indian Office issued more than 32,000 fee patents, covering 4.2 million acres of land, more than half between 1917 and 1920. Across nearly two decades the Indian Office forced approximately 10,000 fee patents upon Native people.[1] When individually allotted land went from trust to fee, the land was taxed and could be sold. The consequences were devastating. In 1920, Cato Sells, the commissioner of Indian Affairs, wrote: "After an Indian receives a patent in fee to his land he is no longer under our supervision or jurisdiction. I do know, in a general way, that a large percentage of the Indians to whom patents in fee have been issued soon dispose of their lands, frequently for an inadequate consideration, and that in many cases the Indians are left homeless."[2]

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[1] Annual Report of the Commissioner of Indian Affairs (ARCIA), Washington, D.C: Government Printing Office, 1920, 172.

[2] Cato Sells to John Barton Payne, SOI, 3 December 1920, CCF, 1907–36, Box 1441, 5–6, General-Patents, Part 4, RG 48, National Archives (NA)–College Park.

Beginning in 1916 and continuing until their protests finally broke through, their patents cancelled, and their case went to court in 1922, Philip Wildshoe, Morris Antelope, and Anasta Smo refused their fee patents. They would not pay taxes. Forcing fee patents upon them without consent, they claimed, was illegal. But was it? These three Coeur D'Alene forced the question to the surface. Years earlier, in 1913, as the Indian Office contemplated issuing fee patents without consent, Edgar Meritt, the assistant commissioner of Indian Affairs, admitted that "This question of forcing fee patents on Indian allottees … involves a serious question of law."[3] Seven years later, with no "definite statement from the Office relative the issuance of patents in fee to Indians without their consent, and prior to the expiration of the trust period- … ," the agent at Coeur D'Alene, H. D. Lawshe, was adrift. He confessed, in 1920, that "I am unable to locate the law on this subject."[4] Law would have to be made.

At the end of December 1928, a Kiowa woman named Tsomah made the following statement and signed it with her thumbmark: "I took the patent but I didn't want to take it. I didn't want to be turned loose by the Government. It was forced on me I had to take it whether I wanted it or not … . I was scared when I heard I had my patent in fee. I knew I would mortgage or sell my land and I didn't know where I was going to get my groceries from. We had to pay taxes on our land. We didn't have the money so had to sell our land. What else could I do? We owed some debts too and had to sell our land to pay them."[5] Tsomah, like many others, did not refuse. Told over and over again that they must accept their fee patents, she and others became ensnared in a debt trap: they mortgaged their land to pay taxes; when they could not keep up with the mortgage they defaulted on their loans; taxes accrued. They either sold their land to pay off their mortgage and to avoid further taxation or they lost the land in a tax sale. Years before, in 1914, on the eve of mass fee patenting, James Fast Horse at Pine Ridge said that should Indian people be given fee patents to their land that "it would melt like snow."[6] Sadly, he was right.

Tsomah's story of individual land loss is, sadly, typical. So too, on a smaller scale, is Philip Wildshoe, Anasta Smo, and Morris Antelope's tale of resistance. Protesting dispossession was an act of courage and defiance. It led to a legal precedent that had an impact across Indian Country.[7] But lack of protest was not synonymous with consent. When the appellate court decided *United States v. Benewah County* in 1923, it largely adopted the views of the Coeur D'Alene: the trust patent's promise of freedom from taxation was a property right that could not be taken away without consent. Indian people who found themselves in a similar position—and there were thousands—might find some relief. Their patents could be cancelled, their taxes refunded. But the decision had the potential to harm more people than it helped because the Indian Office's interpretation of the decision placed an undue burden on Native people to prove they did not consent. The court secured a right; the Indian Office made that right difficult to access. Charles Burke, the commissioner of Indian Affairs when *Benewah* was decided, hid behind the decision, sanctioned a colossal amount of land loss, and blamed Indian people for it. Burke considered acceptance of a patent to be synonymous

[3] Edgar Meritt, "Memorandum for the Commissioner," 1 December 1913, CCF 152466-13-312, General Services (GS), RG 75, NA-DC. Sources sometimes refer to Philip Wildshoe as Philip Weywick; this article uses Wildshoe throughout.

[4] H.D. Lawshe to CIA, 24 June 1920, CCF 44631-20-312-CdA, part 1, Box 52, RG 75, NA-DC.

[5] Affidavit of Tsomah, 8 December 1928, Copies of Affidavits Relating to Forced Fee Patents, 1928–1929, RG 75, NA–Fort Worth (FW).

[6] Abstract of James Fast Horse letter in the collected responses to Secretary Franklin Lane's 1914 circular to 314 "progressive" Indians, 26 March 1914, CCF 84953-15-127-GS, RG 75, NA-DC.

[7] A similar case could have emerged from elsewhere as Native people at Yakima and Cheyenne River, for example, were also consulting with attorneys and getting interested in litigation regarding their forced fee patents. See James McGregor to George Phillips, Asst. U.S. Attorney, 1 April 1921, 29376-21-302-Cheyenne River; Carroll B. Graves to S.M. Brosius, 7 April 1922, CCF 30996-22-302-Yakima; Howard Fuller to Charles Burke, 27 April 1923, CCF 28234-23-302-Cheyenne River, all in RG 75, NA-DC.

with consent. "[W]here the Indian accepted the patent, mortgaged or conveyed the land, he waived any rights that he otherwise might have had, and, as a general rule, this is what most of them did and they are today landless … ."[8]

Was compliance synonymous with consent? Must one actively resist a policy found to be illegal for it not to apply? Yes, it seems. The Indian Office responded to *Benewah* by constructing a remedy that left the vast majority of those affected by the forced fee patents with little recourse. Matter-of-fact lamentations about land loss were hardly sufficient. As the sympathetic agent at the Kiowa Agency put it in 1930: the Indian Office "did much violence to the Indian" when it issued fee patents without consent.[9] That violence continued as those who "accepted" their fee patents lost their land. Issuing fee patents before the end of the trust period and without consent was a profound violation of the trust responsibility. It was a responsibility Native people considered inviolable, but which in this instance the Indian Office violated on a colossal scale. The members of the Nez Perce Business Committee and Advisory Council knew that trust protection is "one of our tangible property-rights … For this and other considerations, we exchanged our lands, our independence, and our whole method of living, our economic system, and our national [tribal] identity."[10] The Nez Perce gave up a lot in exchange for a guarantee of protection—especially protection from the taxing powers of the state. The Indian Office sacrificed nothing.

For decades, scholars have been writing about the history of allotment.[11] But the history of forced fee patenting has been neglected. This is not to say it is unknown. Historians have mapped the broad contours of the policy, explained its architects' reasoning, and enumerated its consequences.[12] There is, however, no work on the Native response. Were it not for Native activism, the precedent-setting *United States v. Benewah County* would never have gone to court in the first place. Understanding the Indian Office's rationale for forced fee patenting is, of course, essential. Equally important is understanding that it was Native people who insisted that the whole thing was illegal.

PART I: THE POLICY

It began with allotment, when the Indian Office singularly dedicated itself to the systematic dispossession of American Indians. Policymakers designed the 1887 Allotment Act to

[8] Charles Burke to E.E. Wagner, 25 September 1926, E.E Wagner, CCF 44868-26-312-Pine Ridge, RG 75, NA-DC.

[9] Statement made by C.V. Stinthicum, before the Senate Committee at Lawton, November 22, 1930, CCF 42332-29-302-Kiowa, RG 75, NA-DC.

[10] Nez Perce Business Committee and Advisory Council, 12 January 1931, CCF 47728-30-302-Nez Perce, RG 75, NA-DC.

[11] Excellent histories of allotment are abundant. Its origins, its nefarious progress, and its catastrophic effects have all been amply documented. Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880–1920* (Cambridge University Press, 1989); Daniel Heath Justice and Jean M. O'Brien, *Allotment Stories: Indigenous Land Relations Under Settler Siege* (University of Minnesota Press, 2021); Judith V. Royster, "The Legacy of Allotment" *Arizona State Law Journal* 27, no. 1 (1995): 1–78; Kenneth H. Bobroff, "Retelling Allotment: Indian Property Rights and the Myth of Common Ownership," *Vanderbilt Law Review* 54 (2001): 1557–1623; Rose Stremlau, *Sustaining the Cherokee Family: Kinship and the Allotment of an Indigenous Nation* (University of North Carolina Press, 2011. For an overview see "Allotment," in Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Harvard University Press, 2005). On allotment's lingering effects see Kristin T. Ruppel, *Unearthing Indian Land: Living with the Legacies of Allotment* (University of Arizona Press, 2008).

[12] The single best treatment is Janet A. McDonnell, *The Dispossession of the American Indian, 1887–1934* (Indiana University Press, 1991); see also Francis Paul Prucha, *The Great Father: The United States Government and the American Indian* (University of Nebraska Press, 1984), 879–85. For work that touches on forced fee patents, see Judith A. Boughter, *Betraying the Omaha Nation, 1790–1916* (University of Oklahoma Press, 1998), 167–204; Edward Michael Peterson Jr., "That So-Called Warranty Deed: Clouded Land Titles on the White Earth Indian Reservation in Minnesota," *North Dakota Law Review* 59 (1983): 159–81; LeAnn Larson LaFave, "South Dakota's Forced Fee Indian Land Claims: Will Landowners be Liable for Government's Wrongdoing," *South Dakota Law Review* 30 (1984): 59–102; Holly Youngbear-Tibbetts, "Without Due Process: The Alienation of Individual Trust Allotments of the White Earth Anishinaabeg," *American Indian Culture and Research Journal* 15, no. 2 (1991): 93–138; Richmond L. Clow, "Taxing the Omaha and Winnebago Trust Lands, 1910–1971: An Infringement of the Tax Immune Status of Indian Country," *American Indian Culture and Research Journal* 9, no. 4 (1985): 1–22.

acquire more land for settlement by destroying Indian identity through the acquisition of private property thereby assimilating Native people into the American mainstream. Allotment's devastating effects on Native communities are, of course, still felt today; in many places those effects are part of the texture of daily life. The half-life of allotment has yet to be calculated. Allotment took aim at reservations. Next in sight were individual land holdings.

