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THE NATIVE AMERICAN ESTATE: LAND AND RESOURCE DIVESTMENT AND RESTITUTION

The University of Oklahoma PH.D. 1979

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GRADUATE COLLEGE

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BY

LINDA S. PARKER

Norman, Oklahoma

1979

THE NATIVE AMERICAN ESTATE: LAND AND RESOURCE DIVESTMENT AND RESTITUTION

APPROVED BY

DISSERTATION COMMITTEE

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THE NATIVE AMERICAN ESTATE: LAND AND RESOURCE DIVESTMENT AND RESTITUTION

CHAPTER I

INTRODUCTION

In contact situations between a nation with superior technology and a nativistic community, principal conflict evolved from differing land tenure systems. This occurred when the imperial nations of Europe and later the United States encountered the aboriginal people of the American continent and the Hawaiian Islands. Colonists from the European nations claiming dominion over native peoples and their lands in the New World reflected the imperialistic mind set of their age. They were unremittingly committed to the exploitation of the aborigines and their lands.

American justification for expropriating Indian land had its roots in European philosophy, theology, canon law, and international law, derived from the rhetoric of the antecedent imperial nations. The new American nation implemented many aspects of Native American management prac-

ticed by Great Britain. American rhetoric which justified the expropriation of aborigines' land had been formulated prior to the expansion of the American frontier to the Hawaiian Islands. Thus, traders, settlers, and missionaries transferred this to native Hawaiians and their lands.

The future relationship between the Old World settlers and the native inhabitants of the Western Hemisphere was to a large degree already predetermined at the time of "discovery." Christianity and classical philosophy helped form preconceived views of the New World peoples and the relation of Christian nations to them.

Religious, ethical, and commercial standards provided the European colonists justification for their conquest of native peoples and their territories in the New World. The basis for the various concepts promoting expansion lay in the European view of aborigines. Associated with the principles of discovery, just wars, and papal donations was the presumptive superiority of the Christian nations over heathen nations.

In 1493 Pope Alexander VI assigned North American to Spain along with the directive to Christianize the natives. The Pope in 1497 reenforced his commission to Spain to convert the New World aborigines. Other European nations did not accept their exclusion from North America.

In order to justify the New World conquest European theologians and philosophers frequently referred to Aristo-

telian thought to substantiate their varying interpretations. The Spaniard Juan de Quevedo cited Aristotle's statement that some men were inferior by nature to uphold the view that Indians were slaves by nature. Francisco de Vitoria denounced the idea that Indians were by nature subject to rule by others and incapable of self-rule. He thought they possessed sound minds and should not be slaves. Vitoria, however, interpreted Aristotle's teachings to mean that natives in their childish innocence required protection from superior Christian nations. Thus, he too justified conquest for the Indian's good. Juan Gines de Sepulveda agreed with Quevedo and added that the aborigines' customs and lack of individual ownership of land (title to Indian land was vested in the tribe) upheld the natural law of superiority of Christian nations over uncivilized non-Christian nations. Bartolome de Las Casas disagreed and charged that Sepulveda did not understand Aristotle. Las Casas maintained that few individuals were by nature slaves and claimed that Indians were rational. Fernando Vazquez de Menchaca accused those using Aristotle's theory of slavery of applying it to "cover wars with a cloak of justice," but the imperialist view prevailed and it became accepted that a Christian nation had a natural right to conquer aborigines and use their labor and exploit their lands.

Another area of debate among theologians and

philosophers centered on the moral and ethical responsibility to Christianize the Indians. Inseparable from this controversy was the idea of just wars. This concept evolved as justification for conquest, expansion, and later displacement of the natives from their lands. St. Augustine first developed the idea that wars could be just if the objective was good, including the intention to "avenge" wrongs. Adding to this Ambrose elaborated the moral obligation to correct or prevent injustices. Medieval theologians claimed that conquest was legitimate only if the war had been just. The Crusades divided the world into an antithetical view of right and wrong as well as between the faithful and the infidel, and implanted the idea that wars of conquest waged in the name of Christianity were just. Later the doctrine evolved to justify world conquest.

After Alexander VI assigned North America to Spain, debate ensued in the Spanish court over voluntary and forced conversion. The Spanish government directed its conquerors to read the Requerimiento to the Indians. If they refused to acknowledge the Pope and the rulers of Spain as sovereigns then the colonists would force them to accept the contents of the Requerimiento. The Law of Burgos (1512) required that the natives be treated humanely but they could be coerced to accept conversion to the Christian faith. Under the encomienda system applied by colonial officials to New Spain, both the Indians and their

lands came under the direct control of the crown. In 1529 Pope Clement VI in the bull Intra Arcana stated that Spanish officials could use force to convert the aborigines. Vitoria denounced the application of force in Christianizing the Indians. He rejected the belief that the refusal to convert justified war. Vitoria did present another reason for a just war which was adopted by the imperial nations in their relations with the aborigines. He argued that natural law and the law of nations allowed the Spanish to travel to the New World and to live there as long as they did not injure the natives. These two doctrines along with divine law guaranteed the imperial nations the right to trade. If the Indians hindered the actualization of this right then Europeans could go to war against them. Vitoria's concept provided grounds for just wars and the justification of intervention and conquest.

Francisco Suarez in 1621 denounced the idea that failure to convert justified a war but he argued that the prevention of teaching the Gospel did provide the grounds for a just war. Many philosophers and theologians in the late sixteenth century continued the debate regarding just wars. The Italian Alberico Gentili agreed with Vitoria that religion or forced conversion did not justify war and that the prevention of trade, which was a part of the law of nations, justified war against the aborigines. Out of this debate emerged the moral and legal defense of

intervention, conquest, and occupation of the New World.

Sir Thomas More provided a justification for expansion in his book, Utopia (1516). If the Utopians moved to an area with vacant lands and the natives refused to obey the new laws then they must be driven from their lands. If they continued to resist, this provided a just cause for war. The English philosopher presented an argument derived from what he called the law of nature dealing with the right to put land to its most efficient use. "When any people holdeth a piece of ground void and vacant to no good or profitable use: Keeping others from the use and possession of it, which notwithstanding, by the law of nature, ought thereof to be nourished and relieved." The evolving idea of the just war later became part of the American justification for expropriating Indian land.

Another European doctrine based on the law of nations legalized appropriation of aboriginal lands. Under this concept a Christian sovereign acquired exclusive jurisdiction over new territories discovered by his representative or subject. The moral or ethical right to hold title to these lands rested on preconceptions of the native inhabitants. Such expansion became legitimate when the aborigines existed in a supposed state of barbarism and heathenism. Natives who were non-Christian and by European standards non-civilized held no property rights and existed outside of the sanctions of morality and

international law. By divine law the Christian imperial nations were superior and had the right to dominion and rule over non-Christian inhabitants and their territories.

Early Spanish treatment of the aborigines of North America had not accorded them any natural rights to property. But Vitoria rose to the defense of the Indians claiming that even savages had some natural rights. According to the Professor of Theology at the University of Salamanca, the Indians had "as much right to possess property as the Catholic peasants" and not even the Pope could take away that right. The Spanish laws slowly recognized limited natural rights of the Indians to occupied lands but not to unoccupied property. Spanish officials later developed a policy of compensating the natives for appropriated lands. The form of payment consisted of grants of unoccupied or "waste" lands.

During the sixteenth century the English refused to recognize any property rights for the aborigines. Title to the new territories rested in the sovereign because of the right of discovery, which encompassed the idea of possession. Following the pattern started in 1496 when Henry VII commissioned John Cabot "to conquer, occupy and possess" the lands of "heathens and infidels", Elizabeth I authorized Sir Humphrey Gilbert in 1578 and Sir Walter Raleigh in 1584 to seize the "remote heathen and barbarous land."

Dutch expansion on the Atlantic seaboard forced the English colonists to resort to the doctrine of natural rights to secure their land claims. The Dutch West India Company instructed its agents in 1625 to obtain legal possession through extinguishing Indian claims by purchase or persuasion. Some English settlers thereafter followed the Dutch policy of acquiring written Indian deeds.

John Winthrop believed that the land in America was legally "waste" lands because Indians had no natural rights to them since they had not acquired them in accordance with English law. The Puritans recognized legal title only to those lands with deeds from the Massachusetts Bay Company. They did not acknowledge Indian title to any land claimed by the Crown. Deviating from the views of most English colonists, Roger Williams rejected the assumption of ownership of land by the sovereign based on the right of discovery. Williams thought that Indians held the only valid title to the land unless it had been extinguished through purchase. The threat of acquisition by others later persuaded Winthrop to purchase land from the Indians.

In the English colonies the practice of compensating the Indians for their land co-existed with recognition of the doctrine of discovery. This policy was continued by the United States. Most of the colonial governments developed a policy of restricting private transactions in Indian land, trade, and creating reservations. Later the

United States government incorporated such practices into its Indian policy.

In reality the European nations had to go beyond the right of discovery to claim new territory on the American continent. The claimant sovereign had to deal with de jure facts and not mere theory. The military power and numerical dominance of the aborigines who had not yielded jurisdiction or sovereignty over the land and the power of contending European nations for the same territory made the discovering nation reconcile its de jure assumptions with the de facto situation. In terms of the contest for land in the New World with other imperial nations, the more conclusive claim came with actual possession or occupation. By 1580 England applied possession as the basis for its claim to new territories. In dealing with the Indians, the European nations used negotiation, purchase, treaties, and compensation. English officials followed the same diplomatic usages in dealing with the Indian chiefs as in their relations with other sovereign states. This provided a de facto recognition of Indian hegemony. If the claims under the right of discovery had been legitimate then it would not have been necessary to make agreements and treaties with the aborigines. Although the rights of Indian land tenure never had equal status to European claims, the colonists did come to recognize them to the extent that they could be extinguished or retained. This

led to the acknowledgment of aboriginal use and occupancy. The right of discovery did not acknowledge any political status for the Indian. Rather the treaty process provided the basis for the evolution of the concept of Indian title. Later the United States government would view Indian land tenure as consisting of use and occupancy.

Except in the lower Mississippi Valley where they engaged in agriculture the French usually did not appropriate Indian lands although they did bring tribal territories under Gaelic dominion. For the most part the French and Russians exploited the aborigines in the fur trade. The Russians in Alaska extended dominion over the area and its people but did not interfere to any great extent in the native's land tenure.

Since the right of discovery brought the new territories under the exclusive jurisdiction of the European sovereign, conflicting claims of the imperial nations occurred. Emmerich de Vattel, a noted eighteenth century international law figure, believed the problem should be resolved by applying the doctrine of natural law. According to the Swiss jurist no nation "can exclusively appropriate to themselves more than they have occasion for, or more than they are able to settle and cultivate." This precept also justified the appropriation of the Indian's land. The aborigines should not have more land than they actually used. Vattel further applied natural law to support the

view that agriculture provided the highest level of economic pursuit. Most Europeans conceived of the Indians as nomadic hunters which made them naturally inferior to the agricultural Christian nations. John Locke had maintained that agricultural peoples should force hunting aborigines to transform their economy. This concept provided a portion of the basis for justification of appropriation during the eighteenth and nineteenth centuries.

Following the War of Independence the new United States government assumed title to Indian lands within its boundaries, based on the English claim in respect to the right of discovery. American leaders perpetuated the imperial management concept which evolved from British practice and the United States government duplicated the central organization initiated under the Crown. The national government assumed the exclusive right of extinguishing Indian title, of regulating trade, and negotiating treaties. During the period of Confederation, the American nation claimed title to Indian lands based on the right of conquest. The aborigines, however, had not been conquered during the Revolution, only temporarily subdued. When the tribes asserted their sovereignty over territory, the national government resorted to the British method of purchasing Indian title.

During the early years of national life, a policy developed for the management of Indian affairs largely through the influence of Thomas Jefferson and Henry Knox,

Secretaries of State and War respectively. Knox and Jefferson believed that the aborigines possessed the natural rights of man and their right of the soil could be extinguished by the federal government by purchase or by just wars. As reflected in the Northwest Ordinance of 1787 and subsequent American policy, the United States government used the concept of just wars to justify appropriation of Indian lands. Jefferson drew from the right of discovery and Indian right of use and occupancy to lands, and propounded the right of pre-emption. According to this concept, Indians had legal title to their lands but could alienate it only to the intruding imperial nation. As the power of the Indian diminished, the strength of their claims correspondingly decreased. In 1823 the Supreme Court decision of Johnson and Graham's Lessee v.McIntosh delivered by Justice John Marshall enunciated the doctrine of discovery whereby the United States held the exclusive title to Indian lands. Indian title comprised the right of use and occupancy.

During the nineteenth century the federal government forced numerous Indian tribes to cede their lands and remove to the trans-Missouri region known as the Great American Desert. Some of the reasons used to justify the expropriation and exile included the charges of Indian savagery, tribal paganism, and a non-agricultural based economy. These had been used for centuries by imperial nations to justify conquest and appropriation of aboriginal lands.