In 1906, Congress amended the Allotment Act with the Burke Act. It was typical of the era: paternalistic and plenary. The Burke Act extended the period of federal guardianship and gave the secretary of the interior the power to issue fee patents to those he deemed "competent" to manage their own affairs thereby "freeing" them, as Commissioner of Indian Affairs Francis Leupp wrote, from "the shackles of wardship." For Leupp, fee patents were "the beginning of the end" of the Indian question. "The Burke law, wisely administered," Leupp said, "will accomplish more in this direction than any other single factor developed in a generation of progress."[13] Once a fee patent had been issued the patent holder became a citizen and was no longer a ward of the federal government. Once a fee patent had been issued the land could be sold, mortgaged, and taxed. As Congress debated the Burke Act, Assistant Commissioner of Indian Affairs C.F. Larabee declared that "it is hardly conceivable that the Secretary of the Interior would issue a patent in fee to an Indian allottee against his will."[14]

But he could do so if he wished. When ninety-one Wisconsin Oneidas signed a petition in 1912 protesting the issuance of patents in fee absent an application, the assistant secretary made it clear, application or not, that the secretary had the power.[15] On the ground, the secretary's power to issue fee patents was in the hands of the Indian Office's local field agents. It would not be "wisely administered." First, to some, the logic of it made no sense. In 1912, the agent at Crow Creek put it well: "On the face of the matter it would appear that it is prima facie evidence of non-competence for an Indian to ask for a patent in fee to land held in trust for the simple reason that he might be imbued with a desire to take up the burdens of citizenship and contribute his share of taxes to the community." After all, he noted, "Any Indian who so desires can make the same use of his land under a trust title that he can under a fee simple title."[16] In other words: what was the point? When an individual wanted a fee patent they filled out an application and the local agent, based on whatever criteria they deemed appropriate, either approved or disapproved. In the two years after the Burke Act, in 1907 and 1908, the Indian Office approved nearly 100 percent of applications. In 1908, the Indian Office determined that 60 percent of those who had been issued fee patents had lost their land. The Indian Office tightened up procedures and it became more difficult for "incompetent" people to be issued fee patents. It worked, for a little while. Approved fee patent applications plummeted.[17] Then, still hoping to find a way to liberate Indians from their shackles, the Indian Office experimented with its first Competency Commission in 1909 on the Omaha Reservation. It was a disaster. The commission sympathized with local White desire for land and issued patents to many who did not apply for a patent, to those who actively protested the issuance of a patent, and to people who did not speak, read, or write

[13] Francis Leupp, "The Burke Law," *Annual Report of the Commissioner of Indian Affairs* (ARCIA), 1906, 30.

[14] C.F. Larabee to Samuel Brosius, 11 April 1906, Folder 4, Box 42, Series 1, Correspondence, 1864–1989, Papers of the Indian Rights Association, Historical Society of Pennsylvania, Online edition.

[15] Samuel Adams, First Assistant Secretary to Thomas Konop, n.d. but referring to Konop's 8 April 1912 letter, Part I, Series 1: Correspondence, 1911–1923 Ernest H. Abbott–Lucy Nelson Carter. 1911–1923, Papers of the Society of American Indians, 1906–1946 Roll 1, Personal Collection of John Lerner, Indigenous Peoples of North America, Gale Primary Sources.

[16] Crow Creek Annual Narrative Report, Section IX, Sales, 1912, p. 32. Superintendents' Annual Narrative and Statistical Reports from the Field Jurisdictions of the Indian Office, 1907–1938, Roll 31, Crow, 1929–35, Crow Creek, 1910–21, National Archives Microfilm Publications, Microfilm Publication M1011 (Washington: National Archives, National Archives and Records Service, General Services Administration, 1975). (Hereafter: SANSR).

[17] McDonnell, *Dispossession of the American Indian*, 89–90.

English. The Omaha lost 95 percent of their land.[18] The Indian Office, again worried that fee patenting was not going as planned, made changes. In 1912 and 1913 the number of approved fee patents dropped.[19]

Then, Cato Sells became commissioner of Indian affairs. In Sells, Franklin Lane, the secretary of the interior, found a willing partner in the mass dispossession of American Indians through fee patenting. In 1913, impatient with the rate at which land was being transferred out of Indian hands, and desperate to end federal supervision, Lane assigned Sells the task of asking all Indian agents which people they deemed "competent to manage their own affairs." "It is our purpose," Lane told Sells, "to relieve the bureau of the care of these Indians irrespective of whether the Indians petition for such action or not."[20] Edgar Meritt, the assistant commissioner, was alarmed. He had warned Sells in the early fall that a "few mistakes in forcing patents on Indians who subsequently demonstrated their unfitness to receive the same would furnish just cause for severe criticism of Indian administration."[21]

Now, as winter closed in, and Lane and Sells moved ahead with their plans, Meritt tried again. The Bureau risked more than embarrassment. A year earlier the Supreme Court had decided *Choate v. Trapp*. The Court found that Oklahoma had illegally taxed eight thousand Choctaws and Chickasaws. Meritt quoted at length from the opinion, but I draw attention to the following: "There is a broad distinction between the power to abrogate a statute and to destroy rights acquired under it; and while Congress, under its plenary power over Indian tribes, can amend or repeal an agreement by a later statute, it cannot destroy actually existing individual rights of property acquired under a former statute." It seemed to Meritt that Sells unwisely thought that the Burke Act superseded the General Allotment Act. But rights acquired under the Allotment Act could not be taken away. In *Choate*, that right was freedom from taxation. "This question of forcing fee patents on Indian allottees … involves," Meritt warned, "a serious question of law."[22]

Sells and Lane pressed on. Much to the eventual, and perhaps eternal, chagrin of the Indian Office, disregarding the "serious question of law" was a grave error. Competency commissions and all their flaws—susceptibility to abuse, the subjective set of measures, the sheer arbitrariness of their decisions—fanned out across the West. Within a year, they were on sixteen reservations and issued reports on seven. When someone was found to be competent they were given a fee patent—whether they applied for it or not. And determining competency was in almost all cases a rushed and incompetent affair.[23] Native people appeared powerless to stop them. With a commission scheduled to visit, a delegation of Cheyenne and Arapaho visited Washington and pleaded with the Indian Office not to issue fee patents. Sells was unmoved.[24] While the commissions were the symbol of the new policy, more important were the superintendents. Between the passage of the Burke Act in 1906 and the

[18] For 95 percent, see ibid. Janet McDonnell, "Land Policy on the Omaha Reservation: Competency Commissions and Forced Fee Patents," *Nebraska History* 63 (1982): 399–411.

[19] Annual Report of the Commissioner of Indian Affairs (ARCIA), Washington, D.C: Government Printing Office, 1920, 172; see also Donald J. Berthrong, "Legacies of the Dawes Act: Bureaucrats and Land Thieves at the Cheyenne-Arapaho Agencies of Oklahoma," *Arizona and the West* 21, no. 4 (1979): 335–54; Holly Youngbear-Tibbetts, "Without Due Process: The Alienation of Individual Trust Allotments of the White Earth Anishinaabeg," *American Indian Culture and Research Journal* 15, no. 2 (1991): 93–138.

[20] Franklin Lane to Cato Sells, 10 November 1913, 54501-14-127-General Service (GS); for Cato Sells surveying reservation populations see Unsigned memo for the Commissioner, including draft of letter to be sent, 11 November 1913, CCF 152466-13-312-GS, both in RG 75, NA-DC.

[21] "Issuance of Pee patents to Indians, Memorandum for the Commissioner,' 16 September 1913, CCF 152466-13-312-GS, RG 75, NA-DC.

[22] Meritt, "Memorandum for the Commissioner," 1 December 1913, CCF 152466-13-312, GS, RG 75, NA-DC; *Choate v. Trapp* (224 U.S. 665).

[23] McDonnell, *Dispossession of the American Indian*, 97.

[24] Berthrong, "Legacies of the Dawes Act," 348.

end of 1917, superintendents issued 13,545 patents. The competency commissions were responsible for 1,824.[25] Unsupervised, often working in league with local land agents, fraud was rampant. The clerk and the superintendent at the Otoe Agency, for one example among many, colluded with a local land dealer to induce two dozen Otoes to apply for patents in fee. The conspirators filled out the paperwork, vouched for the competency of the "applicants," and charged them for their services in a complex scheme to not only defraud people of their land, but also run them into debt.[26] Despite his concerns, Meritt appears to have been mollified. The following year, he wrote that "The Office will not force an Indian to take a patent in fee for his lands."[27] This was not to be so.