Certainly, American views toward aborigines and their territories already had crystallized prior to the extension of the American frontier to the Hawaiian Islands. American settlers largely applied their view of Indians and their relation to land to native Hawaiians. Both religious and commercial reasons motivated American expansion. After 1820 when American settler, missionary, and trader immigration increased and became the dominant segment of the foreign community in the islands, most of them perceived the natives to be uncivilized, lazy pagans. Americans considered their Christian, commercial, and agricultural lifestyle superior to the Hawaiian mode; that their superior institutions gave them the right to expand. American residents believed that native Hawaiians would become civilized only when they adopted alodial (freehold) tenure, used the soil according to Christian principles of commerce, and converted to Protestantism. Man's natural rights to own private property and the Americans' ability to exploit the soil to its highest utility justified acquisition of Hawaiian lands. American belief in free exercise of commercial rights led to continual requests to their home governments for warships to enforce their assumed prerogative to engage freely in commerce, to own land, and to be secure in their property. Local native power forced American and European residents to accept the native land tenure system until they attained sufficient power and influence to change it. American in-

truders applied the same rhetoric and some of the methods to acquire Hawaiian lands as they had to secure Indian lands. The relatively small land mass of the islands, especially those lands suitable for agricultural or pastoral purposes, intensified the contest for property. Although some differences did exist, the final outcome of American imperialism in Hawaii resulted in the extension of American sovereignty and possession of most of the Native Americans' lands.

This study will compare the American Indian and the native Hawaiian land tenure systems, the rhetoric and methods of expropriation, and the vicissitudes of aborigines under European and Anglo-American imperialism. It concludes with a survey of the Native Americans' attempts to regain land and restore or reaffirm fishing, hunting, and water rights.

CHAPTER II

NATIVE AMERICAN LAND TENURE SYSTEMS

Adaptations in institutions ultimately lead to modifications in a society's land tenure system. Such alterations result from changes occurring within a society, from contact with alien societies, or because of changes forced by intruders. To comprehend the degree of change in the native Hawaiian and American Indian land-holding and use systems which resulted from contact and conquest by Western imperial nations, an examination of the native land tenure systems and the aborigine views toward land is imperative.

Both the Hawaiian and the American Indian's relationship with land and nature were steeped in the metaphysical. Native American attachment to land was a transcendental identification with nature which was reflected in their economic, religious, social, and political institutions.

Indians believed that a supernatural power gave land to his children to use forever and to preserve it for the benefit of their descendants. They perceived the earth as their mother who was the source of life and who provided material subsistence for them. The earth gave meaning to

living. Their way of life developed from and remained an integral part of the land which they considered their home. The aborigines possessed an attachment to their homeland which "The Maker" gave them to live on; and Mother Earth provided them with the animals, fish, vegetation that furnished them food, clothing, and shelter. Indians respected the earth and nature in all its features. The aborigines believed that they came from the earth and were a part of it. A Yakima Indian expressed this feeling when he declared "It is the earth that is our parent. . . . God made our bodies from the earth. . . . the lands are a part of my body."[1]

Native Hawaiians also had a mystical relationship with the land and a spiritual identification with their homeland and the land upon which they lived and derived their subsistence. The nature gods, Lono and Kane, gave the land to the Hawaiians to use and enjoy its fruitful products. The very features, qualities, and forces of nature confronting the Hawaiians endeared them to their lands. This attachment to their lands appeared frequently in their myths. The Hawaiians' closeness to the land was reflected in their religious rites and beliefs. Their belief in the gods of the sea, volcano, water, rain, and agriculture was a very explicit part of their relationship with nature. The Hawaiians dedicated their sons at the time of weaning to Lono, the agricultural god. At the dedication of a new

dwelling, the natives prayed for the blessing of Lono. They offered the first fruits of the harvest at the beginning and ending of each year at the Makahiki festival given in honor of Lono. Both Hawaiians and Indians treasured and respected, even revered the land, its ecological features, and nature whereas Westerners viewed land and the forces of nature as obstacles to overcome and conquer.[2]

Concepts of private or absolute ownership of land did not exist among either Indians or Hawaiians. Ownership in fee simple that prevailed in Western societies entailed the privilege of use and the right of alienation. The former prevailed among Indians and Hawaiians while the privilege of alienation existed only in a few instances and even then this right was highly restricted, and carried no similarities to absolute ownership in the Western legal sense. Among the few Indian landholding units which conceived of the right of alienation, this privilege only allowed for the transfer of land or its resources to members of the local group occupying the land and in some instances only with their prior approval. Among Hawaiians, alienation in the form of buying and selling of land did not exist.

Hawaiians and Indians did not perceive of land as a commodity to be sold or bought in the marketplace. They did not value land as a piece of real estate and placed no commercial value on it. Aborigines treasured land because of its produce which provided subsistence for life; they valued

the fruits of the soil and not the land per se. Even Hawaiians' frequent wars of conquest for territory were fought primarily to gain lands valued for their produce. Fertile productive land increased the material welfare of the island chiefs, the alii, and this was a measure of their supremacy. Even among the few Indian landholding units such as the Yuma of California which allowed the selling or buying of land, the value of the land rested upon its produce. Among both Hawaiians and Indians a landholding unit usually ceased to possess a tract of land when they no longer used it for its resources. In a few instances, Indians including the Navajos retained possession of the plot when they did not use it.[3]

Among Hawaiians, the right to use land and water continued only as long as the natives utilized both resources. If a commoner stopped cultivating his land or produced insufficient food, then the alii revoked the tenant's tenure and removed him from the land. If the konohiki, the alii's land supervisor and lower chief, did not fulfill his duties of ensuring the fruitful exploitation of the land, then the chief removed him from his position and rescinded his allotment of plots which the commoners cultivated for the konohiki's exclusive use. Similar rights of tenure related to the proper utilization of water for irrigation. Hawaiians believed the gods provided water as a free resource rightfully belonging to all as long as they used it. The duty

of every Hawaiian, alii and commoners, required that they aid in the construction of irrigation ditches and if they failed to perform this task then their right to the water was revoked. If a native did not exploit the water provided in the water system, then his right to use the water ceased. This closely related to the effective cultivation of his land, for in most cases water ensured the fruitful production of the land upon which his continued usufruct rested.[4]

The concept of inherited use ownership of land prevailed to a certain degree among both Indians and Hawaiians. It covered both communal holding and nominal private holding of land by Indians. A common holding of land existed although the composition of the landholding unit varied greatly. Among Indian groups the right of land use uniformly existed although the Indian inherited this privilege as a child of Mother Earth, the tribe or largest landholding unit, and in some cases from his family. Among Hawaiians the concept of inherited use ownership did not completely apply to the land tenure system. All Hawaiians possessed the right to use the land and its resources. The supreme chief, the mo'i, merely held the land rather than owning it. The gods Kane and Lono entrusted the lands to his care and his role entailed that of a trustee. Land tenure, in theory, was transitory for all the natives. Even the alii held no permanency in their proprietorship and could be removed by

conquest or at the will of a superior chief. Inheritance of a land area by alii often did not exist. Alii, however, frequently bequeathed land to their heirs and some chiefly families retained land within the family for generations. Families of tenant farmers whose usufruct depended upon the satisfactory cultivation of the soil and continued favor of the alii usually lived upon their lands for generations. In actuality, the tenants inherited the right to continue using their lands.[5]

Although the alii could revoke the makaainana's, or commoner's, tenure for any personal reasons or for violation of customary laws, the tenant usually remained untouched by the frequent warfare waged for control of the land. The alii sought to retain stability with those who tilled the soil and produced other products necessary for the subsistence and comfort of the alii class and their warriors. The chiefs, moreover, needed the loyalty of the makaainana in time of war. This allegiance was imperative to insure that they would not align with an opposing chief and would continue producing food. Infrequently the alii recruited commoners for service in his military forces. However, most of the military service fell to the alii class.[6]

Since the mo'i required the loyalty of the people in his district, the alii usually were not over-demanding in their treatment of the makaainana, at least according to the moral standards of their society. The alii relegated the

overseeing of the ahupua'a, an administrative land unit, to konohiki who usually treated the commoners fairly. Otherwise, if the annual tribute was insufficient for the chief's needs, or the konohiki failed to rally enough men for the alii's army in time of war, or the produce from the koele, fields specifically cultivated by the tenants for the exclusive use of the alii, was insufficient, then the alii examined the cause of the difficulties. If the alii found the konohiki maltreating the makaainana, then he removed the konohiki from his position. The alii's dependence upon the commoners tended to protect the makaainana from the capriciousness possible in such a system and provided them with some security in their tenure.[7]

Although the native Hawaiian land tenure system possessed similarities with European feudalism, it also differed in several important aspects. In Hawaii the commoners were not tied to the soil and they could freely move from the land of one chief to that of another. The makaainana seldom obtained much advantage by transferring his loyalties to another chief. Occasionally, a commoner simultaneously held plots under two different chiefs in order to protect himself in case of dispossession by one of the alii. Often when an alii removed a tenant from his land, the chief also took the makaainana's personal property. In common with European feudalism, the commoners and lower chiefs owed tribute, labor, and sometimes military service to their superior

chiefs; and in contrast, the alii did not have reciprocal obligations to the makaainana. The commoners depended upon the benevolence of the alii. A certain moral obligation, somewhat like the European noblesse oblige, was built into the system and custom decreed that the king should protect the property of the makaainana and carefully refrain from exacting excessive demands.[8]

The exactions required of the commoners were harsh by Western standards; under feudalism in England, France, and Germany "definite limits" were placed upon the demands of the lords. Alii could require unlimited produce and services. The chiefs received up to two-thirds of the goods produced by the makaainana in tribute and gifts. Rebelling or moving to another chief's lands provided some relief for commoners against harsh treatment from the alii. On a number of occasions, the makaainana revolted and killed or expelled exploitive chiefs.[9]

Both the subordinate chiefs and commoners owed allegiance and feudal dues in the form of tribute and labor to the superior chief. During the annual Makahiki festival held in honor of Lono, the makaainana and alii offered tribute to the mo'i. The priests with a physical representation of Lono traveled along the entire seacoast of each island collecting tribute. The konohiki in control of the ahupua'a collected the manufactured goods consisting of feather mats, tapa, and produce of the soil at the altar erected at the

boundaries of the ahupua'a. The king exacted heavier taxes from the larger districts. The mo'i took the tribute, setting aside a portion for himself and his retainers and then allocated the remaining goods to the subordinate chiefs. While the Makahiki was a religious festival, it also acknowledged the superior land rights of the ruling alii.[10]

The Hawaiian Islands were delimitated into geographical and administrative land units. Each island, the moku, was divided into geographical divisions, ohana, and the number varied on the different islands. A supreme chief, the mo'i or ali'i-ai-'moku, held the largest land unit, the island as an independent kingdom. At the time of Cook's discovery of the Hawaiian Islands in 1778, a mo'i claimed "ownership" and suzerainty on each of the four larger islands while some of these supreme chiefs or kings also ruled over Niihau, Lanai, Molokai, and Kahoolawe. During most of the earlier period of Hawaiian history, individual chiefs ruled over districts of an island so that a moku sustained several independent kingdoms simultaneously.[11]

The kingdoms increased or diminished in size in accordance with the ambitions and abilities of the mo'i. The control and redistribution of land measured political supremacy and prompted frequent wars. The king of an island or district held all the land under his jurisdiction, not as an individual, but rather by virtue of his office and as a trustee of the gods. A king obtained possession of the

land either through conquest or inheritance. When a new mo'i ascended to power by the former process, he customarily redistributed the land among his subordinate chiefs and followers while retaining some of the choice lands for his own use. This division generally resulted from the decisions of a grand council of chiefs or in later times through the actions of the kakai-moku, the king's political and military administrator. The mo'i usually did not allocate the larger districts to the highest chiefs in order to prevent them from obtaining sufficient power to overthrow his government. If the new distribution displeased any of the chiefs, they could revolt or acquiesce. Loyal followers of the new ruler who possessed sufficient power often remained undisturbed in the holding of their lands. When a chief over a district died, the lands reverted to the king. Sometimes the mo'i allocated the land to the designated heirs of the deceased chief or redistributed the lands to one of the other chiefs.[12]

The alii subdivided their lands to the charge of lesser chiefs, dependents, and konohiki. At the lower end of the allotment process, the makaainana received usufruct over their plots from the lower chiefs. Only the alii were concerned with obtaining possession of the land. Words from an ancient Hawaiian folktale conveyed this idea: "Thou art satisfied with food, O Thou common man, To be satisfied with land is for the chief."[13]

Struggle among the alii for control of districts and

ahupua'as intensified with the more economically valuable and populous lands. The ideal ahupua'a existed as a self-sustaining pie-shaped wedge with its base reaching from the coast to its apex at the center of the mountain top. Often other ahupua'as intersected an ahupua'a and cut it off from the mountain or sea. The size of the ahupua'as varied; some were of a standard dimension of one-quarter of a mile wide and several miles long. One mountain ahupua'a on Hawaii comprised 300 square miles and Honouliuli on Oahu consisted of 40,000 acres. Some ahupua'as extended into the sea to include deep sea fisheries. The monopolization of these deep sea fisheries restricted the smaller ahupua'as to fishing along the shallow coastal waters. If breakers existed, the ahupua'a stretched to them and if not the ahupua'a extended one and one-half miles into the sea. Occasionally, an ahupua'a did not reach to the sea, thereby barring its inhabitants from in-shore fishing and compelling them to resort to deep-sea fishing.[14]

The people of an ahupua'a maintained rights to all the products within its boundaries: taro, bananas, coconuts, sugar cane, breadfruit, sweet potatoes from the valleys; fish and seaweed from the sea; and timber, alona, pili grass, and feathers from the forests. At times, extension of exclusive rights to an individual to gather certain products of the ahupua'a such as feathers, birds, animals, koa logs, wauke, or to fish restricted the privileges of the chiefs and commoners.[15]

Each of the ahupua'a had specific names and boundaries. Certain individuals within the community were trained to know the boundary lines and were called upon to settle any disputes that arose. Distinctive geographical characteristics such as a ridge, depression, stream, or the line of growth of a specific tree, grasses or herbs, or the location of a certain bird's habitat or rock marked the boundaries of the ahupua'a. Altars erected for the purpose of collecting tribute during the Makahiki festival also delimitated the borders of the ahupua'a on the seacoast. An ancient method of determining the boundaries between hillside and valley ahupua'as consisted of rolling a stone down the hillside. This method was used to demarcate the boundary of Kewalo and Kai-muohena. The land above the position where the stone stopped was Kewalo and the property below was Kai-muohena.[16]

The ili, normally an oblong tract running parallel to the ahupua'a's boundaries and sometimes reaching to the sea, was the administrative land unit next in size to the ahupua'a. Each ili had specific limits and names. An ahupua'a usually was divided into ili's which varied in dimensions. Some ahupua'a contained thirty to forty ili, although at times an ahupua'a did not have any ili. Occasionally, ili existed without being in an ahupua'a. There were two main kinds of ili: the ili of the ahupua'a and the ili kupono or ili ku. The former comprised a subdivision of the ahupua'a. Some of the ili included most of the area of

the ahupua'a; on Hawaii, ninety percent of the ahupua'a of Waimea consisted of the ili ku's of Puukapu and Waikaloi. The chief of the ili ku owed allegiance in the form of service and tribute directly to the king and did not have any obligation to the alii of the ahupua'a in which the ili ku was located. Usually the high chief of the island gave the ili ku to a chief residing from another ahupua'a in order to strengthen his political control of the area. When a chief of an ili ku died, the tract reverted to the king who then re-allocated the land but not necessarily to the designated heirs of the former chief. When the mo'i reassigned the lands of an ahupua'a in which the ili ku was located, this division did not affect the holdings of the chief of the ili ku. Sometimes an ili contained several dispersed tracts which were designated as lele. On Oahu, the ili of Kanewai had a lele at Kahala on the sea and a taro lele in the valleys of Palolo and Manoa. Occasionally the lele had separate names or the same appellation as that of the ili.[17]

The people living in an ili comprised the 'ohana, a dispersed expanded family related by blood, marriage, and adoption. Members of the 'ohana residing on the seacoast and inland exchanged commodities. The entire 'ohana participated in the harvesting of olona and its subsequent production into fish nets and lines. During the Makahiki festival, the Konohiki levied the tribute on the 'ohana and its head, the haku, possessed the responsibility for gathering the taxes.

The alii also exacted offerings preceding the commencement of a war and in honor of the firstborn of the chiefs from the 'ohana as an entity. The ahupua'a included numerous 'ohanas.[18]

The makaainana cultivated a field, the kihapai, for their own use. Its boundaries were not distinctly marked and varied in size with those in fertile valleys being smaller. The commoners farmed two or three acres of the upland kihapai every year and then allowed these fields to fallow for several years. In return for the use of the lands the tenants owed services and tribute to the king and alii.[19]

The makaainana lived in scattered dwellings inland and on the coast. Villages only existed when the topography of the land dictated the location of homes in close proximity and even then the village did not develop as a social entity.[20]

In the Hawaiian Islands the mo'i possessed title to the land under his control although he did not hold absolute ownership and his possession usually was transitory in nature. The makaainana held usufruct of the land under their individual cultivation even though their rights of tenure were highly restricted.

In contrast to native Hawaiians who had a uniform system of land tenure, American Indians practiced a variety of land tenure systems. Even within the same landholding group several systems of land tenure often prevailed.

Property rights often depended upon the types of subsistence: hunting, gathering, or farming.

Indians usually held land in common although the composition of the landholding unit varied. It consisted of either the tribe, tribelet, village, band, clan, lineage group, family, or nominally an individual. Frequently, several units simultaneously held the land.

The nominal owner of the land frequently differed from the proprietor. In the Pacific Northwest a wealthy man of the village held title to the land but the whole village or kinship group possessed the usufruct. Among many Indians, the tribe held the land while family units were the actual proprietors of individual plots.

The type of fauna dominating in an ecological area largely determined the main method of subsistence. The aborigine's primary means of existence included hunting, gathering, farming, and fishing and normally more than one characterized the overall economy of a particular landholding unit.

To a certain degree, the ecology of a locality determined the land tenure systems. A desert region such as the Great Basin with its widely scattered scarce food sources necessitated small family groups having free access to a large area in order to obtain the essential food needed for survival. Exclusive tracts of land would have meant starvation for the band and family members.

The Great Basin tribes consisted of the Shoshoni linguistic family. The Shoshonis generally did not conceive of exclusive rights to land or its products and believed the resources were free for everyone to use. Most of the Shoshonis and many of the Northern and Southern Paiutes lacked a concept of band or village ownership of food areas and land. The main exceptions were the Northern Paiutes in Owens Valley, the Reese River Paiutes, some Southern Paiutes in Death Valley, and the Pahrump and Las Vegas villages. These bands possessed property rights in delimitated hunting and seed territories. The Owens Valley Paiutes held exclusive claim to hunting, fishing, and seed gathering rights in specific boundaries. A district headman determined when and where the members of the community would gather seeds. Some anthropologists maintain that families claimed exclusive rights to plots. Communal hunts were restricted to the district while individual hunters could hunt anywhere. Some of the districts shared hunting, fishing, and seed rights in specific areas. Both the Owens Valley and Reese Valley Paiutes protected their territories against trespass. The Owens Valley deviation from the Shoshonian pattern of maintaining no exclusive property rights in food areas largely can be explained because of the ecology of the area. It was a fertile, densely populated locality with permanent villages and a small area provided the essential good resources. Some of the Southern Paiutes also held rights to exclusive use of

some food areas. Although the Paiutes of Death Valley did not conceive of band ownership of food territories, individual families held cultivated land and mesquite, screw beans, and pine-nut plots. The Death Valley Paiutes did not claim exclusive use of other wild seed and hunting areas. Families among the Pahrump and Las Vegas villages in southern Nevada, eastern California, southern Utah, and northern Arizona held property rights in pine-nut groves, and these were inherited patrilineally. They, however, freely invited those whose crops had failed to participate in the seed harvest. Families did not claim other wild seed areas and hunting territories. Families of the Saline Valley Shoshonis of eastern California possessed usufruct to pine-nut plots while neither the family nor band owned other food areas.[21]

In the Plateau region, families or individuals usually did not hold exclusive rights to land or its resources but rather usufruct rested with the village, band or tribe. The tribes or bands held the more favorable fishing sites in common. Some families built weirs and maintained exclusive right to them. Small groups, as well, held usufruct to improved hunting sites such as pitfalls, traps, and game fences but the length of tenure is unknown. The Nez Perces villages had special fishing sites while the entire nation shared the more productive fishing places. Other bands and tribes recognized the prairies around the sheltered canyons where the bands lived during the winter as

belonging to Nez Perces bands and in these contiguous areas the bands fished, hunted, and gathered roots.[22]

A similar land tenure system existed among the Coeur d'Alene bands of Idaho and eastern Washington. Villages or the tribe held the land, rivers, and lakes in common. Each band chief directed the use of the area contiguous to the villages and determined when roots and berries would be gathered. The bands did not hold exclusive rights to the village locality since other tribal members possessed the privilege to exploit this area and only needed to notify the village chief as well as follow his regulations for use of the resources. Even so outsiders seldom utilized the village area of another band. The area distant from the villages was tribal territory and could be exploited freely by any of the tribal members.[23]

Like most other Plateau landholding groups, the Okanagon, Sanpoil, Colville, and Lake tribes of Washington each held land in common. Tribal members freely exploited the entire tribal territory. However, one band normally did not use the land near the headquarters of another band without its express permission.[24]

Tribelets or village communities in California existed as the typical autonomous political and landholding units. Probably about 500 of these miniature tribes occupied aboriginal California. In southern California clans claimed the land and its resources. In dealing with the

California culture area, anthropologists usually divide the aborigines into approximately forty ethnic non-political units or "tribes".

The tribelet or village communities held a distinct territory recognized by its members and surrounding tribelets and they guarded their boundaries against trespass. These village communities usually extended utilization of food resources to visiting tribelets who secured permission.

Among at least half of the tribelets including the Patwin, Achumauei, Yaki, Ipai, and Tipai, the community held the land and its resources in common with free use to all its members. Among the remaining tribelets, the village, clan, family, or individuals simultaneously claimed exclusive rights to the land and its resources. Shasta families held exclusive rights to fishing sites and hunting places while claiming private use to tobacco plots for only one season. Among the Northern Yanas, tribelets held the land while families possessed usufruct to seed plots and fishing sites. Tolowa villages held the territory while families claimed acorn groves and salmon-fishing areas for fifteen miles inland from the coast. The Maidu villages possessed hunting and fishing tracts in common, although families claimed certain fishing sites but other members of the community maintained the privilege of using them provided they obtained the proprietor's permission. These fishing places were inherited patrilineally. Similar to the Maidus, the Nisenan

tribelets held the hunting and fishing grounds in common while families controlled specific fishing places, oak groves, and certain trees. Each of the Southern Valley Yokut tribelets held the land and food sources in common although in some areas, individual women controlled tracts abundant in seed. The Coast Miwok tribelets held the land but families claimed exclusive right to certain trees, hunting areas, fishing spots, and clam-digging spots.[25]

Three Southeastern Pomo tribelets at Clear Lake held in common the land on which their villages were located. Plots of shoreland belonged to individual families on which they claimed exclusive gathering rights to the acorns and other vegetable food. Common hunting privileges pertained to the entire tribelet territory including the family tracts. Deer hunters refrained from hunting on other families' gathering grounds during the fall so the proprietor would not suspect them of attempting to gather acorns. Highly developed concepts of family exclusive use of food sources prevailed in areas of dense population and abundant food such as at Clear Lake and with some interior tribelets. Some of the other Pomo tribelets recognized common rights to land and its resources. A few of the tribelets shared hunting and gathering privileges in the other's territory.[26]

The Yurok had the most highly developed property rights of the California aborigines. Multiple forms of ownership prevailed among these tribelets. Families owned cer-

tain fishing sites, oak groves, hunting grounds and gathering places. Unclaimed food source areas remained communal and available for use by the entire village. Individuals and families could sell and buy fishing, gathering, and hunting rights to specific sites to other members of their community.[27]

Among other California aborigines, particularly in southern California, clans or lineages held the land. The Cahuilla "tribe" was separated into clans which consisted of three to ten lineages. Members of the clan held the clan territory in common. The lineage possessed the area contiguous to the village while the clan controlled other land which they divided into tracts used by the clan, families, and individuals. Clans also held land among the Serrano, Luiseno, and Cupeno. All members of a Luiseno village collectively used the resources of its territory. A village chief directed the exploitation of hunting and gathering areas. Individual families possessed usufruct over gardens and these were inherited patrilineally. Patrilocal families also claimed certain oak groves, plant areas, and tobacco plots. Clans among the Cupeno held the more favorable areas of the Cupeno territory and the region located between clan territories were freely used by all members of the clans. Every Cupeno could hunt throughout the entire territory claimed by the clans. Some lineages within the clan claimed separate lands.[28]

In the Pacific Northwest from northwestern California to Alaska, two overlapping concepts of property rights existed. The most profitable sites for subsistence were allocated. Nominally rich men of the village held title to the more favorable fishing, snaring, trapping, and gathering places. They had to grant permission to kinship groups, often the entire village, to exploit these areas so actually usufruct rested with the community. The nominal owner retained the right to use the sites at the most favorable times. Some of the land remained common hunting grounds for the entire village. Among the Yuroks, individuals held private fishing sites as well as occasionally claiming them jointly with non-relatives. The son inherited these fishing places from his father. Individuals could buy and sell the fishing sites although this right of alienation applied only to members of the community. The village build communal fishing weirs annually but the community usually allocated specific sections of it to individuals. The Makah Indians of western Washington in the Cape Flattery locality held restricted areas contiguous to their villages. The outlaying land remained free territory and other tribes came to the area to fish.[29]