On April 17, 1917 Sells announced the Declaration of Policy and abandoned the notion that competency was demonstrated by thrift, industry, and the like. Competency was now determined by crude and reductive racial reasoning. The Policy declared that all Indians of one-half blood or less would automatically be issued fee patents whether they wanted one or not. Indians with more than one half Indian blood, found to be competent, would be issued fee patents. And all Indian students twenty-one or older and who had finished school, received a diploma, and were competent would also receive fee patents.[28] Sells noted that "Under existing regulations and practice the issuance of a fee patent does not require the application or consent of the allotee [sic]. Such patents are being issued to many Indians who have not applied for them and have even requested that they not be issued."[29]

An extraordinary acceleration in the issuance of fee patents ensued. From 1917 to 1920, the Indian Office issued more than 17,000 fee patents—nearly double the number that had been handed out between 1906 and 1916. Many worried they were next, like the 228 Nez Perce people who did not want to be declared competent.[30] The agent at Round Valley, in Northern California, knew people would be so upset by the plan to issue fee patents that he kept it a secret.[31] Sells was delusional, writing in 1919: "There is no longer any doubt that with adequate provisions for the expense of proper inquiry as to competency and with faithful adherence to the broadened declaration of policy we shall speedily sift the Indian who should stand on his own merits, pay taxes, discharge the service and exercise of freedom of citizenship, from those who will require the protection of the Government for some time before taking on such responsibilities."[32]

PART II: COMPETENCY ON THE COEUR D'ALENE RESERVATION

The Coeur D'Alene reservation was both typical and unique. Everything that happened on other reservations happened there. Land cessions in the 1880s and 1890s and then allotment

[25] See data in table "List of Fee Patents Issued from May 8, 1906 to December 31, 1917," no date, CCF 21986-19-312-GS, RG 75, NA-DC.

[26] John Fain, U.S. Attorney for Western Oklahoma to Attorney General, 8 March 1916, File #180166, Straight Numerical Files, RG 60 (Records of the Department of Justice), NA-College Park. See also *Miller v. United States* (57 F.2d 987), 1932; *United States v. Caster* (271 F. 615), 1921; *United States Ex. Rel. Prettybull v. Lane* (47 D.C. 134), 1917.

[27] Meritt to Henry Jackson, 24 August 1914, CCF 84953-15-127, GS; see also his assurance to the Superintendent at Fort Lapwai that no fee patents would be issued without consent, Meritt to Theodore Sharp, 21 May 1914, CCF 3342-14-127-Ft. Lapwai, RG 75, NA-DC.

[28] McDonnell, *Dispossession of the American Indian*, 104. Katherine Ellinghaus, *Blood Will Tell: Native Americans and Assimilation Policy* (University of Nebraska Press, 2017).

[29] Sells to C.V. Stinthicum, Superintendent Kiowa School, 31 July 1918, CCF 26363-18-127-Kiowa, RG 75, NA-DC.

[30] Erskine Wood, writing on behalf of David Wood and 228 other Nez Perce, to CIA, 29 December 1921, CCF 47728-30-302-Nez Perce, RG 75, NA-DC.

[31] W.W. McConihe to CIA, 26 March 1919, CCF 28486-19-312-Round Valley, RG 75, NA-DC.

[32] Cato Sells, "Releasing Indians from Government Supervision," *ARCIA*, 1919, 3. On land sales generally see Leonard A. Carlson, "Federal Policy and Indian Land: Economic Interests and the Sale of Indian Allotments, 1900–1934," *Agricultural History* 57, no. 1 (1983): 33–45.

in 1906: their land base steadily slipped away. Fee patents arrived in 1913.[33] Then a Competency Commission visited in 1916. Confronted by a reservation population committed to rejecting citizenship through patents in fee, the commission nonetheless issued patents without consent.[34] In this way, Morris Antelope, Philip Wildshoe, and others received fee patents. The superintendent at the time, Morton Colgrove, noted that many refused the patents the commission recommended. "[T]hey declare that their agreement with the United States was that lands allotted were to be held for a period of twenty-five years and that, prior to that time, they do not intend to pay taxes … ." To Colgrove, refusal in itself was a mark of competency.[35] The Coeur D'Alene commitment to the twenty-five year trust period would be vindicated in court.

The following year the Declaration of Policy arrived. Aided by a list of "competent" Coeur D'Alenes that Idaho Congressman Burton French furnished to Sells, the Indian Office hoped to make quick work of issuing even more patents. Colgrove supported the Declaration. If "persistently adhered to," the Policy "will, by throwing the competent entirely on their own resources, do more to hasten the solution of the problem … than all other agencies combined in the last half century … . It seems the beginning of abandonment of the reservation by the Indians themselves."[36] But he worried. The men on French's list were "almost without exception, opposed to such process … ." Issuing patents to them would "only lead to turmoil."[37] But refusal was not an option. The Indian Office told Colgrove to record the patents of those who refused and then send the patents via registered mail to the patentees. The Indian Office's chief clerk pointed Colgrove toward the Burke Act and noted that "your special attention is invited to the 'Declaration of Policy.'"[38] Colgrove drew up a detailed list and sent it in.

The list was six pages of names, each accompanied by a description of the person's "competency," alongside clear evidence that Colgrove and the Indian Office forced patents upon the Coeur D'Alene. Colgrove's recommendations were entirely subjective. They were based, of course, on blood quantum (where he learned *that* he did not say). But mixed in were comments like: "can do well if he so elects and is fully capable of choosing between right and wrong"; "No reason known why he should not be given his patent and assume full citizenship"; "citizenship will make no change with him aside from taxation." And on and on. Colgrove recommended patents whether people wanted them or not. One person with a large family had in the past been passed over for a patent as the taxes might have been a burden. No more. "I believe patent now might issue although he does not desire it." Another "will strenuously oppose the issuing of a patent but I believe it should be given nevertheless." One man "is fully capable of caring for himself and should be forced to do so." One woman should be given a fee patent "although she does not want it." Forcing patents upon people without their consent and over their clear objections was a hallmark of the Indian Office's practice.[39]

[33] Ross R. Cotroneo and Jack Dozier, "A Time of Disintegration: The Coeur D'Alene and the Dawes Act," *Western Historical Quarterly* 5, no. 4 (1974): 405–19.

[34] On resisting the commission see telegram from Frank Thackery to CIA, 7 April 1916; for the list of patentees see C.F Hauke to H.A. Meyer, 7 July 1916, both in CCF, 1907–36, 5–6, General, Competent Indians, RG 48, NA-College Park. The year 1916 was not the first time competency had been considered. In 1912 and 1913 the Indian Office asked the agent at Coeur D'Alene to report on competency. See F.H. Abbott to Morton Colgrove, 14 December 1912, CCF 129828-12-127-Coeur D'Alene; CIA to Colgrove, n.d. (form letter discussed earlier and sent after 11 November 1913), CCF 152466-13-312, GS, RG 75, NA-DC.

[35] Morton Colgrove, Annual Report, 1917, 14 July 1917, Coeur D'Alene, reel 21, SANSAR.

[36] Colgrove, Annual Report, 27 July 1918, p.7, Reel 21, SANSAR.

[37] Colgrove to CIA, 21 July 1917, CCF 71599-17-127-Coeur D'Alene, RG 75, NA-DC.

[38] C.F. Hauke to Colgrove, 13 September 1917, CCF 71599-17-127-Coeur D'Alene, RG 75, NA-DC.

[39] Colgrove to CIA, 28 September 1917, CCF 71599-17-127-Coeur D'Alene, RG 75, NA-DC.

Morris Antelope, Anasta Smo, and Philip Wildshoe, as well as others, would all lose their land. Their refusal to pay taxes cost them their land and also forced the question of consent into court.

PART III: THE CASE BEGINS

On a June day in 1920, Antelope, Smo, Pe-ell, and another Coeur D'Alene man who had refused his fee patent and wanted it cancelled gathered in the new superintendent's office on the Coeur D'Alene reservation. Later, H.D. Lawshe would write that these " … Indians are the most reactionary on the reservation. From the records, it would appear that they have in past been the most active in their opposition to the policies of the Department"[40] But for now, Lawshe had invited them so that they might come to see things his way. Instead, they argued all afternoon. The meeting ended where it had begun: as they had for years, Antelope, Smo, Pe-ell, and others refused to accept their fee patents and pay their taxes; Lawshe refused to give credence to their way of thinking. "There is no reason whatever in the arguments that were advanced by these Indians." Antelope, "who is a leader of the dissatisfied faction on this reservation, is no doubt the guiding inspiration in this matter." He "made numerous statements which he alleges is the law." But because Antelope's conception of the law was "at variance with all law which I have knowledge" he must, according to Lawshe, have been influenced by "some irresponsible person." Antelope surely could not have come up with these ideas on his own![41]

What did Antelope argue that was so beyond the legal imagination of Lawshe—and many others? It was simple, but profound. It was not an argument unique to Antelope or the Coeur D'Alene; many others made the same claim.[42] Antelope argued that because the Coeur D'Alene did not apply for nor consent to the issuance of their fee patents they remained in trust. Thus, the taxes levied against their land were illegal. The plain language in their trust patents meant their land remained in trust for twenty-five years, free from taxation and unable to be sold. Likely still stinging from the allotment of their reservation in 1908–1909, which resulted in the Coeur D'Alene losing 50 percent of their reservation and which many bitterly opposed as a clear violation of the law creating their reservation in 1889, leaders like Antelope loathed the prospect of losing more land.[43] Antelope was especially incensed that the Coeur D'Alene had had no say. "When these patents in fee were issued, the whole tribe was not consulted and no council was held about it … ." Lawshe countered that this was "not a matter that could or should be settled by a council among the Indians; that patents in fee were issued as provided by the law to each individual according to the competency of the individual." Confident that he was right and Antelope was wrong, Lawshe told those gathered in his office that "should all the Indians in the United States hold a council for a year, it could in no way affect the status of the patents in fee, as issued to those present." The law was the law; it must be obeyed.[44]

Lawshe said he wanted to be helpful, but for time being all he could advise was that they pay their taxes in protest and consider taking their case to court. Antelope was relentless. If

[40] Lawshe to CIA, 14 January 1921, CCF 71599-17-127-Coeur D'Alene, RG 75, NA-DC.

[41] First quote in Lawshe to CIA, 19 May 1920; second in Lawshe to CIA, 24 June 1920, CCF 44631-20-312 Coeur D'Alene, Part 1, Folder 2, RG 75, NA-DC.