In the western Arctic in present Alaska, Eskimos and Aleuts subsisted on caribou, moose, sea mammals, and fish. These aborigines lived in small aggregations and did not claim defined territories. Patricentered families held ex-

clusive usufruct for salmon and seal netting sites as well as for inland hunting places or tracts. Patrilineal inheritance prevailed for salmon net sites.[30]

The food quest of the Athapaskan Indians of the Yukon Sub-Arctic in Alaska centered around fishing and hunting of caribou and moose. The hunting of the latter was international in some localities while in some areas it was band-centered. Kinship groups claimed exclusive rights to fishing sites.[31]

The Iroquois League before 1678 consisted of twelve or thirteen Mohawk, Oneida, Onondaga, Cayuga, and Seneca villages situated in western New York. The Iroquois nation held nominal title to the tribal territories. Villagers, however, possessed usufruct over the hunting land, fishing sites, berry patches, gardens, medicine plant areas, pigeon nesting sites, and sugar bush areas contiguous to the village. Tribal members could hunt throughout the tribal territory. Kin groups held usufruct over fishing sites and maternal lineages held agricultural land. When the fertility of a village area became exhausted and firewood and game became scarce, the entire village moved and at the new location the maternal lineage household received new plots of land. The Iroquois tribes relinquished claims on the lands they formerly occupied. They allowed dislocated tribes to occupy and use tribal land but title remained with the Iroquois.[32]

Some of the eastern agricultural tribes shared tribal

hunting grounds with other tribes. Only the Powhatan and Delaware tribelets claimed restricted use of hunting territories. Among the Delawares, a matrilineal group held the hunting land while Powhatan men nominally held tracts of land but probably they actually were used by a kin group. Powhatan kinship groups claimed exclusive use of fishing sites. Both fishing and hunting rights were included in the plots of land claimed by Powhatan men.[33]

Among Algonkians on the Atlantic coast in Virginia and eastern North Carolina each family possessed usufruct to its own garden plot. The village also held a town field in common and the entire community shared its produce. Each Indian cleared as much land as he wanted and the plot remained exclusively his as long as he cultivated it. If he abandoned the field, anyone could claim it. Title rested with the tribe.[34]

The Sac and Fox tribes of the upper Mississippi Valley held communal title to their land. Families did not maintain exclusive property rights in land or its resources. Each season the tribal council designated certain areas for small groups to exploit. Their neighbors, the Winnebagoas, subsisted mainly on hunting while agriculture supplied secondary food sources. Each clan segregated and kin groups held fields in common with each family usually cultivating their own field.[35]

In the sub-arctic regions of eastern and northern

United States the Algonkians' food quest largely involved hunting. Much anthropological debate in the twentieth century has centered on the aboriginal or post-contact origin of small patrilineal family hunting tracts with delimitated boundaries. Currently, consensus maintains that small family hunting territories developed in the historic period largely in response to the fur trade.[36]

The Plains aborigines subsisted by hunting large game such as the buffalo, elk, deer, and antelope. These nomadic hunters roamed the Plains in their food quest. A subculture included the Pawnee, Mandan, Hidatsa, Arikara, Assiniboin, Omaha, and southern Siouan tribes which some anthropologists have described as Prairie tribes. These tribes differed from the main Plains culture because their means of subsistence was derived from farming as well as bison hunting.

Many of the Plains aborigines organized into autonomous, political units either on the band or tribal level. Some, including the Cree, divided into family units during the winter in order to enhance survival. The Plains tribes or bands did not claim a defined territory because they believed "Mother Earth" belonged to all mankind. The tribes or bands usually restricted their hunting to certain areas so they could preserve food sources for their exclusive use. If the food supplies within their territory became depleted, the bands or tribes entered the domain of other groups but with the full knowledge that their trespass could lead to

warfare. The aborigines believed food sources belonged to everyone. Some of the tribes or bands shared hunting grounds. No social unit smaller than the band or tribe among the main Plains culture held usufruct.[37]

The subculture of the Prairie aborigines allowed proprietor rights to small garden plots or wild rice areas. The Omaha, Mandan, Gros Ventre, and Arikara tribes recognized usufruct in garden plots as long as the women used the fields. Nominally the women held the plots but the matrilineal kin group cultivated the gardens so in reality usufruct rested with the latter. If a family allowed a plot to remain uncultivated for a season, then anyone in the tribe could claim it because the tribe or band merely had loaned the plot to the cultivator. Clans among the Hidatsa tribe possessed definite property rights and when the proprietor of a garden plot died, it reverted to the clan for their disposal. In the wild rice area around the Great Lakes Indian families habitually returned to the same rice fields every year. Property rights pertained to the wild rice beds rather than the land.[38]

The agricultural tribes of the Southwest viewed the produce of the fields as the essential element in tenure rather than ownership of land. Among these tribes multiple forms of land tenure existed and the landholding unit included the tribe, village, clan, family, and individual. Each Pueblo existed as an autonomous political unit and con-

sisted of numerous kin groups. The village divided its agricultural land among the kin groups thus enabling each to possess proprietorship over its fields. Family plots were inherited bilineally.[39]

Among the Hopis the village, clan, and families held land. Each village allotted land to the matrilineal clans while retaining some tracts as village lands. The clan assigned fields to the maternal lineage segments which lived in separate households. The women of the household held usufruct over individual plots and possessed the right of alienation subject to the approval of the clan or sib mother. Both the family and clans possessed numerous dispersed fields in the village area in order to guard against families becoming destitute when fields flooded or were destroyed. Also insuring against such disasters, the clans retained some of its fields from cultivation in order to assign them to families beset by ruined fields. The mother of the household gave plots to her daughters when they married. Upon the mother's death, any remaining fields usually descended to female relatives, mainly to daughters. If a man cleared former village waste land, he assumed exclusive use of the plot as long as he cultivated the plot. Another villager could claim a field which fell into disuse but he had to obtain the permission of the original cultivator who could reassert possession if he resumed farming the plot. Upon the death of the cultivator the field was trans-

ferred to a son or nephew, otherwise the field reverted to the village. The village or clan set aside land for political, ceremonial, and dancing societies. Village inhabitants maintained these fields and also cultivated the chief's land.[40]

Among the Navajos the first person, man or woman, who cultivated a plot established permanent possession even if the original cultivator or his descendants abandoned the field. Exclusive use, however, pertained only to agricultural produce and not to the natural vegetation such as shrubs, trees, roots, berries, and to springs which anyone could use freely. The land was inherited matrilineally. Anthropologists have described the Navajo land tenure system as one of inherited use ownership.[41]

Similar to the Pueblos, the Pima land tenure consisted of village, family, and nominally individual possession. The men received allotted lands from the village. Even though women could not claim land they retained usage rights. The male head of the household held official possession of the land, but the entire family worked the plot and maintained usufruct. The family retained only exclusive use to the agricultural products, trees, and bushes on their assigned land while the vegetation on unassigned tribal land could be exploited by anyone. If a family required additional land, they applied to the village council.[42]

Among the agricultural tribes of the Southwest, kin

groups seldom claimed hunting territory. Chiricahua Apache bands, consisting of kin groups, possessed hunting territories. The Pueblo hunting territory was controlled either by an entire Pueblo or was international.[43]

The Southeast tribes--the Chickasaws, Cherokees, Creeks, Choctaws, and Natchez--were largely agricultural with hunting and gathering as secondary methods of subsistence. Each tribe claimed sovereignty over designated areas. Several of the tribes shared rights to certain hunting territories as well as having specific tribal hunting areas. Even in the latter case, some tribes hunted on the other's territory without fear of punishment for trespass. A hunter could hunt anywhere on tribal territory outside of the jurisdiction of the villages which usually extended only beyond its contiguous limits consisting of scattered houses with garden plots. The Euchees, a Creek cognate, however, apparently claimed exclusive hunting territory.[44]

Each village held lands in common. Village fields existed in each village community. The villagers under the charge of a village overseer communally cultivated the crops which largely consisted of maize. Each town plantation located on the outskirts of the village was divided into family plots with artificial features such as strips of grass and poles marking the boundaries between plots. During the harvest season the woman of the household reaped the family plot in the town field and stored the produce in the

family's private granary. Each family gave a certain portion of the crop to the village storehouse under the charge of the village chief. The food supply stored in the public granary provided food for village visitors, ceremonies, war parties, families whose granaries became depleted, and times of disaster.[45]

Each of the families held usufruct to garden plots located by their houses. Among the Creeks the garden plots were inherited matrilineally. A family could cultivate any amount of land and as long as they used the plot it belonged exclusively to the family. If the family abandoned the plot, any village member could claim usufruct.[46]

The Natchez assigned certain plots to the chiefs and designated other areas as sacred fields. The men worked the latter while village members cultivated the chief's fields.[47]

The Indian and Hawaiian valued land for its products rather than the land per se. They maintained a metaphysical relationship with the land. Neither conceived of land in terms of absolute ownership. Inherited usufruct provides a more conclusive description of Indian land tenure than either communal, in common, or individual. Among the Hawaiian makaainana, inherited usufruct normally prevailed in actuality and occasionally applied to the alii class. Wars of conquest and the subsequent redivision of lands frequently prevented the inheritance of lands, especially among the chiefs of the Hawaiian Islands.

END NOTES

[1]Quoted in Sue Whalen, "The Nez Perces' Relationship to Their Land," Indian Historian 4 (August 1971): 30.

[2]The Makahiki festival began in October or November and lasted for four months. David Malo, Hawaiian Antiquities, trans. by Nathaniel Emerson (Honolulu, 1903; 2d ed., Honolulu, 1951; reprint ed., Honolulu, 1971), pp. 81-95, 141-59, 121, 124-25; Edward S. M. C. Handy and Mary Kawena Pukui, The Polynesian Family System in Ka-u, Hawai'i (Wellington, New Zealand, 1958), pp. 28-29; Samuel M. Kamakau, Ka Po'e Kahiko; The People of Old, trans. by Mary K. Pukui, edited by Dorothy Barrere (Honolulu, 1964), pp. 19, 27-28, 64-91, 128; E. S. Craighill Handy and Mary K. Pukui, Native Planters in Old Hawaii: Their Life, Lore, and Environment (Honolulu, 1972), pp. 42-43.

[3]Although the Yuma did allow this practice, it seldom occurred. See Daryll Forde, "Ethnography of the Yuma Indians," University of California Publications in American Archaeology and Ethnology 28 (1931): 114; Harold Driver, The Indians of North America, 2nd ed., rev. (Chicago, 1969), p. 281.

[4]James Jarves, History of the Sandwich Islands. . . 4th ed. (Honolulu, 1872), p. 17; Handy & Pukui, Native Planters, pp. 58-60, 63.

[5]During the middle period of Hawaiian history, the position of moi frequently became hereditary; although this was tempered by the wars of conquest. Occasionally powerful alii held title to land without regard of the moi's supremacy. Abraham Fornander, An Account of the Polynesian Race . . ., 3 vols. (London, 1878-85; reprint ed., Rutland, Vermont, 1969), pp. 65-78, 91, 94-95, 2-5-215, 269-281, 290-94, 300; C. J. Lyons, "Land Matters in Hawaii," The Islander 1 (1875): 103, 104, 111, 118, 126, 135, 143, 150, 159, 168, 174, 182, 190; Handy & Pukui, Native Planters, pp. 41, 288.

[6]Malo, Hawaiian Antiquities, pp. 53, 61; Handy & Pukui, Native Planters, p. 288; W. D. Alexander, "A Brief History of Land Titles in the Hawaiian Kingdom," Hawaiian Annual (1891),

p. 108; Territory of Hawaii, Indices of Awards Made by the Board of Commissioners to Quiet Land Titles in the Hawaiian Lands (Honolulu, 1929), p. 1; William Richards to Charles Wilkes, William Richards, March 15, 1841, William Richards MSS, AH.

[7]Malo, Hawaiian Antiquities, pp. 16, 18, 58, 195.

[8]Ibid., pp. 53, 58, 61, 193, 195; Handy and Pukui, Polynesian Family System, p. 4; Archibald Campbell, A Voyage Round the World, From 1806 to 1812 . . . 4th Am. ed. (Rosbury, Mass., 1825), p. 130; Marshall Sahlins and Dorothy Barrere, eds., "William Richards on Hawaii Culture and Political Conditions of the Islands in 1841," Hawaiian Journal of History 7 (1973): 38, fn. 10.

[9]Malo, Hawaiian Antiquities, pp. 53, 58, 60-61, 195, 202-03; Fornander, Polynesian Race, p. 290; Richards to Wilkes, March 15, 1841, Richards MSS.

[10]Malo, Hawaiian Antiquities, pp. 141-159; Kamakau, Ka Po'e Kahiko, pp. 19-21.

[11]Malo, Hawaiian Antiquities, p. 16; see Fornander, Polynesian Race, p. 300 and passim and Handy & Pukui, Native Planters, pp. 278-279 for discussion of the rise of moi's over one island.

[12]John Papa Ii, Fragments of Hawaiian History, trans. by Mary K. Pukui and ed. by Dorothy B. Barrere (Honolulu, 1959), pp. 13-15; Fornander, Polynesian Race, pp. 67-78, 91, 94-95, 106, 145-46, 149, 205-15, 269-78, 292-94, 300, 302, 307-08; William Ellis, A Journal of William Ellis: Narrative of a Tour of Hawaii . . . (London, 1827; reprint ed., Honolulu, 1963), p. 106; Jarves, History of the Sandwich Islands, p. 20; Malo, Hawaiian Antiquities, p. 194.

[13]Quoted in Martha W. Beckwith, "The Hawaiian Romance of Laieikawai," Bureau of American Ethnology, Annual Report , 33 (1919): 310; Malo, Hawaiian Antiquities, p. 192.

[14]Lyons, "Land Matters in Hawaii," pp. 103-04, 111; Alexander, "A Brief History of Land Titles in the Hawaiian Kingdom," p. 106.

[15]Lyons, "Land Matters in Hawaii," pp. 104, 111.

[16]Malo, Hawaiian Antiquities, p. 146; Alexander, "A Brief History of Land Titles in the Hawaiian Kingdom," p. 106; Hawaiian Annual (1890), p. 65; Ellis, Narrative of a Tour of Hawaii, p. 250; James Cook and James King, A Voyage to the Pacific Ocean . . . 3 vols., 2nd ed. (London, 1785), 3: 158.

[17]Malo, Hawaiian Antiquities, p. 16; Alexander, "A Brief History of Land Titles in the Hawaiian Kingdom," pp. 106-07; Lyons, "Land Matters in Hawaii," p. 119; Jean Hobbs, Hawaii: A Pageant of the Soil (London, 1935), p. 14.

[18]Handy and Pukui, Polynesian Family System, pp. 2-3, 5-6; Handy & Pukui, Native Planters, pp. 315-16.

[19]Malo, Hawaiian Antiquities, p. 146; Campbell, Voyage Round the World, pp. 126, 130. Territory of Hawaii, Indices of Land Commission Awards, pp. x, 134.

[20]Cook and King, Voyage to the Pacific Ocean, 3: 113, 128; Handy and Pukui, Polynesian Family System, pp. 1, 7-8; Handy & Pukui, Native Planters, pp. vi, vii, 284-85.

[21]Julian Steward, "Linguistic Distributions and Political Groups of the Great Basin Shoshoneans," American Anthropologist, n. s., 39 (Oct.-Dec. 1937): 629-34; Idem, "Ethnography of the Owens Valley Paiute," UCPAAE, 33 (1933): 241, 247-52, 305; Idem, Basin-Plateau Aboriginal Groups, Bureau of American Ethnology, Bulletin 120 (1938): 252-58; Willard Park, et al, "Tribal Distribution in the Great Basin," AA, n. s., 40 (Oct.-Dec. 1938): 623-33; Isabel Kelley, "Ethnography of the Suprise Valley Paiute," UCPAAE, 31 (1932): 75-78, 185; Idem, "Southern Paiute Bands," AA,n.s., 36 (Oct.-Dec. 1934): 549, 557, 560.

[22]Herbert Spinden, "The Nez Perce Indians," American Anthropology Association Memoirs, vol. 2, pt. 3 (1908), pp. 242, 245-46.

[23]James Teit, The Salishan Tribes of the Western Plateaus, ed. by Franz Boas, BAE, AR, 45 (1930): 37-38, 88, 162-63.

[24]Ibid., pp. 198, 237, 277.

[25]Alfred Kroeber, "The Nature of Land-Holding Groups in Aboriginal California," Reports of the University of California Archeology Survey no. 56 (1956), p. 109; Edward Gifford, "Miwok Lineages and the Political Unit in Aboriginal California," in Robert Heizer & M. A. Whipple, eds., The California Indians, (Berkeley & Los Angeles, 1951), p. 328; Edward Spicer, ed., Perspectives in American Indian Culture Change (Chicago, 1961), pp. 14-15; William Sturtevant, gen. ed., Handbook of North American Indians, vol. 8: California, edited by Robert Heizer (Washington, 1978), pp. 364, 373, 379, 398, 418, 454.

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[45]Swanton, Indians of the Southeastern United States, p. 309; Idem, "Social Organization . . . Creek Confederacy," pp. 336, 443-44; Idem, "Social and Religious Beliefs and Usages of the Chickasaw Indians," p. 216.

[46]Swanton, "Social Organization . . . Creek Confederacy," pp. 336, 443; Idem, Indians of the Southeastern United States, p. 137; Underhill, Red Man's America, pp. 30,33.

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CHAPTER III

APPROPRIATION OF THE INDIAN LANDED ESTATE: PART ONE

The United States government's relation with the American Indian has largely concerned the status of tribal territory, producing the progressive reduction of the Native American land base. Americans continuously clamored for additional land during their expansion westward. Usually the federal government negotiated with the Indians for land already occupied by frontiersmen. In the treaties the national government pledged that reduced tribal territories would remain forever in the possession of the Indians. The seeming insatiable thirst of American settlers for land forced the United States repeatedly to break its pledges to the tribes. Even in the twentieth century the federal government has taken Indian lands held in trust or has instituted policies that ultimately led to alienation of Indian lands.

In the late eighteenth and for most of the nineteenth century the United States government used two methods to appropriate Indian lands--treaties and military force. Federal officials often treated with the Indians for reduced tribal territory or for an exchange of lands in an unsettled area.

Military conflict between Indians and the army often provided justification for taking land because officially the Indians had committed either treason or rebellion against the United States. The army occasionally came to the aid of Indians when settlers invaded their territory but usually they joined their fellow whites in fighting the Indians. By recognizing the right of Indian tribes to make treaties, the United States government recognized the theoretical existence of Indian tribes as independent nations with sovereign character. The United States government frequently used treaties as a means to institute new federal policies toward the Indians. Also treaties often sanctioned frontier expansion onto Indian lands as an ex post facto measure.

The young American nation essentially followed the British policy model in dealing with aborigines, although the founding fathers deviated from this course during the period of the Confederacy. Thus, from 1783 to 1786 American leaders claimed Indian lands on the basis of the law of conquest. The participation of most of the Eastern Indian tribes on the side of the British during the Revolutionary War provided the justification for American demands that the aborigines cede large portions of their land as war reparations. Demoralized as a result of the War of Independence, the Northern and Southern Indian tribes agreed to the treaty provisions. By 1786 the aborigines had recovered and began to assert their claims to ownership of ceded lands and aggressively began to

oppose settlement of these lands. American leaders discovered that their rationale for acquiring Indian lands failed in its application because the Indians did not willingly accept the loss of their lands as reparations of war. Since the poverty-stricken American government could not afford to wage war against the Indians and because it desperately needed the income from the sale of lands acquired by the cession treaties, national leaders abandoned the principle of conquest and reverted to the British policy of purchasing land by token payment, thereby acknowledging the Indian's right of soil.[1]

National leaders returned to the philosophy that the United States had acquired title to all the land west to the Mississippi River based on the doctrine of discovery which they inherited from the British. Thus Indian tribes merely possessed the right of occupancy on the lands they claimed. Based on this concept, the United States leaders believed they should purchase the tribal right to the soil. George Washington, Thomas Jefferson, and Henry Knox espoused the view that just wars against the Indians also permitted appropriation of Indian lands. Washington, Jefferson and Knox, and others believed that the Indians possessed the right to the soil and that the United States had to purchase the lands and that this principle provided the only honorable rationale for acquiring Indian land. They formulated policy acknowledging Indian rights and protection of tribal land.

These early leaders, Knox in particular, sought a policy that would not stain the national honor.[2]

American officials believed that Indians would readily sell their lands and national expansion would proceed in a peaceful and orderly fashion. The Northwest Ordinance, 1787, stated:

> The utmost good faith shall always be observed towards the Indians; their lands and property, shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress but laws founded in justice and humanity shall from time to time be made for preventing wrong being done to them, and for preserving peace and friendship with them. [3]

No matter how well-intentioned or humanitarian the official view, the national government lacked the means to control settlers actions, few of whom seemed to care about national honor or Indian rights. Frontiersmen, for the most part, saw Indians as obstacles to obtaining land, westward expansion, and desired economic development.

Rank and file Americans also continued in the European view that Indians should not possess all of the land claimed by each tribe because they used only a small portion of it. The American belief also maintained that land should be used for farming and tribes not following agriculture should be deprived of lands that held agrarian promise. Many reformers, missionaries, and national leaders used morality to justify appropriating Indian land; they thought that

Indians should become farmers and live on small plots of land. Americans viewed private property as a sign of civilization.[4] For the most part, the tribes held land in common and did not conceive of land in terms of individual ownership.

Many officials, missionaries, and humanitarians believed that the federal government should make an effort to civilize the Indians. They believed that Indians should be encouraged to adopt white customs including farming, Christianity, and other aspects of Anglo civilization.[5] Government policy and missionary activity came to reflect this attitude.

Many American leaders hoped to provide for peaceful white expansion by assimilating the Indian; then they would sell their lands so that American expansion could proceed smoothly. Few Native Americans, however, willingly ceded their land; most Indians aggressively resisted white expansion. Although the United States had acquired title to substantial tracts of Indian lands by the end of the eighteenth century, it accomplished this largely through the use of military force.

Thomas Jefferson supported the use of military force in the 1790s against the Old Northwest tribes because of their insurgency, but he advocated other methods to acquire Indian land. He recommended that the federal factory system be used as a means of obtaining Indian land; government traders were encouraged to lead Indians into debt through

generous extension of credit, and in order to pay their obligations the aborigines would be forced to sell land. Jefferson also believed that many Indians would sell their land and move westward as the settlement line approached their territory and killed off the game. Jefferson also supported assimilation as a means of acquiring Indian lands. As Indians became absorbed into the white population, their land needs would diminish. And until the War of 1812 this attitude provided the basis for United States Indian policy. Jefferson also entertained the idea of removing portions of some of the Eastern tribes west of the Mississippi River.[6]

Early in the nation's history the concept of right of conquest, doctrine of discovery, treaty making, and military conflict played an important part in dealing with Indian tribes. The new government of the United States reestablished peace with the Iroquois Confederacy in 1784 at Fort Stanwix, New York. Most of these tribes had sided with the British in the American Revolution and as a result American officials claimed that they had relinquished their claims to part of western New York, Ohio, and Pennsylvania. Conflict erupted in the Old Northwest after settlers moved into the territory guaranteed to the Indian tribes in the Northwest Ordinance of 1787. The frontiersmen demanded that the national army protect them as they expanded into the region above the Ohio River. After the army sent two unsuccessful expeditions into the area to bring peace, General Anthony Wayne defeated

the confederated Indians at Fallen Timbers in northwest Ohio. Wayne forced the chiefs to cede about two-thirds of Ohio, a large part of Indiana, and other areas in the Old Northwest in the Treaty of Greenville, 1795.[7]

From the beginning the national government tried to regulate Indian affairs and the transfer of aboriginal lands. Congress in 1790 passed the Non-Intercourse Act which required that Indian land could be purchased only through federal treaties. Three years later Congress in the second Non-Intercourse Act required the presence of a United States commissioner at negotiations between individual states and tribes. Congress had to approve the treaties.[8]

Several states pursued an independent policy in defiance of national rules. New York agents negotiated with the Oneidas for six million acres of tribal land, and for a large cession from the Onondagas and Cayugas. The state government persisted in its efforts to purchase Indian lands even after the United States government again guaranteed the lands of the Six Nations in the Treaty of Canandiagua in November, 1794. Secretary of War Timothy Pickering and the United States agent to the Six Nations repeatedly told New York officials that the tribes' land rights could be extinguished only through treaties with congressional sanction. Federal officials informed the Iroquian tribes and state officials that any other treaty would be deemed invalid. New York agents, however, negotiated cession treaties with

the Cayuga, Onondaga, and Oneida tribes. During the eighteenth and nineteenth centuries, New York concluded more than two dozen treaties with the Oneidas. As late as 1890 state officials violated federal statues by purchasing land from the Oneidas.[9]

Other states violating the national directives included Maine, Massachusetts, and Georgia. Massachusetts officials negotiated treaties with the Passamaquoddy and Penobscot tribes. After entering the Union in 1820, Maine assumed responsibility for these two tribes. Within a few years, Maine commenced its policy of selling and leasing Indian lands. In November, 1786, Georgia authorities concluded a treaty with a small group of Creeks in which the Creek tribe ceded all its lands in Georgia east of the Oconee River.[10]