[42] See the many examples of people on the Flathead Reservation declining to sign fee patents in spring 1920 based on their belief that the twenty-five-year trust period was legally binding. Folder Recommendations-Patents, 312, Montana, Decimal Files 312-314, Correspondence, Reports-Land Patents and Mortgages, 1901–1956, RG 75, NA-Denver.

[43] On the allotment of the reservation see Ross Cotroneo and Jack Dozier, "A Time of Disintegration: The Coeur D'Alene and the Dawes Act" *Western Historical Quarterly* 5, no. 4 (1974): 405–19.

[44] Lawshe to CIA, 24 June 1920, CCF 44631-20-312 Coeur D'Alene, Part 1, Folder 2, RG 75, NA-DC.

Lawshe wanted to be helpful, Antelope told him the best thing he could do would be to have their fee patents revoked. Cancelling their fee patents was something Lawshe no more knew how to do than he knew how to "stop the sun from shining."[45] Antelope had a different view: in two years the law would change and all patents would be canceled. As it happened, Antelope was close to the mark: all of their patents would be cancelled within a year and the Ninth Circuit Court of Appeals would change the law in three. But for now, Antelope was unable to believe what he was hearing from Lawshe. Could Lawshe really believe they had no case? If he did, Antelope wanted it in writing. And so Lawshe declared the following: "I am confirming the following statement: that in as much as the law provides that a patent in fee can be issued to an Indian without his consent or application for same, a council of Indians on this reservation would not effect it. In fact, should all the Indians in the United States meet in council for a year, it would not change the law in a particle."[46] The Indian Office backed Lawshe up, telling him that the "lands become taxable as soon as the patents in fee are issued."[47]

But that position rested on unstable legal ground. In 1917 the Eighth Circuit Court of Appeals decided *United States v. Morrow*.[48] In a precursor to the Declaration of Policy, the 1906 Clapp Amendment removed all restrictions on trust patents on the White Earth Reservation that had been issued to "mixed bloods." *Choate v. Trapp*, discussed earlier, had decided that freedom from taxation during the trust period was a vested property right. The Eighth Circuit agreed: In 1917, the Court found that Becker County, Minnesota, had no authority to levy taxes on White Earth reservation residents without their consent before the end of the trust period.[49] The decision left the Indian Office wondering just what its position should be in the Coeur D'Alene case. The superintendent and the Bureau were initially unsympathetic. Antelope, Wildshoe, and Smo needed to pay their taxes or lose their land. "As you know," Lawshe told Wildshoe, "the Interior Department differs with your opinion in this matter, and unless you test the matter in the courts, I cannot see how you can keep from losing your land, unless you pay back taxes due." Wildshoe would have none of it. "I do not recognize any legality of the patent in fee held in your Office and I will not accepted [sic] it, no matter what advice of danger you gave me. Have no fear to lose an inch of my land because I am not deprived of the last rights of men to protect my property under true Justice, and true good laws of men."[50]

Philip Wildshoe got a lawyer. At the end of October, Samuel Herrick, a prominent D.C. attorney who had long been involved in Indian affairs (his letterhead noted his specialty in "Indian Rights") contacted the commissioner. Having been advised by Wildshoe's local lawyer that his patent had been issued without consent, Herrick demanded the commissioner open "an immediate investigation, to the end that the patents which were so illegally issued be returned to your office and cancelled and the land restored to the condition in which they formally were, namely, the protection of trust patents." The local lawyer wanted to make clear that Wildshoe not only worried about his land, Wildshoe wanted it known that "every Indian who obtained a patent for his land, the White Man is now the owner of the same."[51]

[45] Ibid.

[46] Statement of H.D. Lawshe, 23 June 1924, CCF 44631-20-312 Coeur D'Alene, Part 1, Folder 2, RG 75, NA-DC.

[47] C.F. Hauke to Lawshe, 7 July 1920, CCF 44631-20-312-Coeur D'Alene, Part 1, Folder 2, RG 75, NA-DC.

[48] C.F. Hauke, Chief Clerk to Lawshe, 7 July 1920, CCF 44631-20-312 Coeur D'Alene, Part 1, Folder 2, RG 75, NA-DC.

[49] *United States v. Morrow* (243 F. 854). On the Nelson Act and the Clapp amendment see Melissa Meyer, *The White Earth Tragedy: Ethnicity and Dispossession at a Minnesota Anishinaabe Reservation, 1889–1920* (University of Nebraska Press, 1994), *passim*.

[50] Lawshe to Philip Wildshoe, 8 September 1920 and Wildshoe to Lawshe 23 September 1920, both in CCF 44631-20-312 Coeur D'Alene, Part 1, Folder 2, RG 75, NA-DC.

[51] Herrick to CIA, 25 October 1920, CCF 44631-20-312 Coeur D'Alene, Part 1, Folder 2, RG 75, NA-DC.

As the new year began, Lawshe was weary. Harangued by Antelope, Smo, and Wildshoe; faced now with the prospect that "there will be a great many who will want their cases opened"; and adrift in a legal and policy vacuum, Lawshe pleaded with the office for guidance. "Without such information I am placed in an embarrassing position in my relations with these Indians, as I cannot intelligently advise them."[52] His superiors at the central office had little to offer: the Indian Office was flummoxed. Did the land become taxable once the fee patent was issued or did *Morrow*, in which the facts were different but some of the principals might be similar, confound that long-held position? Whatever the answer, Lawshe was not only worn down by the uncertainty of the law and the pressure he was under from angry Coeur D'Alenes. He had also come to a stark realization. "[W]ere all the Indians today to be freed from Government control, as is advocated by certain elements, I firmly believe the result would be written in history, as a betrayal of the Indian by the Government, as great if not greater than any outrage of the early days in the history, where the Indian suffered at the hands of the white man."[53]

Herrick's letter got the attention of the Indian Office. The Coeur D'Alenes' refusal, the Herrick letter, the Indian Office's creeping concern over the applicability of *Morrow* to the facts coming from Coeur D'Alene—all of these combined to warrant a definitive statement from the solicitor of the Department of the Interior.[54] Whatever his feelings might have been—which we do not know—on competency, the Declaration of Policy, blood quantum, and all of the other justifications for issuing fee patents, Interior Solicitor Charles Mahaffie, in a clear and powerful opinion, agreed with Morris Antelope, Anasta Smo, PhilipWildshoe, and the many other Native people across the West who had refused their fee patents because they knew them to be illegally issued because they violated the trust responsibility. For Mahaffie, the matter turned on several things: first, "the question as to the effect of the fee patents prepared in their names in the face of their refusal to apply for and accept the same." In other words, are the patents legal without consent? Second, what was the meaning of the Burke Act? And third, did *Morrow v. United States* apply? He came quickly to the conclusion that the Burke Act did not override the General Allotment Act's provision regarding the twenty-five-year trust period. And thus, *Morrow* applied. "There is no question that under the provisions of said section 5 [of the Allotment Act], no right of taxation exists while the land is held solely under the terms of the trust patent and applying the rule laid down in the Morrow case this exemption from taxations is a vested property right which even Congress has not power to alter against the will of the patentee."[55] Many Native people knew this already. A forced patent violated the twenty-five-year trust period guaranteed in their original trust patent. In 1917, Neda Parker Birdsong, the daughter of the Comanche leader Quanah Parker, rejected the fee patent that was issued to her without application or consent. She was clear why: "My reason is there exists a Treaty between the Government and the Kiowa-Comanche-Apache tribes of Indians to hold what <u>little</u> was allotted to them in trust for a period of twenty five years."[56] As one Rosebud man put it when told he had been issued a fee patent without his application or consent: "I said that it was contrary to the agreement in the trust patent to force us to take a fee patent under twenty five years and that I did not want it and that he should keep it."[57] For Mahaffie, consent was critical. "The patents in the

[52] Lawshe to CIA, 9 April 1921, CCF 44631-20-312 Coeur D'Alene, Part 1, Folder 2, RG 75, NA-DC.

[53] H.D. Lawshe in Board of Indian Commissioners, April 30, 1921, Bulletin No. 140, "Releasing Indians from Government Supervision," CCF 56074-212-312, GS, RG 75, NA-DC.

[54] E.B. Meritt, Assistant CIA to SOI, 19 November 1920, CCF 44631-20-312-Coeur D'Alene, RG 75, NA-DC.

[55] Charles D. Mahaffie, Solicitor, 14 December 1920, Sol. Op. M 1190, CCF 44631-20-212-Coeur D'Alene, RG 75, NA-DC.

[56] Neda Parker Birdsong to C.V. Stinthicum, 17 June 1917, CCF 56322-17-312 Kiowa, RG 75, NA-DC

[57] Affidavit of Arthur Parker, 8 May 1929, Orders, Circulars, and Letters, Replies to Circulars, 1907-35, Answers to Circulars 2464 to 2467, Box 165, both in RG 75, NA-DC. (Hereafter response to Circular 2464.)

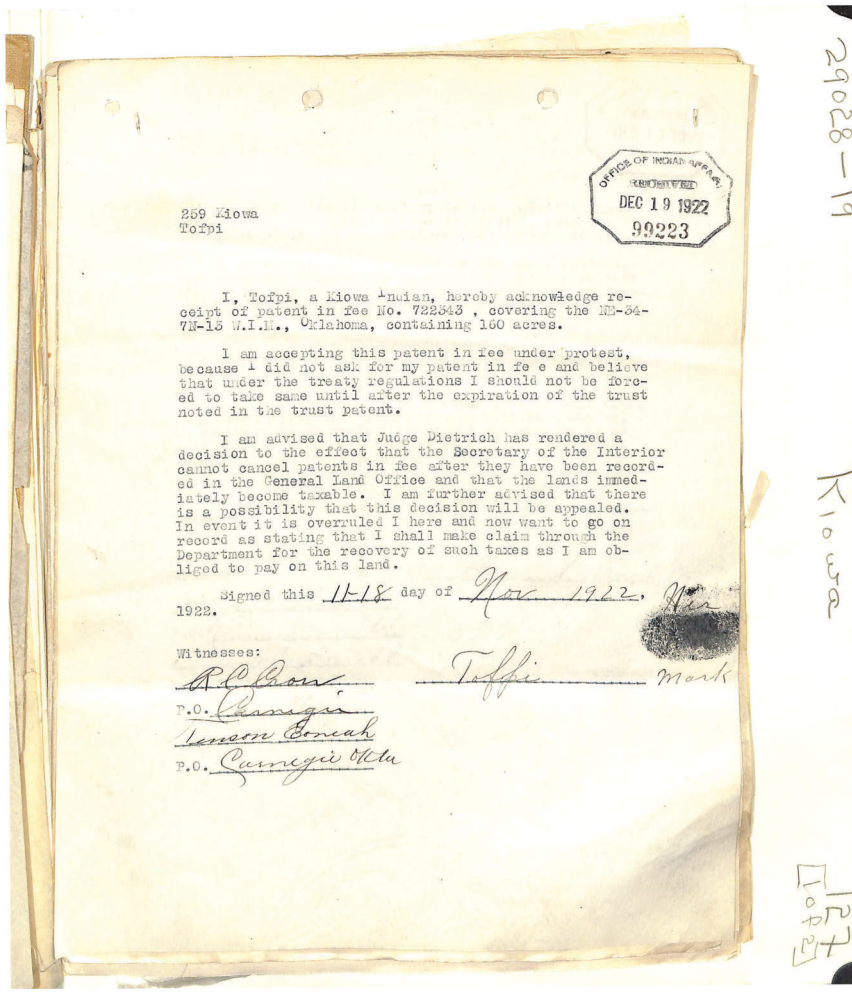

29028-19
OFFICE OF INDIAN AFFAIRS
RECEIVED
DEC 19 1922
99223
259 Kiowa
Tofpi
I, Tofpi, a Kiowa Indian, hereby acknowledge receipt of patent in fee No. 722343 , covering the NE-54-7W-15 W.I.M., Oklahoma, containing 160 acres.
I am accepting this patent in fee under protest, because I did not ask for my patent in fe e and believe that under the treaty regulations I should not be forced to take same until after the expiration of the trust noted in the trust patent.
I am advised that Judge Dietrich has rendered a decision to the effect that the Secretary of the Interior cannot cancel patents in fee after they have been recorded in the General Land Office and that the lands immediately become taxable. I am further advised that there is a possibility that this decision will be appealed. In event it is overruled I here and now want to go on record as stating that I shall make claim through the Department for the recovery of such taxes as I am obliged to pay on this land.
Signed this 11-18 day of Nov 1922.
1922.
Witnesses:
Tofpi Mark
P.O. Carnegie
Lawson Bonnah
P.O. Carnegie Okla
Kiowa
127
Tofpi

Fig. 1. Tofpi affidavit. Example of the many affidavits Native people made regarding the fact they protested the issuance of fee patents. CCF 29028-1919-302 Kiowa, RG 75, NA-DC.

instant case were never delivered in the sense of the definition of that term—'putting a thing into the possession of another'—actually transfer of the physical control of the object from one to another." Because they were never delivered to the patentees they cannot be binding. He concluded that "there was no authority of law for issuing the fee patents … against their will and consent, and that under the circumstances herein disclosed it must be held that the lands in question were not subject to taxation by the State of Idaho."[58]

Mahaffie's opinion acted like legal Drano, cutting through the clog of indecision. By the end of the year, Interior, the Indian Office, and Justice had all concluded that because the patents had neither been applied for nor accepted when issued the land was not taxable and that the patents should be canceled.[59] Even Cato Sells, responsible for the forced fee patents

[58] Mahaffie, Sol. Op. M 1190.

[59] Alexander T. Vogelsang, First Assistant SOI to Attorney General, 17 December 1920, #213326, Straight Numerical Files, 1904–37, Box 3488, RG 60, NA-College Park; C.F. Hauke, Chief Clerk to Samuel Herrick, 29 December 1920, CCF 44631-20-312-Coeur D'Alene, RG 76, NA-DC.

and seeming to have utter disregard for the fate of those subjected to his misguided policy, asked for the cancellation of Antelope, Smo, and Wildshoe's patents. After all, the land might in fact not be taxable.[60] The Coeur D'Alene's refusal of their forced patents forced the government to change its position.

PART IV: *UNITED STATES V. BENEWAH COUNTY*

At the end of 1921, the U.S. government sued Benewah and Kootenai counties, and the following spring the court heard the case. The U.S. attorney for Idaho rather than write his own brief merely pasted in Charles Mahaffie's Solicitor's Opinion from the previous year.[61] The court consolidated Anasta Smo's and Maurice Antelope's cases into one and issued an opinion covering both in September 1921.[62]

The District Court opinion is less a piece of judicial reasoning than it is a policy brief in support of the Indian Office's fervent effort to alienate Indian land. The judge mostly ignored Mahaffie's opinion and decided that the sole question at issue was the following: "Did the adjudication by Secretary of Indian's competency and the subsequent issuance of patent, with tender thereof to the Indians, convey the legal title, or at least relieve the government of its trust?" Regarding the authority to issues patents without consent: "Without going into detail, it is to be said that a perusal of departmental correspondence and documents leaves no doubt of the view of the Department that the Secretary had the authority, under the act of May 8, 1906, at any time, within his discretion, to declare the competency of an Indian and to issue to him a fee patent without his consent, or of the further view that such authority was indispensable to the successful execution of governmental policies touching the well-being and civilization of the Indians."[63] The parroting of Bureau policy is evident, of course. But more than that the court arrived at its conclusion "without going into detail." The details matter. What did the Burke Act intend? The District Court chose to spend very little time with the legislation. It seems that the court did not look at the legislative history. We cannot know because the court would, by its own admission, not go into detail. But the judge did pay special attention to the Declaration of Policy. In fact, it was the sole document from the record that he chose to quote. Why? It was evidence of the secretary of the interior's intent. No one doubted the intent of the Declaration of Policy; the case was about its legality. Further evidence of the secretary's intent was the fact that the General Allotment Act allowed the president to extend the trust period at his discretion and without the consent of the Indians. "But is there not quite as much reason there as here for the interpolating a provision requiring the Indian's consent?"[64] So self-evident was the answer to this question that the judge did not bother attempting to reply to it. And thus he ruled in favor of the state.

Faced with such an unfavorable decision, the Indian Office, Interior, and Justice each needed to decide if an appeal was warranted. E.G. Davis, the U.S. attorney who argued the case, wanted, unsurprisingly, to appeal. He thought the District Court was simply wrong, writing that "It would be unusual, to say the least, for any statute to provide that an Indian could be deprived of a valuable property right without his consent and without

[60] Sells to SOI, 6 January 1921, #213326, Straight Numerical Files, 1904–37, Box 3488, RG 60, NA-College Park.

[61] Brief of Plaintiff, *United States of America v. Kootenai County*, In the District Court of the United States, In and For the District of Idaho, No. 782, Civil Case Files, RG 21 (Records of the US District Court), NA-Seattle.

[62] Philip Wildshoe eventually dropped out of the case.

[63] *United States v. Benewah County*, No. 781 and *United States* v. *Kootenai County*, No. 781, United States District Court for the District of Idaho, Northern Division, 16 September 1922, 8 (hereafter *Benewah County*, DC).

[64] *Benewah County*, DC, 8.

compensation, and it is extremely doubtful that Congress ever intended such a result."[65] Davis's clear-eyed naïveté was to be commended—all the more because it would be met with a directly opposing, if somewhat flaccid, view from his superiors in Washington.

Interior and the Indian Office advocated for an appeal. Was this, perhaps, something of a *mea culpa* for Charles Burke? Burke was of course responsible for the 1906 amendment to the General Allotment Act that bears his name and which was used by his predecessors to dispossess and render impoverished and homeless so many Indian people. Now, he was commissioner of Indian affairs. He strongly favored an appeal. As he noted, during the previous administration, and especially when the Declaration of Policy was in force, "many Indians had refused to accept patents and insisted upon the letter of the contract as expressed in their trust patents—exemption from all charge or incumbrance whatsoever for twenty five years." Contrary to the District Court's opinion, Burke knew that it was "far from clear that Congress intended by the Burke Act that vested right should be taken away from Indians without their consent." In fact, for Burke, upon a close look at the legislative history and congressional debate, "the contrary can be inferred." Burke, like Justice in its pleadings, put great stock in *Morrow*. Here, Burke, like others, attempted to disentangle the power of the secretary of interior to issue fee patents without consent and the power to impose taxes without consent. While on the surface it might seem to be a distinction without a difference—after all, it was the issuance of the fee patent that triggered taxation—it reveals a certain discomfort with the notion that the power to issue fee patents without consent might not lie with the secretary. Further, and more strategically, separating the two did, and would, allow Justice to rely on *Morrow* should they choose to appeal. Burke recognized that "taxes have been levied against practically all of the land involved, and many allotments have been sold or about to be sold for nonpayment of taxes, and the Indians will be unable to redeem their homes." If taxation was illegal, which it appeared to be, perhaps Indian people would have some redress. So many people and so much land was affected, Burke wrote, that an appeal was necessary.[66]