Soon after the Old Northwest cession in 1795, settlers coveted the Indian lands remaining north of the Ohio River and invaded tribal territory. A nationalistic Shawnee chief, Tecumseh, and his brother the Prophet, opposed additional cessions and attempted to rally other Indian tribes into uniting and halting the continued sale of Indian lands. Tecumseh refused to accept land cessions made by weaker chiefs. He maintained that no tribe or individual could give away or sell any land because it was the common property of all tribes. Governor of Indiana Territory William Henry Harrison was determined to rid the region of Indians. When

the War of 1812 erupted, Tecumseh joined the British in fighting the Americans. Harrison's troops killed Tecumseh at the Battle of Thames River in southern Canada in October, 1813. With his death, his followers scattered. After the American victory, the Indians lost their British allies, their means of resistance, and in a series of treaties quickly surrendered much of their remaining lands to the United States.[11]

After the War of 1812, the federal government moved toward a policy of removing the Indian tribes west of the Mississippi River. This action first started with the Old Northwest tribes. Settlers wanted the lands still occupied by the tribes and demanded Indian removal. They justified their demands by claiming that the tribesmen had committed treason against the United States and therefore should be punished by cession of their lands. After the War of 1812, the Old Northwest tribes possessed little ability to resist American expansion although bands of Kickapoos, Sac and Fox, and Winnebagoes resisted removal efforts. As late as 1832 Black Hawk, the Sac and Fox leader, resisted surrender of tribal lands in Illinois and removal to the trans-Mississippi region.[12]

Removal, a segregation policy, also affected the Southeast Indian tribes after the War of 1812 and their fate became similar to that of the Old Northwest tribes. After the American Revolution, the United States government signed

peace treaties with the Southern tribes because most of them had sided with the British. Settlers moved onto Indian lands and pressured the government to acquire additional lands from the Creeks and other tribes of the region. Angered by white expansion a Creek faction, the Red Sticks, joined Tecumseh in his opposition to settler expansion. During the War of 1812 these insurgents aligned with the British. Red Stick raiders attacked settlements in Georgia and Alabama and killed several hundred Americans. General Andrew Jackson, aided by loyal Creek and Cherokee regiments defeated the Red Sticks at Horseshoe Bend in March, 1814. At the Treaty of Fort Jackson, 1814, the United States government forced the entire Creek Nation to cede about two-thirds of its territory in Georgia and Alabama because one faction of the tribe had sided with the British.[12]

In 1818 troops under General Jackson invaded Spanish Florida to punish the Seminoles for harboring runaway slaves. Spain ceded Florida to the United States in 1819. As a result of the First Seminole War, the United States forced the Seminoles to cede much of their land in Florida and acacept a reserve in the interior of the peninsular.[13]

Desiring to flee from the press of American settlements some tribal bands voluntarily moved west of the Mississippi. Kickapoos, Delawares, and Shawnees comprised the first emmigrants, although Cherokee immigrants provided the first substantial migration to the Indian country. In the

1790s a band under the leadership of The Bowl moved to Arkansas, and in 1809 a group of Lower Cherokees joined them. In an 1817 treaty the Cherokees and the United States government formalized Cherokee possession of an area in northwestern Arkansas, where most of the immigrants resided, in exchange for ceding one-third of their lands in the East embracing tracts in North Carolina, Tennessee, and Georgia. Later in 1828, the United States government signed another treaty with the Cherokees in which they exchanged their lands between the White and Arkansas Rivers for lands in present day Oklahoma. They agreed to the exchange to escape the press of American settlements pushing up the White and Arkansas river valleys. In order for the Cherokee land transactions to take place, the federal government negotiated treaties in 1808, 1818, and 1825 with the Osages for cession of their lands in present day Missouri, Arkansas, and Oklahoma.[14]

Pressure by the United States government and white settlers also led a group of Choctaws to sign the Treaty of Doak's Stand in 1820 in which the tribe ceded a portion of its lands in Mississippi for lands in southwestern Arkansas Territory and Indian Territory. Preceding this treaty, in 1818 the Quapaws concluded an agreement with the federal government which ceded their lands between the Arkansas and Red Rivers.[15]

Frontiersmen also had intruded into Creek territory and these settlers agitated for the tribe's land. A number

of treaties with the United States government including ones signed in 1818 and 1821 led to continued reduction of Creek lands. Concerned over the demise of their domain the Lower Creeks under the leadership of Chief William McIntosh, a mixed-blood, agreed in 1825 to relinquish their lands in Georgia for a new domain in Indian Territory. The Upper Creeks, led by Opothleyaholo, refused to sign the treaty until 1826 when they agreed to a removal treaty, the first Treaty of Washington, which ceded only a portion of their lands in Alabama and Georgia in exchange for a new domain in Indian Territory. Most of the Creeks wanted to remain on their ancestral lands and refused to move to Indian Territory.[16]

During this period of voluntary removal, only a fragment of the Creeks, Cherokees, and Choctaws, migrated to their western lands. Most of the tribal members remained on their ancestral lands in the South. Those Indians removing hoped to escape the continual encroachment by frontiersmen and harassment by state governments.

The policy of forced segregation through removal or Western exile, that evolved in the early part of the nineteenth century,received official sanction during the 1820s and in 1830. President James Monroe in 1825 announced the intensified removal policy. Monroe and Secretary of War James C. Calhoun formed the initial plan for relocating the Eastern tribes. As indicated the federal government first applied removal to the Old Northwest tribes and then to the

Southern Indians. At first President John Quincy Adams tried to uphold the Southern Indians' right to remain on their ancestral lands but before leaving office Adams agreed that removal provided the only solution to the Indian problem. Almost every president had considered such a policy but they always believed it should be voluntary. The decisive break came with the election of Andrew Jackson to the Presidency in 1828. Jackson's policy led to forced removal sanctioned by treaties with the tribes surrendering their southern lands. Jackson's attitude reflected that of frontiersmen who believed that Indian residence in the Eastern United States comprised an unnecessary obstacle to white expansion and economic development. Jackson also thought that the Indians had only a "possessory right" to the land they lived on and thereby were subject to American sovereignty; he denied that Indian tribal governments could exist within a state or territory.[17]

The policy of segregation by removal reflected not only the desire of moving the Indians out of the path of westward expansion but also was consummation of the view held by some Americans that such a measure would benefit Indians. This attitude of morality urged that Indians must be removed west of the Mississippi River in order to save them from destruction by the effects of white civilization that already had devastated so many aborigines. Jefferson had entertained this idea as the basis for his consideration

of Indian removal to the trans-Mississippi West. Frequently this view was mere rhetoric to cover the lust for Indian lands. Wilson Lumpkin, the governor of Georgia during the removal period, rationalized predatory actions by Georgians against resident Indians on moral grounds. Lumpkin implied that removal provided protection for the Cherokees while they transformed from a state of "barbarism" to one of "civilization" and became acculturated.[18]

President Jackson seasoned his removal plan in a rhetoric which stated that by removal west of the Mississippi the Indians, away from the influence of white civilization, would prosper. He hoped that in time the aborigines would accept white civilization. As the American nation continued to expand, many Americans accepted Jackson's ideas. Since Americans wanted to justify the removal of the Indians, they adopted Jackson's rhetoric that provided them with moral justification to ease their conscience. They accepted the view that removal outside of the organized United States would save the Indian from destruction by white society and that it provided the only humane alternative. Also, in the 1830s many national leaders came to believe it offered the best solution for the Indians.[19]

During the early part of the nineteenth century, the vast expanse beyond Missouri was popularly viewed as the "Great American Desert," a region unfit for white habitation and survival. Many therefore believed that American expansion

would never extend west of Missouri. This provided the background for the attitude that Indians would be safe and secure in their Western lands. Jefferson held this view as did Secretary of War John C. Calhoun. In 1825 Calhoun supported removal because he believed that the Indians would have a permanent home there because the United States would never expand beyond Missouri. William Clark, Superintendent of Indian Affairs at St. Louis, presented this view when he told President Monroe that the federal government should be benevolent to Indians since they no longer posed a military threat; thus, they should be removed so they "could rest in peace." President Jackson presented a similar argument. Most Americans held this outlook and pro-Jackson forces used this reasoning in Congress during debate of Jackson's removal policy. A few men with more foresight argued that this would not occur. Senator Theodore Frelinghuysen, New Jersey, and Senator Edward Everett, Massachusetts, in objecting to Jackson's removal plan maintained that Indian title to the land west of the Mississippi would not be secure since the United States would advance to the area before the end of the 19th century, especially if the region was as fertile as the pro-removal forces argued in urging passage of the Indian Removal bill.[20]

A large number of Eastern humanitarians in the 1820s and early 1830s supported the Southern Indians' right to remain on their ancestral lands. They stressed the obligation

of the federal government to protect the Indians in their possession of aboriginal title because it had sanctioned this in treaties with the tribes. These humanitarians, including members of the American Board of Commissioners for Foreign Missions, and some abolitionists, believed federal authorities should protect these rights guaranteed in earlier treaties. Humanitarians as well as anti-Jackson politicians opposed the removal plan and tried to defeat the measure in Congress. When this approach failed the anti-removal forces turned to the United States Supreme Court in an endeavor to safeguard the Indians' territorial rights. The Indians and their white supporters based their legal action on rights guaranteed by treaty and used Georgia's mistreatment of the Cherokees as a basis for their appeal to the Supreme Court. Settlers within Georgia as well as in other southern states harassed the Indians and the state governments protected the frontiersmen in their activities. After removal, the settlers and governments in Missouri, Arkansas, and Kansas continued this policy. Settlers carried out acts of depredations against the Indians by burning Indian towns, running off livestock, and squatting on Indian lands. State courts and juries, protected the settlers. State law refused to allow Indians to testify in courts against whites. If the Indians resisted militarily, frontiersmen summoned troops from frontier posts to put down the "Indian uprising." In the South the states, following Georgia's precedent, extended state law over the

tribes' territory and dissolved the tribal governments. President Jackson refused to safeguard the Indian and his rights.[21]

The anti-Jackson forces and humanitarians urged the Cherokees to take legal action and supported them in their appeals to the United States Supreme Court in the early 1830s. The Cherokees' legal endeavors characterized one way in which they tried to resist white encroachment on their lands and to retain their tribal sovereignty. In 1827 the Cherokees adopted a written constitution. This document proclaimed the Cherokees as an independent nation with complete sovereignty over tribal land in Georgia, North Carolina, Tennessee, and Alabama. While the federal government previously had used tribal sovereignty as an excuse to obtain Indian land cessions the Cherokees intended to use tribal sovereignty to prohibit future transactions. Since Georgia officials considered Indians as merely tenants subject to the will of the state, they passed legislation extending state jurisdiction over the Indians' territory. To support their actions, Georgia officials referred to the 1823 McIntosh decision. On that occasion Supreme Court Justice John Marshall had stated that Indians held their land by "right of occupancy" which was subordinate to the "right of discovery" that the United States inherited from England. The Cherokee Nation reacted by filing suit in the Supreme Court for an injunction to stop Georgia from interfering with the tribe's internal

affairs. The Cherokees argued that the court must defend the tribe's droits to land and self-government since the federal government had long upheld these sovereign rights in treaties. The court in Cherokee Nation v. Georgia ruled that it did not have jurisdiction in the case because the Cherokees incorrectly sued as a foreign nation. Supreme Court Justice Marshall in the majority opinion described the Cherokees as a "domestic dependent nation" and their relationship to the federal government as one of ward to his guardian. Thus the Supreme Court ruled against the Cherokee claim for a restraining order and their assertion of status as a sovereign nation. It also refused to uphold the state's view that the Cherokees were at the mercy of Georgia.[22]

Although the Supreme Court's decision went against the Cherokees, they steadfastly continued to resist Georgia and Jackson's demands for removal. In 1831 the Cherokees again appealed to the Supreme Court for relief from impositions by the state of Georgia. In December, 1830 the Georgia legislature passed an act that prohibited the presence of whites in Indian territory after March 31, 1831, without a license from the state. Georgia officials sought to exclude white missionaries residing among the Cherokees who, the Georgians believed, opposed removal. Two of the missionaries, Samuel A. Worcester and Elizur Butler, refused to obtain the permits, and the Georgia militia subsequently arrested the two men. The Cherokees petitioned the Supreme Court and the judiciary

decided in their favor. In its decision, Worcester v. Georgia the Court declared Georgia's extension of state law over the Indians unconstitutional and ordered the immediate release of the missionaries. State officials and President Jackson refused to carry out the mandate. The President remarked that "the decision of the supreme court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate."[23]

The Cherokees' legal attempts to remain on their ancestral lands and maintain their tribal sovereignty followed earlier maneuvers by other Southern tribes to resist the tide of white encroachment. Choctaws, Chickasaws,and Creeks had pursued similar efforts. The first technique consisted of a policy of cooperation that included gradual cession of tracts of their tribal domains. During the War of 1812, most of the Five Civilized Tribes remained loyal to the United States in hopes of retaining their lands. The Southern tribes also tried to co-exist with white settlers and to accept many white ways and institutions. Some of the tribal members, especially the mixed blood element, adopted farming, plantations, business, education, and white patterns of government in an attempt to win favor from the white neighbors and to be left alone. Rather than receiving the desired results, these actions tended to make the white settlers jealous; certainly they had little effect on curbing the settlers' lust for Indian land.