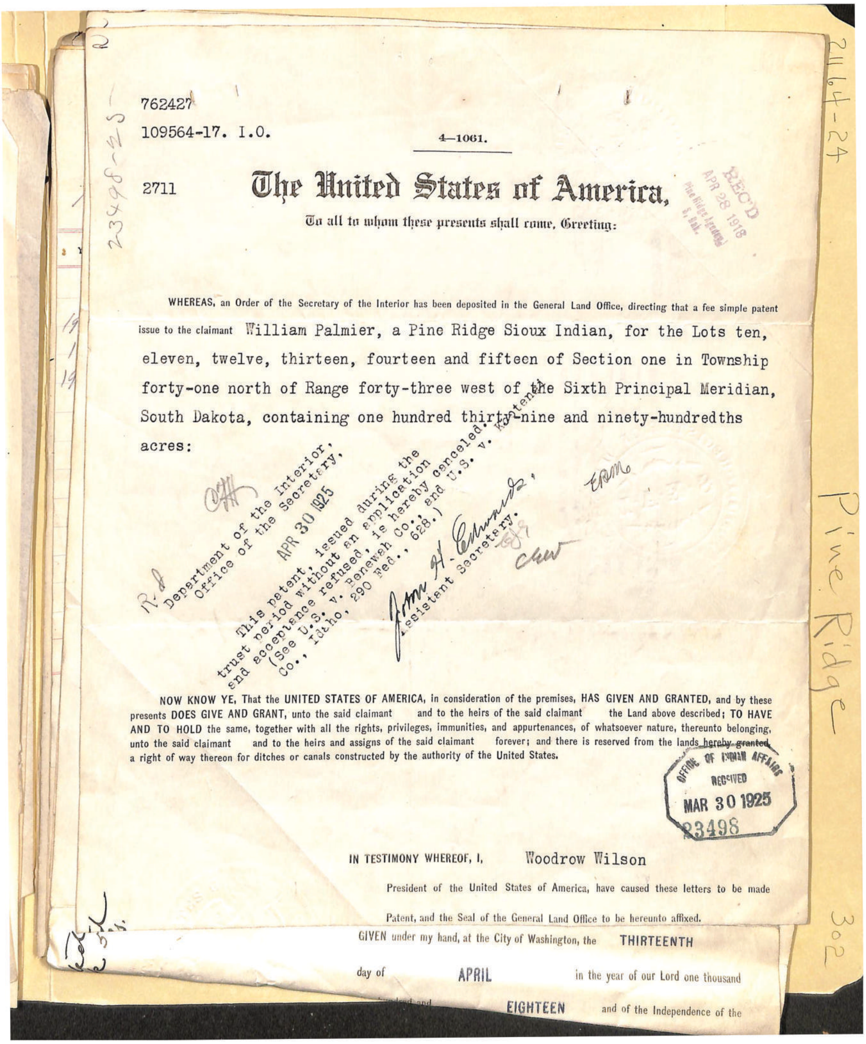
While Interior agreed with Burke and advocated an appeal, Justice was skeptical. The solicitor general thought the "Government cannot appeal these cases with any reasonable prospect of success." And, on the chance the Ninth Circuit reversed the District Court, it seemed to the solicitor general that this would be of "questionable value to the Interior Department in its administration of Indian Affairs."[67] In other words, if the Coeur D'Alene view of the matter prevailed, the policy of dispossession through fee patenting might be stymied. Consent was the crux. There is nothing, wrote Assistant Attorney General Underwood, in the Burke Act "about consent or application. To construe it as urged by the Indians is to make necessary interpolation of the words 'upon application of any Indian allottee' or words of similar import." Further, Underwood wrote, the secretary and his officers had been carrying on in such a way between 1906 and 1920. In other words, the practice of its administration became the law's meaning.[68] It was only when attention was drawn to the Coeur D'Alene refusal that anyone raised a fuss (of course implying that if such a fuss had not been raised business as usual would have proceeded).

[65] E.G. Davis to Attorney General, 13 October 1922, #213326, Straight Numerical Files, 1904-37, Box 3488, RG 60, NA-College Park.

[66] Burke to SOI, 7 November 1922, CCF 44631-20-312-Coeur D'Alene, RG 75, NA-DC.

[67] Jameson Beck, Memorandum for Assistant Attorney General Riter, 13 December 1922, #213326, Straight Numerical Files, 1904–37, Box 3488, RG 60, NA-College Park.

[68] [Illegible] Underwood, "Memorandum relative to appeal," *U.S. v. Benewah County, Idaho, et al., #781*; *U.S. v. Kootenai County, Idaho, et al., #782*, 7 December 1922, 7 December 1922, #213326, Straight Numerical Files, 1904–37, Box 3488, RG 60, NA-College Park. This reasoning brings to mind a line in Neil Gorsuch's majority opinion in *McGirt*: "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law." *McGirt v. Oklahoma* 140 S. Ct. 2452.


762427
109564-17. I.O.
4—1061.
2711

The United States of America,

To all to whom these presents shall come, Greeting:

REC'D APR 28 1918 Pine Ridge Agency S. Dak.

WHEREAS, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimant William Palmier, a Pine Ridge Sioux Indian, for the Lots ten, eleven, twelve, thirteen, fourteen and fifteen of Section one in Township forty-one north of Range forty-three west of the Sixth Principal Meridian, South Dakota, containing one hundred thirty-nine and ninety-hundredths acres:

Department of the Interior, Office of the Secretary, APR 30 1925

This patent, issued during the trust period without an application and acceptence refused, is hereby canceled. (See U.S. v. Benewah Co., and U.S. v. Kootenai Co., Idaho, 290 Fed., 628.)

John H. Edwards, Assistant Secretary.

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; and there is reserved from the lands ~~hereby granted~~, a right of way thereon for ditches or canals constructed by the authority of the United States.

OFFICE OF INDIAN AFFAIRS RECEIVED MAR 30 1925 23498

IN TESTIMONY WHEREOF, I, Woodrow Wilson President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the THIRTEENTH day of APRIL in the year of our Lord one thousand nine hundred and EIGHTEEN and of the Independence of the

21164-24 Pine Ridge 302

Fig. 2. Palmier Patent. Example of a cancelled fee patent in the wake of United States v. Benewah. CCF 21164-1924-302 Pine Ridge, RG 75, NA-DC.

But more than simply deviating from what had become practice, seeing the case from the Coeur D'Alene—and by extension many others—viewpoint would on its own be objectionable. For, as the assistant attorney general worried, the "construction which is argued for, would subject the Interior Department to *the will of the Indian*." If Native people had a say over whether or not they wanted a fee patent or to be taxed it would "frustrate the Government's declared policy of placing the Indian upon equality with the white man whenever his attainments warranted, and retard his material advancement."[69] While Underwood was overruled and the case would be appealed, his opinion highlighted the continued precariousness of Native property rights. Whereas Mahaffie did not consider policy but only the

69 Assistant Attorney General Underwood, Memorandum relative appeal *U.S. v. Benewah County, Idaho, et al., #781*; *U.S. v. Kootenai County, Idaho, et al., #782*, 7 December 1922, *ibid*. Emphasis added.

law, Underwood looked to the law to support a policy he appeared to agree with. And for the time being so did a Judge.

The government appealed anyway. Despite their skepticism Justice followed the lead of Burke and Interior. The government's brief to the Ninth Circuit Court of Appeals was clear: "The property of the Coeur D'Alene Indians could not be taken without their consent." The Burke Act did not say otherwise.[70] The Ninth Circuit agreed. The opinion was brief and to the point: there had been no application; there was, in fact, "the distinct refusal to accept" the fee patent. As a result "we are of the opinion that title in fee did not pass to the Indians by the issuance of the patents."[71] Within two weeks of *Benewah*, Burke wrote that "The decision comports with the opinion that I have always entertained, and is in accordance with what was in my mind when I prepared what became the Act of May 8, 1906—namely, that the Secretary of the Interior should only be expected to grant a patent in fee upon the request of the allottee."[72] Too bad he did not make this clear when the Congress passed the act. And, too bad he did not really mean it.

PART V: CONSENT

The fallout from the case would be tremendous. The hope it gave to Indian people, the cases, and the chaos generated in its wake—that would all come. But one immediate reaction, from an attorney in South Dakota, who thought the case did not go far enough, is worth pausing for. It allows us to think about all those who could not or did not refuse and ask: must one resist a policy found to be illegal for it not to apply?

Howard Fuller was an attorney in South Dakota with long experience in Indian law and who was currently working in various capacities at Cheyenne River, Standing Rock, and Lower Brule. He thought taxes should not be applied to Indian land whether in a fee or trust patent before the end of the twenty-five-year trust period. Channeling previous court decisions (*U.S. v. Morrow* and *Choate v. Trapp*) that found freedom from taxation to be a vested property right, Fuller thought that the *Benewah* decision only did the minimum to protect Native people from state taxation. The decision placed too much emphasis on the need for evidence that an individual protested the issuance of their fee patent. He wondered: does that mean if there was no evidence of protest that the Indian individual *could* be taxed? As he put it, "I would like to have seen the issue brought up in the first instance under the bold claim, with or without an acceptance of patent the Indian might be given the right of alienation, by the patent, without the loss of exemption from taxation … ." Fuller understood why the government litigated *Benewah* in the way it did; it was a straightforward case. But Fuller thought the government took the easy path. "In this case the government has obviously taken the most ideal state of facts for the contention but it is a question whether the relief is as far reaching and beneficial as it really ought to be."[73] It's that last line that sticks out: did the decision go far enough?

Fuller's theory that protesting a patent need not be in evidence when determining the legality of a fee patent is important. It's a way of seeing things that echoes the voices of many, many Native people who did not protest their fee patents but who were on the hook for taxes and did not think they should have to pay them. Morris Antelope's sister, Julia

[70] Brief of Appellant, *United States of America v. Benewah County and Kootenai County, No. 3895*, quote at 7, United States Circuit Court of Appeals for the Ninth Circuit, RG 21, NA-Seattle.

[71] *United States* v. *Benewah County* (290 F. 628), 1923, 630–31.

[72] Burke to George F. Short, Attorney General of Oklahoma, 17 July 1923, CCF 44631-20-312-Coeur D'Alene, part 1, folder 2, RG 75, NA-DC.

[73] Fuller to Charles Burke, CIA, 20 July 1923, CCF 44631-20-312-Coeur D'Alene, part 1, folder 2, RG 75, NA-DC.

Nicodemus, wondered what would become of those who did not protest and took their patents, most of whom lost their land.[74] The question of whether one protested their patent or not became something of a fetish for the Indian Office. To raise merely one objection to this way of thinking: Some had been unable to refuse their patents because they were not physically present. The Indian Office issued fee patents without application or consent to soldiers fighting in World War I and to boarding school students. One veteran said: "Well this patent was issued to me when I was in the War therefore I had no chance to make any answer to it as I did not know anything about it until it had been issued. I think in accordance with the way the trust patent reads the United States should make some kind of settlement for issuing the patent in fee before the end of the trust period."[75] Very often people were not informed they had been issued a fee patent. A Citizen Potawatomi man learned in 1926, close to a decade after his patent in fee had been issued, that his land had been sold for unpaid taxes. He had no idea taxes had been accruing much less that his trust patent had been swapped for a fee patent. No one told him.[76] Further, it became practice, and then law, that if a person mortgaged their land they lost the opportunity to have their fee patent cancelled and their land put back in trust. Yet, the reason many mortgaged their land was to *pay* taxes—taxes that were being levied illegally.

Charles Burke added another semantic wrinkle when he wrote to the attorney general of Oklahoma to let him know of the *Benewah* decision. "The decision comports with the opinion that I have always entertained, and is in accordance with what was in my mind when I prepared what became the Burke Act … namely, that the Secretary of Interior should only be expected to grant a patent in fee upon the request of the allottee."[77] One need not have actively protested the issuance of a patent for it to be cancelled. If one had not applied, that, too, could be the basis for cancellation. Both were matters of consent. Both needed to be based in evidence—and, according to Burke, "proof would have to be clear and convincing."[78]

But proof of what? Take the case of Jennie Moeller on Pine Ridge. She had been issued a fee patent without application; she accepted it without protest. Should her patent be cancelled? In 1922, a year before the *Benewah* decision, she wrote to President Warren Harding to complain about her forced patent and the tax burden she now faced. She expressed her deep frustration with the superintendent and the general state of affairs on the reservation. In her letter to the president, and later in an affidavit, she claimed she did not want the patent. Using Burke's own reasoning she seemed a good candidate for cancellation—she did not protest but nor did she apply. She got nowhere. The superintendent wrote that her situation is "past remedy and she must stand or fall without help from the Indian Bureau, since her land is without restriction." The Indian Office's chief clerk, C.F. Hauke—often the voice of Bureau policy—wrote her directly that because she had accepted the patent without protest the land was taxable. He then went on to admonish her. "If Indians will have more faith in the honesty and good will of the Government … it would be greatly to the Indians' advantage." Of course, having faith in the honesty of the government would be easier to

[74] Nicodemus to Lawshe, 27 October 1922, CCF 44631-20-312-Coeur D'Alene, RG 75, NA-DC.

[75] Affidavit of Reason Didier, Rosebud, 9 May 1929, Replies to Circular 2464, Folder 6 of 12, Orders, Circulars, and Circular Letters, Replies to Circulars, 1907–35, Answers to Circulars 2464 to 2467, RG 75, NA-DC. (Hereafter Replies to Circular 2464.)

[76] Affidavit of the heirs of William Sweeney, Replies to Circular 2464, part 10, RG 75, NA-DC.

[77] Burke to George F. Short, AG of Oklahoma, 17 July 1923, CCF 44631-20-312-Coeur D'Alene, RG 75, NA-DC.

[78] Burke to William Williamson, 10 November 1925, CCF 70336-25-312-Pine Ridge, RG 75, NA-DC.

achieve if the trust period in the original patents were upheld and if there were more clarity regarding the conditions under which a patent would be cancelled.[79]

On Pine Ridge the Indian Office issued 682 fee patents without consent or application. When patents arrived en masse from the central office the agent reported the patents to the local tax commission and told patentees that whether they accepted the patents or not taxes would be levied.[80] If the taxes were not paid the land would be sold, people were told.[81] In 1918, the reservation superintendent, H.M. Tidwell, issued Peter Dillon a fee patent without his consent or application. Dillon did not want the patent and said so. Protest was futile. Tidwell told Dillon: "The issuance of this fee patent has been reported to the tax collector and if you do not pay the taxes, whether you take the patent or not, eventually, the land will be sold to satisfy them."[82] Hattie Clifford did not apply for a patent in fee; she did not want a patent in fee. But she accepted it like so many others because the "common talk among the neighbors was that those to whom patents had been issued would lose their land if they did not sign the receipts" indicating acceptance. She signed solely to keep her land.[83] William Larvie did not protest his patent because, according to the superintendent, "like all the Indians to which these patents were issued, he was advised by this Office to accept it and to keep the taxes paid."[84] And here we arrive back in the company of Howard Fuller. In his effort to get his patent cancelled, the Indian Office's central office told Larvie that "Unless you can furnish evidence immediately that you protested against the acceptance of the patent, you should pay under protest the taxes assessed against your land." If you are able to prove you protested, the Indian Office will help. Otherwise, "if you accepted it without protest but believe your land is not taxable until twenty-five years from the date of the trust patent, you have the right to file suit in the United States District Court for the purpose of settling that question."[85] A Colville man, Anthony Pelissier, was told the same thing. He did not want a patent, but was now faced with a tax bill he could not afford. Contrary to Burke's view that one need to have *applied* for a patent, Edgar Meritt told him that if he merely accepted the patent without protest there was nothing the Indian Office could do. He could, Meritt suggested, file a claim in court on his own behalf.[86]

Evidence of consent and the legality of taxation before the end of the trust period: the two issues Fuller raised within weeks of the *Benewah* decision were not at all theoretical.[87] By making cancelling a fee patent dependent on evidence of protest or lack of application, the question immediately emerged: what constitutes evidence? Officials in Caddo County, Oklahoma, less than two months after *Benewah*, agreed to stop levying taxes on fee land issued to Indians over their protest. But, "they will not take the unsupported word of an

[79] Moeller to President Harding, 3 May 1922; Superintendent Tidwell to CIA, 31 May 1922; Hauke to Moeller, 8 August 1922 all in CCF 39036-22-312-Pine Ridge; Affidavit of Jenny Moeller, 16 November 1928, Replies to Circular 2464, RG 75, NA-DC.

[80] Affidavit of Mark Marston, Land Clerk at Pine Ridge, 20 November 1924, CCF 60666-24-302-Pine Ridge; for 682 patents see E.W. Jermark, Superintendent, to CIA, 18 February 1929, Response to Circular 2464, RG 75, NA-DC.

[81] Henry Tidwell, superintendent to Benjamin Conroy, 1 July 1920, in Appendix, *Clare Potter v. South Dakota*, Non-Trial Civil Cases, RG 21 (Records of the US District Courts), NA-Denver.

[82] Tidwell to Dillon, 22 October 1918, CCF 80566-24-312 Pine Ride, RG 75, NA-DC.

[83] Affidavit of Hattie Clifford, CCF 81195-36-302-Pine Ridge, RG 75, NA-DC.

[84] E.W. Jermark, Superintendent, to CIA, 20 September 1924, CCF 60664-20-302-Pine Ridge, RG 75, NA-DC.

[85] C.F. Hauke, Chief Clerk, to William Larvie, 10 October 1924, CCF 60664-20-302-Pine Ridge, RG 75, NA-DC. Larvie was lucky: his patent was eventually cancelled and the land put back into trust. It took three years of persistent effort and Bennett County, South Dakota, refused to refund the taxes he did pay; it was not until 1936, after suing the county, that he recovered his tax payments.

[86] Anthony Pelessier to CIA, 5 June 1934; Meritt to Pelessier, 20 June 1924, CCF 43804-24-302-Colville, RG 75, NA-DC.

[87] Burke had been focused on refusal since before the decision in *Benewah*. Given the decision in *Morrow*, which held that taxes cannot be levied without consent, Burke and others came to focus on evidence of refusal. See Burke to SOI, 7 November 1922, CCF 44631-20-312-Coeur D'Alene, Part 1, Folder 2, RG 75, NA-DC.

Indian that he accepted a patent in fee under protest."[88] There must be written proof. And thus the path led to a perhaps predictable outcome: the absence of evidence of protest became evidence of acceptance.

Within a few years Charles Burke declared his policy: "This Office and the Department have taken the position that a subsequent acceptance has the same effect as an application for a patent." So, too, did mortgaging one's land: "A mortgage or sale of any part of patented land is considered as acceptance and delivery of the patent, even though it may never have been in the hands of the patentee." Burke considered acceptance of a patent to be synonymous with consent. And if one accepted a patent there was nothing to be done: "where the Indian accepted the patent, mortgaged or conveyed the land, he waived any rights that he otherwise might have had, and, as a general rule, this is what most of them did and they are today landless … ."[89] But what about all of those people to whom patents were issued under the Declaration of Policy? Or by Competency Commissions? Or by superintendents who found them competent? None were given the opportunity to apply, comply, or refuse. They had no choice whatsoever. And when their taxes came due, like those at the Kiowa agency who were being charged an 18 percent annual interest rate, they were told to pay or lose their land.[90] The Kiowa superintendent was frustrated: he knew many people did not want their patents, said as much, but no one wrote it down. As a result, John Buntin "believed that the Indian is being subjected to an injustice."[91]

Burke's views solidified into law in 1927 and 1931 when Congress passed two cancellation acts. Both were an effort to right some of the wrongs of the forced fee patents. They certainly signaled a symbolic shift: the Indian Office admitted it had created a disaster. But the relief offered was minimal and the burden was on Native people. Each individual had to prove they either protested or did not apply for a fee patent; even a whiff of consent quashed one's chance of cancellation. A Yakima man wrote the Indian Office in 1932 asking after his deceased daughter's land—land lost to a tax sale. The commissioner admitted the fee patent had been issued without application. Yet evidence of refusal was necessary for the Indian Office to consider cancelling the patent in an effort to redeem the land.[92] And, what's more, the solicitor, echoing Burke, decided that acceptance was consent and thus all those people who "accepted" their patents, without having any idea what they were, had no recourse.[93] There was yet another obstacle: patents would only be cancelled upon the application of an allottee. There was not, nor would there be, a mass cancellation.[94] The exact opposite of the indiscriminate issuing of fee patents. Further limiting both versions effectiveness was the fact that one still had to be in possession of one's land for either to apply: the 1927 act allowed for the cancellation of one's fee patent if the land had not been sold or mortgaged; the 1931 law permitted patents to be cancelled on any land remaining if one had sold a portion of their allotment. By the time the 1927 law passed, only about one thousand affected

[88] John Buntin, Superintendent, Kiowa Agency to CIA, 15 September 1924, CCF 29028-19-127-Kiowa, RG 75, NA-DC.