Another strategy used by some of the tribal members consisted of accepting removal in order to retain tribal sovereignty in their new territory and to escape harassment of frontiersmen. Choctaws, Chickasaws, and a mixed-blood faction of Cherokees, as well as bands of the tribes who had migrated west to new territories before 1830, followed this approach.

Resistance either through legal endeavors, non-violent refusal, or military action comprised other tactics taken by the Five Civilized Tribes in their attempts to retain their Southern ancestral lands. The Ross faction of the Cherokees, consisting mainly of full-bloods, employed both judicial means and peaceful obstinacy. The Creeks resisted by steadfastly staying on their Eastern lands and by furious military action against encroaching Americans. The Seminoles, after provisionally agreeing to cede Eastern territory, for the most part refused to emigrate to Indian Territory. Those remaining fiercely resisted removal attempts by waging war against federal military forces in a war that lasted until 1842. Some of the Seminoles remained in Florida. The military escorted most of the Seminoles, Creeks, and Cherokees who had followed this last resort to resist expropriation of their lands and exile to Indian Territory.

A few tribesmen continued to live in the South but most of them immigrated to Indian Territory. The exodus of the Five Civilized Tribes resulted in a tremendous loss of life. Those who survived the exile experience proceeded to

restore their tribal governments and communities. They enjoyed prosperity and a period characterized largely by a peaceful life unhampered by white expansion until the Civil War.

During the same period when the Five Civilized Tribes experienced removal, the federal government forced the Old Northwest tribes to make additional land cessions and started them on a trail of numerous exiles to the trans-Mississippi West. American sympathy for the plight of the Northern Indians did not arise as it had for the Five Civilized Tribes. Consequently, they did not have white supporters to oppose federal acquisition of their lands and permanent exile. The federal government's policy toward the Old Northwest tribes consisted of the method of making treaties for land cessions without the excuse of military conflict. The tribes after 1815 possessed insufficient power to resist government demands and settler depredations. Poor organization among the tribes and reduction of tribal populations also added to the lack of strength for effective resistance. Actual removal west of the Mississippi River did not commence until after the inauguration of James Monroe as President in 1817. With the Indian Removal Act of 1830 forced migration beyond the Mississippi became a reality for the Northern tribes as it did for the Southern Indians. The government had removed most of them by 1845.

Emigration of the Northwest tribes commenced the

beginning of a long succession of tragic removals for several of them. After ceding their lands in the Great Lakes and Ohio region to the United States, many of these tribes moved from reservation to reservation in Missouri, Iowa, and Kansas before finally receiving their last domain in present-day Oklahoma. Each time the federal government promised that the new reservation would be their final home. In each case the insatiable demands of settlers pushed the Indians off their land, removing them to another reservation with the promise, never kept, that at last they lived beyond the reach of aggressive frontiersmen. At the time of their removal to Indian Territory in the late 1800s, many of the Delaware and Sac and Fox elder tribesmen had experienced the ordeal of four removals. With each forced migration, the Indians succumbed to more illness, disease, death, white depredations, tribal disunity, tribal decimation and demoralization. By the 1850s many of these former Old Northwest tribes lived on reservations in present-day Kansas. Other tribes also had been removed to the northern part of Indian Territory or had received reduced reservations in that area.

During the 1840s and 1850s Congress debated the opening of northern Indian Territory to white settlement. This action reflected the desires of such avid expansionists as Thomas Hart Benton of Missouri, frontiersmen, and railroad officials. The push of westward expansion to the new territories of Oregon and California also played a vital role in the demand

for opening of northern Indian Territory. Finally in 1854 Congress passed the Kansas-Nebraska Act which established Kansas and Nebraska Territories. Congress did not enact this legislation without debate. Supporters of the act argued that these territories must be organized and opened to white settlement in order to connect the eastern part of the nation with the western part, that it was time to meet the demands of Western settlers in the states east of northern Indian Territory who were waiting to migrate to the area, and to sanction those frontiersmen who already had intruded on Indian lands. Advocates of the formation of the two territories claimed that the Indians' rights would be protected and that they could choose to remain in the territories.[24]

Voicing his opposition Volney Howard of Texas claimed that the settlers would soon surround the Indians and they would have to become United States citizens or sell their lands and emigrate elsewhere. Opponents of the act pointed to the earlier treaties made with Indian tribes that guaranteed that the Indians would have the lands forever and would remain outside the limits of any territory or state. Whether these supporters of the Indian treaty rights solely reflected humanitarian intentions remains somewhat unclear because supporters charged that their adversaries objected to the bill out of self-interest. Many of the outspoken critics represented Texas who wanted the railroad to take a southern route through their state and retain the traffic of settlers moving

to the Western states and territories. Edward Everett, who had opposed earlier removal treaties consummated under Andrew Jackson, objected to the legislation. He reiterated a statement first articulated in 1830 that the Indians would never be safe from the thrust of westward expansion and if the act became law then the United States must treat the Indians with much kindness. Undoubtedly the opposition to the opening of the northern part of Indian Territory resulted from a combination of self-interest, humanitarian concern, and belief that the United States should uphold its treaty obligations.[25]

Proponents of the formation of Nebraska and Kansas Territories obviously supported the opening of the area out of self-interest and conviction that it would promote growth and unity of the United States. One supporter of the act maintained that the question rested with the supremacy of United States sovereignty over the Indians. H. H. Sibley, delegate from Minnesota Territory, observed that the United States had always promised that the Indians would enjoy permanent tenure on their new lands and that the federal government consistently had broken these pledges. He thus implied that no precedent existed for the government to start upholding its treaty obligations with the Indians. Intense debate over the opening of the area to whites and the organization of two territories developed in 1853 and 1854. In the latter year, when Congress passed the Kansas-Nebraska bill, debate included the issue of slavery which soon overshadowed that of the Indian rights issue.[26]

With the passage of the Kansas-Nebraska Act, extinguishment of title to Indian lands became important to the settlers and territorial officials. Within six months after enactment of the legislation, territorial officials and citizens wanted to extend territorial jurisdiction over the Indian reservations. Commissioner of Indian Affairs George Manypenny traveled among the Indians in northern Indian Territory in 1853 discussing the negotiation of new treaties for the cession of all or part of their lands to the United States government. After the establishment of Kansas and Nebraska Territories, Manypenny renewed his efforts to obtain treaties. In 1854 the Commissioner concluded treaties with the Wyandot, Omaha, Missouri, Otoes, Sac and Fox of the Missouri, Iowa, Kickapoo, Delaware, Shawnee, Miami, and the Confederated tribes of the Peoria. Although each of the Manypenny Treaties varied somewhat they either led to a reduction in tribal domains or to the allotment of tribal lands in fee simple and sale of surplus lands to settlers and railroads. Some tribal bands or tribes temporarily retained tribal reserves due to their refusal to accept individual ownership of lands and to abolish their tribal governments.[27]

The treaties failed to satisfy the demands of settlers because the Indians still held some of the best agricultural land. As a result frontiermen intruded on tribal lands and committed acts of violence against Indians. Settlers and railroad officials continued to agitate for complete Indian

removal, and the federal government attempted to meet their demands. Treaties concluded during the 1850s and 1860s led to the steady diminution of tribal lands and extinguishment of Indian title. To help promote Indian removal from Kansas, the territorial and then state officials in the early 1860s taxed the Indians' lands and confiscated them as a result of failure to pay taxes. This action violated the terms of the Kansas-Nebraska Act which exempted the Indians' lands from taxation. Alien to the aborigines, taxation provided an effective means for the state to obtain Indian lands. Some of the treaties providing for the allotment of lands in severalty limited the alienation of the Indian's lands to the federal government but some of the treaties failed to provide such protection. Indians with unrestricted lands lost most of them in a relatively short time and became homeless and destitute.[28]

Settlers' acts of hostility and intrusion on Indian lands and the state's illigal actions led most of the tribes in the 1860s and 1870s to move to new reservations in Indian Territory where federal officials assigned them new reservations. The Omnibus Treaty of 1867 signed with the Ottawas and Wyandots, and the Miami and Peoria Confederacy, included the provisions of selling their Kansas lands and purchasing new domains in Indian Territory. A number of other tribes residing in Kansas concluded similar treaties with the United States in 1867. The Shawnees, Delawares, and Munsees with

two bands of Chippewas purchased land and citizenship rights in the Cherokee nation and settled in the northern part of its territory. These tribes also had suffered at the hands of Kansas citizens. The Delawares in 1860 in a treaty with the United States had alloted their lands in severalty and sold surplus lands to the railroads. The Munsee and Chippewa bands had confederated in 1859 and received a Kansas reserve in that year. But neither of the tribes remained safe from the depredations of Kansas citizens. The Potawatomis had agreed to a treaty in 1861 that followed the usual pattern of allotment and most sold their lands within a short period. The Prairie band refused to accept individual ownership of land. The Sac and Fox tribe accepted the allotment of lands in severalty and sold their suplus lands to settlers. By 1867 both tribes, weary of the treatment received from Kansas settlers, negotiated with the United States for cession of their lands in Kansas and the purchase of a new reservation in Indian Territory. The Sac and Fox and Potawatomis accepted new domains in east central Indian Territory.[29]

During the 1870s other tribes residing in Kansas and Nebraska removed to Indian Territory and ceded their lands in these states. The Osages returned to a reservation in northern Indian Territory in the early 1870s. The Kaws sold their Kansas lands and immigrated to a new reserve in the Cherokee Outlet. The Pawnees who had successively ceded their lands in Nebraska sold the last of their reservation

and accepted a domain in the Cherokee Outlet during 1873. In 1865 the Poncas ceded one-third of their lands in South Dakota and Nebraska to the United States and the federal government further reduced their territory in 1868. A congressional act in 1876 provided for the complete removal of the Poncas from their remaining lands in the North. After Ponca leaders saw the lands assigned them in Indian Territory, they refused to emigrate. Although the legislation contained a provision allowing the Poncas the privilege of approving a proposed reservation, the military forcibly removed them to the Cherokee Outlet reserve. The federal government later sanctioned the return of some Poncas to their lands in Nebraska.[30]

By an act of Congress the federal government provided a reserve for the Absentee Shawnees in 1872 in east central Indian Territory. In the 1880s Congress passed legislation authorizing the sale of the remainder of the Otoe and Missouri lands in Kansas and Nebraska and for the purchase of a new domain in the Cherokee Outlet. Another tribe, the Iowa, still retained land in Kansas but by an executive order in 1883 the tribe moved to east central Indian Territory. The Mexican Kickapoos also received a reserve in the same area by executive order in 1883. An act in 1885 authorized relocation of the Tonkawas, originally a Texas tribe, to a reserve vacated by the Nez Perces in the Cherokee Outlet. After 1871 Congress officially ceased making treaties with tribes and thereafter

used legislation and executive orders to handle Indian affairs. This new policy explains why tribes moving to Indian Territory after that date received their lands by congressional act or executive order.[31]

Settlers emigrating to California in large numbers after the discovery of gold there in 1848 devastated resident Indian tribes and tribelets. Californians tended to kill Indians as if they were animals. Pioneers swarmed over Native American hunting grounds, destroying villages, and killing the Indians. Between 1849 and 1859 approximately 70,000 Indians died from murder, disease, or starvation. In an attempt to survive the remaining Indians sometimes resorted to robbing the intruders. The settlers retaliated by indiscriminately murdering both the innocent and guilty. Some of the Indians in northern and central California escaped to the hills while many of the desert bands in southern California evaded the colonists' atrocities. The federal government, far removed from the scene, had little control over the activities on the West coast. In the early 1850s, federal officials signed treaties with some of the surviving tribes and tribelets in which they ceded title to their lands and received reservations. The designated reservations comprised lands whites desired. Californians did not want the treaties ratified and successfully pressured Congress to reject them.[32]

Appropriation of Indian land in the Pacific Northwest followed a pattern consisting of military conflict followed

by treaties in which the tribes ceded large amounts of their ancestral lands and received in turn reduced reserves. Conflicts between Native Americans and settlers developed soon after the United States acquired Oregon in 1846. Following the usual pattern the American pioneers intruded on Indian lands and threatened the existence of the tribes resulting in Indian attempts to expel the squatters. In southern Idaho, the Shoshonis and Bannocks attacked settlers on their way to Oregon. The Rogue River Indians in southwest Oregon had conflicts with miners. The Cayuses killed whites after a measle outbreak decimated their population. The Oregon tribes ceded much of their land and federal authorities placed them on limited reserves.[33]

Soon after I. I. Stevens became governor of Washington Territory in 1854, he sought to acquire Indian land for settlers and to assure the completion of a transcontinental railroad from Minnesota to Puget Sound. Impatiently he forced the tribes in the Puget Sound area and the interior to cede large tracts and accept greatly reduced reservations. The governor's methods included use of fraud and coercion. Tribesmen resisted these exactions, but they were easily defeated and placed on small reservations. Military engagements with the interior tribes continued until 1858 when the Yakimas, Cayuses, Wall-Wallas, Spokans, Palouses, and Cour d'Alenes capitulated. Military tribunals executed the Indian resistance leaders. The federal government forced the tribes to settle on small

reserves, and opened their original territories to white settlement.[34]