[89] First quote: Burke to E.E. Wagner, 9 October 1926; second quote: Burke to E.W. Jermark, Superintendent, Pine Ridge, CCF 60666-24-302-Pine Ridge; third quote: Burke to Wagner, 25 September 1926, CCF 44868-26-312-Pine Ridge, RG 75, NA-DC.

[90] See letters from C.V. Stinthicum to various people regarding impending tax bills, 2 February 1922, CCF 00-22-302-Kiowa, RG 75, NA-DC.

[91] John Buntin, Superintendent, Kiowa Agency to CIA, 15 September 1924, CCF 29028-19-127-Kiowa, RG 75, NA-DC.

[92] P.F. St. Martin to C.J. Rhoads, 16 December 1931, 70655-31-302-Yakima, RG 75, NA-DC; Rhoads to St. Martin, 3 February 1932, 70655-31-302-Yakima, RG 75, NA-DC.

[93] E.O Patterson, M-22708, 24 February 1928, File 90-2-11-54, Litigation case files, RG 60, NA-College Park. See also the opinion of the South Dakota Attorney General. Buell F. Jones, AG to Peter Burns, State's Attorney, 23 April 1928, CCF 4322-28-302 Cheyenne River, RG 75, NA-DC.

[94] This question came up in the hearings on the law. Burke affirmed that only upon application by an individual would a patent be cancelled. See Transcript of Hearing on S. 2714, Committee on Indian Affairs, House of Representatives, 27 January 1927, 69th Congress, S. 2619-S. 2733, RG 46, Records of the US Senate, NA-DC.

allotments remained in trust. As of 1930, three hundred patents had been cancelled—a pitifully small number. Four years later, when Congress amended the law, the number of patents eligible for cancellation had dwindled to between three hundred and four hundred.[95] And, remember, the cancellation acts only affected those who had been able to hold on to their land. Native people who lost land were offered nothing—and never have been.

The same year that Congress passed the second cancellation act, C.J. Rhoads, the commissioner of Indian Affairs, reflected, briefly, on the fiasco. He conceded that "about 10,000 patents in fee were issued without authority of law from the years 1917 to the early part of 1920." And for the last decade, "this Office and the Department have been endeavoring, as far as possible, to save what property the patentees have lost." With the number of allotments left estimated at only a few hundred, it seems that "as far as possible" was not very far at all. Rhodes knew where the blame lay: land had been lost "partly through fraud practiced upon [Indians] by white persons." But he also blamed Indians. "[B]ecause of incompetence or indifference," they lost their land.[96] In other words, at fault was not the fact that "10,000 fee patents were issued." The blame lay with those Rhoads perceived as either greedy Whites or lazy Indians. About 470 patents were cancelled under the two acts—or less than 5 percent of the estimated 10,000 forced fee patents.[97]

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Views on consent began to change. In preparing two tax and forced fee cases from the 1930s concerning the Nez Perce and the Blackfeet, some Justice Department lawyers and Interior officials began to take seriously Indian people's claims that they had not wanted fee patents but had been forced to take them. If Burke thought taking a mortgage out to pay taxes was consent, Assistant Attorney General Harry Blair claimed it could be compulsion. "The fact that taxes are paid in response to a demand for payment under threat of losing the land through a delinquent tax sale is sufficient to constitute compulsion … . the mere fact that the Government thrust fee patents upon the Indians and they, having no choice in the matter, accepted them, should not be sufficient to constitute 'consent.'"[98] One former agent testified that when patents arrived from the Indian Office, referring to one woman in particular, "I … forced the patent on her, that was all. I had been directed so to do, and I forced the patent on her."[99] In a case involving more than thirty Blackfeet issued patents without their consent, but for some of whom there was no direct evidence of refusal, the changing view would have material advantages when the court sided with the United States. The first assistant secretary of the interior explained: "We believe that the fact that an Indian may have signed a receipt for a fee patent so issued, and had the patent recorded in the county, should not be considered an indication of ratification or confirmation of the Secretary's action in issuing a patent to him, because in most cases the Indian in so doing followed the advice of the agency officials." In direct contradiction to Charles Burke's constrained view of consent, he went on: "It is our view also that the bare acceptance by an allottee of a fee patent forced

[95] See statement of William Williamson, Representative from South Dakota and sponsor of the 1931 legislation, 28 January 1931, *Congressional Record*, 3413; for 300 cancellation see J. Henry Scattergood, Assistant CIA to James H. McGregor, Superintendent, CCF 58451-27-312 Pine Ridge, RG 75, NA-DC.

[96] C.J. Rhoads to Burton Wheeler, 18 February 1931, CCF 7199-30-302 Flathead, RG 75, NA-DC.

[97] McDonnell, *Dispossession of the American Indian*, 117–18; Harold Ickes to Ambrose Kennedy, 17 March 1938, Ickes to Kennedy, 17 March 1938, CCF 16574-32-312, Haskell, RG 75, NARA-DC.

[98] Harry W. Blair to James H. Baldwin, U.S. Attorney, 26 March 1934, File 90-2-5-32, Section 1, Litigation Case Files, RG 60, NA-College Park.

[99] Testimony of C.B. Stinchcomb, *U.S. v. Board of County Commissioners of Comanche County*, U.S. District Court for the Western District of Oklahoma, Law and Equity Case Files, 1908–1938, Box 538, RG 21, NA-Kansas City.

upon him by the Government can in no wise be construed as a waiver by him of his vested right to have his land exempt from taxation for the period of twenty-five years from the date of issuance of trust patent to him."[100] Finally, toward the end of the decade, in 1938, another sympathetic Justice Department lawyer wrote that in accepting their patents many Indian people were following "the dictates of the Government officials … ." But this should not be construed as consent. "There must be … a clear showing or at least some substantial evidence of the conscious surrender of a known right on the part of the Indian, from which alone his real consent can be implied."[101] While this was a radical departure, and a loosening of the strictures imposed by the 1927 and 1931 cancellation acts, it was of course too late for the many people who had been told they had no case because they had no evidence of refusal. One Blackfeet woman took out a $70 mortgage to pay her taxes; under the cancellation acts this was evidence of consent. The assistant attorney general, in an attempt to include her in a case, reminded the U.S. attorney, that "the power to tax is the power to destroy."[102]

This is what we forget when we write stories of resistance: those who could not, did not, would not, for whatever reason, resist power but against whom an injustice had nonetheless been committed. Penalizing Native people for borrowing money in the form of a mortgage to pay illegally levied taxes added deep insult to a profound injury.

What was to be done? The cancellation acts were a nice gesture but hardly sufficient: because of the restrictions imposed they accounted for only about 470 patents. The raft of tax cases litigated in the late 1920s and 1930s on behalf of Native people helped individuals and set some important precedents. But no remedy commensurate with the harm wrought by the forced fee patents ever materialized. In 1934, the Kiowa, Comanche, and Apache tribal council recommended a radical solution and especially took into consideration the many thousands whose land was lost to taxes because they had to take out a mortgage. They recognized what was so obvious but which Burke and others were, if not blind to, then unable or unwilling to do anything about. "Many of these Indians suffered heavy losses by receiving the patents in fee without application by mortgaging their land, and in many cases the Indians were forced to sell their land for lack of money to pay taxes and interest on mortgages." What would resolve the problem? "We know of no other way the Government could reimburse them except by making a survey to ascertain the loss the Indian actually suffered, and appropriate from Government funds such amounts as would be necessary to pay them for all losses sustained." The reply? John Collier, the new commissioner, noted that "The same condition existing under the Kiowa jurisdiction exists on many other reservations, and an amount to care for all such losses would be very great."[103] He was right: the "same condition" existed all over Indian country and it would cost a lot. It might be time.

[100] Alexander Vogelsang to Attorney General, 15 July 1933, 90-2-5-32, Section 1; on consent in the context of the Nez Perce case see Carl McFarland, Assistant Attorney General to John Carver, US Attorney, 13 May 1938, 90-2-5-54, Section 3, both in RG 60, NA-College Park. *United States* v. *Glacier County* (117 F. Supp. 411, 1936); *Glacier County* v. *United States* (99 F. 2d 733, 1938).

[101] Carl McFarland, Assistant Attorney General to John A. Carver, US Attorney, 13 May 1939, 90-2-5-54, Litigation Case Files, RG 60, NA-College Park.

[102] George C. Sweeney to Wellington D. Rankin, 23 August 1933, File 90-2-5-32, Section 1, Litigation case files, RG 60, NA-College Park.

[103] Jasper Saunkeah, Albert Attockme, and Howard Soontay to John Collier, 12 December 1934; Collier to the same, 23 January 1935, CCF 42332-29-302-Kiowa, RG 75, NA-DC.

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