The Nez Perces who resided on the Washington, Oregon, and Idaho border had always been at peace with the United States, but they too endured a reduction of their lands. In 1855 Nez Perces leaders negotiated a treaty with the United States that guaranteed the tribe perpetual tenure to their lands. In 1860 intruders on Nez Perces lands discovered gold. The subsequent extension of the mining frontier to the area led to the compression of their lands. In 1863 government commissioners used coercion and bribery with selected tribal leaders for the cession of their esteemed lands. Although the chiefs of bands who had not approved the treaty argued that they were not bound by its terms and would not move to the reduced reserve, government agents declared that the entire tribe must adhere to the provisions of the treaty.[35]

Chief Joseph's band steadfastly refused to leave the Wallowa area of northeast Oregon. In 1877 the military threatened to forcibly remove them to the new reservation and reluctantly Chief Joseph agreed to relocate. Meanwhile his warriors killed intruders and federal troops immediately attacked Chief Joseph's band. After defeating the federal troops, Chief Joseph fled with his band of nearly 400 men, women, and children. Other bands who had refused originally to migrate to the new reserve joined Chief Joseph. They fled from the pursuing troops seeking to reach Canada. Just

short of the Canadian border in the Bear Paw Mountains in Montana, the army overtook the Nez Perces and a battle raged for five days. Chief Joseph finally surrendered to save the freezing and starving women and children. The surrender terms agreed to on the field of battle allowed Chief Joseph and his people to return to a reservation in the Pacific Northwest. Government officials, however, countermanded this agreement and escorted the Nez Perces to a reserve in the Cherokee Outlet situated in Indian Territory. After sustained pleas from Chief Joseph, the Indian Rights Association, and Presbyterian church leaders that the federal government honor its pledges, the Nez Perces in 1885 were permitted to return to the Pacific Northwest. The federal government sent Chief Joseph and one group to the Colville reservation in Washington while another group was settled on the reserve in Idaho where they joined their kinsmen who had not been exiled since they had not participated in the conflict.[36]

The United States government forced other tribes including the Flatheads in western Montana to cede large tracts and accept smaller reservations. The Shoshoni and Bannocks of southern Idaho resisted white intruders but federal troops forced the insurgents to surrender and to settle on reservations.[37]

The Modocs also were faced with the familiar format of military conquest and reduced reservations. This tribe, native to the Tule Lake area in northern California and the

Klamath Lake region in southern Oregon, endured for over twenty years the intrusion of settlers into their territory. Once entrenched the Americans agitated for all of the tribe's land. Thus in 1864, along with the Klamaths, the Modocs ceded their lands to the United States in return for a reservation in southern Oregon. The Modocs, led by Captain Jack (Kenitpoos), resented not having received a reserve in their homeland area and they complained that the Klamaths mistreated them. Captain Jack and fifty warriors left the Klamath reservation and returned to their homeland near Lost River. They petitioned the government for a reservation in that area but federal officials refused the request. Finally the military's attempt to return them to the Klamath reservation led to the Modoc War of 1872-1873. Greatly outnumbered, the Modoc warriors fought five battles without a single defeat. The army pushed the Modocs to the lava beds south of Tule Lake, where after six months of warfare, sixty-five Modocs surrendered in mid-1873. Ten days later, the military with the aid of some Modocs captured Captain Jack and twenty-five warriors. A military commission tried Captain Jack and five other warriors and sentenced them to hang; but President Grant commuted the sentence of two of the men to life imprisonment. Federal officials removed one hundred Modocs as prisoners-of-war to northeastern Indian Territory. In 1909 the government allowed them to return to the Klamath reservation although some of the Modocs remained in Oklahoma.[38]

Another example of use of military force as a phase of federal policy to appropriate Indian land occurred with the Five Civilized Tribes. During the Civil War they signed treaties of alliance with the Confederacy. Using this as an excuse for taking large sections of their territories, federal officials in 1866 forced the Cherokee, Creek, Seminole, Choctaw, and Chickasaw nations to cede the western half of Indian Territory to the United States as a form of war reparations. Federal officials planned to resettle Indians from Kansas and Nebraska and from the southern plains on this land.[39]

In the attempt to place the Western Indians on reservations and clear the way for expansion, federal officials actively pursued a policy of pacifying the tribes and making them conclude treaties providing for reduced reservations. Once the military succeeded in subjugating the resisting Northern and Southern Plains tribes, the subdued tribes were forced to settle on compressed reservations, ceding the remainder of their territories to the federal government. These lands were then opened to white settlement.

Tribes in the American Southwest experienced the same pattern of military conquest, cession of tribal lands, and placement on reduced reservations. The Mescalero Apaches and Navajos were defeated by Union troops during the Civil War and concentrated at Bosque Redondo in eastern New Mexico where they lived until 1868. The Mescaleros were then assigned a small reservation in southeastern New Mexico, the Navajos a larger

one in northeastern Arizona. Conflict between the Mimbreno and Chiricahua Apaches and settlers in Arizona and New Mexico erupted in 1862, due largely to the expansion of the mining frontier onto Apache territory. Under the leadership of Mangas Coloradas and Cochise, Apache raiders depredated white settlements across the Southwest. By 1871, however, these Apaches agreed to surrender vast territories and to move to four reservations established for them by the federal government in New Mexico and Arizona Territories. Most Apaches remained on the reservations but some became incensed at the actions of corrupt agents and injustices perpretrated against them by local residents, and renewed attacks on southwestern settlements. From 1874 to 1883 Apache leaders including Victorio, Nana, and Geronimo conducted destructive raids. In 1883 Geronimo and his followers capitulated and returned to the reservation. Two years later, Geronimo left the reservation with a band of about fifty men and one hundred women and children. A federal army of nearly 5000 pursued Geronimo's band. Finally, in 1886 after receiving assurance that he could rejoin his people on the Arizona reservation, Geronimo surrendered. However, federal officials countermanded this agreement and shipped Geronimo and 500 other Apaches to military prison in Florida and later to Alabama. At least one-fourth of the interned Apaches died from illness and diseases while in the South. In 1894 the government moved them to the Kiowa-Comanche Reservation in Indian Territory

and their status as prisoners-of-war continued until 1913. At that time most of the Apaches returned to New Mexico and joined the Mescalero Apaches, although some remained in Oklahoma and purchased land from the Kiowas and Comanches.[40]

During the Civil War, tribes in Colorado, Nevada, and Utah territories lost much territory following defeats by volunteer infantry and cavalry regiments. These tribes were assigned to reservations. The Utes suffering a long period of warfare and loss of territory in Colorado were assigned in 1867 a reservation in western Colorado on the White River west of the Continental Divide. Soon settlers and miners demanded their reservation, and in 1879 the Utes revolted and were defeated after considerable bloodshed. Most Indians were stripped of their lands and forced to accept a reservation in Utah.[41]

War among the Southern and Northern Plains tribes and the United States military in the second half of the nineteenth century led to the inevitable reduction of Indian land through conflict and cession of territory through treaties. Hostilities developed in Colorado during the Civil War. Southern Cheyenne territory lay in the path of miners moving into the Rocky Mountains. The federal government's effort to coerce the tribes to cede the territory guaranteed to them by the Fort Lamarie Treaty, 1851, precipitated the conflict. After government agents attempted to appropriate the lands of the Southern Cheyenne and Arapaho, intermittent conflict

continued for three years. At that time the Indians sued for peace. Chief Black Kettle and White Antelope concluded an armistice and settled at a camp at Sand Creek. Colonel J. M. Chivington and a force of Colorado militia in a surprise attack ravaged the camp killing most of its inhabitants. Black Kettle and a few warriors escaped from the Sand Creek massacre. This atrocity led to renewed warfare. After the Sand Creek Massacre the Cheyennes and Arapahoes scattered; most of them settled in western Kansas where bands of the Brule and Oglala Sioux and Northern Cheyenne warriors joined them. They attacked settlements from the Platte in Nebraska to South Pass. In 1865 leaders of the Cheyenne, Arapaho, Kiowa, Comanche, and Kiowa-Apache tribes met with federal commissioners and concluded the Little Arkansas Treaties. The provisions included the cession of their lands north of the Arkansas River and acceptance of reduced reservations in Indian Territory, southwestern Kansas, and the Texas panhandle. Conflict continued on the southern plains in spite of the Little Arkansas Treaties. The Senate failed to ratify these agreements and federal officials refused to protect the tribes from trespassers. Hunters crossed their lands, killing the buffalo that provided their subsistence. In an attempt to protect their rights the Indians struck back at the intruders. By 1867 federal officials believed that the domains assigned to these tribes at the Little Arkansas Council needed to be reduced in order to satisfy the demands of settlers and railroad

builders for additional lands. In 1867 despite protestations eloquently delivered at the grand council at Medicine Lodge Creek the chiefs of the Kiowa, Comanche, Cheyenne, Arapaho, and Kiowa-Apache tribes submitted to the commissioners' demands for drastically compressed reserves in Indian Territory.[42]

The Northern Plains Indians endured similar experiences leading to loss of tribal territories. Their lands lay in the path of the proposed transcontinental railroad and trails leading to Washington and Oregon Territories. Thus federal officials determined on removing them from the path of expansion.

Hostilities began in 1854 after a settler claimed the Indians had killed one of his cows. Federal troops attacked the Sioux and in 1855, Spotted Tail, the leader of the Brule Sioux, surrendered and government officials imprisoned him. This brought temporary peace to the northern plains. Peace in this region continued until 1862 when hostilities broke out in Minnesota between the Santee Sioux and intruding settlers. Eventually federal troops defeated the insurgent tribesmen, hanged thirty-nine of their leaders, and relocated the survivors on small reservations, taking most of the Santee Sioux's land as reparations. Some of the tribesmen fled to Canada or joined the Teton Sioux in the Dakotas.[43]

The Northern Cheyenne and Sioux stood as a barrier both to transcontinental railroad construction and the expansion of the mining frontier in Montana. Successive victories over

federal troops led to the evacuation of the tribes' hunting grounds in the Powder River country. During April, 1868, Sioux and Northern Cheyenne leaders met with government officials at Fort Laramie and negotiated a treaty. Its terms stated that the government would abandon military posts in the Sioux hunting grounds; the tribes would allow peaceful passage of the railroad through tribal territories; and the Sioux and Northern Cheyenne accepted smaller reserves in the Dakota, Montana, and Wyoming Territories with a hunting area in the Big Horn-Powder River area.[44]

Settlers on the eastern boundary of the Indians' reservations desired these lands and government officials attempted to compress the tribesmen on even smaller reserves. They also encouraged slaughter of buffalo because they believed that once the buffalo were exterminated, the tribes would have to move to reservations and accept government rations for survival. After the Fort Laramie Treaty of 1868, skirmishes continued between the tribesmen and soldiers, railroad workers, and settlers. The Sioux alleged that the conflicts resulted from trespass on their lands and violation of rights guaranteed them by the treaty.[45]

In the mid-1870s hostilities reached a fateful climax. Gold discovered in the Black Hills in South Dakota attracted many miners to the region during 1875. The Sioux threatened retaliation if the military did not expel the trespassers. Initially the army tried to expel the miners and the govern-

ment attempted to purchase the Indian claim to the Black Hills, but the Sioux refused. In an attempt to prevent clashes the military ordered the Sioux and Northern Cheyenne to settle near the agencies on the reservations where they could be watched. Many of the Sioux complied with the government's demands but a large number journeyed to the Big Horn Mountains for their annual summer camp and sun dance. The military attacked a band of Northern Cheyennes on their way to the agency and a band of Oglala Sioux under Crazy Horse rescued them. The Northern Cheyennes then joined the Sioux at the Little Big Horn. Determined to bring these tribesmen back to the agencies, federal troops attacked the encampment with the resulting defeat of Colonel George A. Custer and a portion of the Seventh Cavalry. The military relentlessly pursued the Indians. Sitting Bull and a group of his followers, the Hunkpapa Sioux, fled to Canada where they remained until 1881. Other bands fought until forced to surrender. Officers killed Crazy Horse in an alleged escape attempt in 1877. By the end of 1876 the Northern Plains Indians had been subdued. In 1877 the Sioux surrendered the Black Hills and accepted a reservation in central South Dakota; the aboriginal barrier to white expansion in the northern plains had been erased.[46]

The federal government compressed other tribes' territories in the West. The Havasupai, native to the Grand Canyon area, several times during the 19th century were required to accept reductions of their original land base. Like many

Western tribes, the Havasupai offered no military resistance to this compression of their tribal lands.[47]

Federal policy toward the Alaskan aborigines essentially followed the same pattern as that employed toward other Native Americans. Legislation passed by Congress pertaining to Indians also applied to the Alaskan natives.

When the United States purchased Alaska from Russia in 1867, Congress recognized the natives' right to use or occupancy of the lands in their possession. Article three of the Treaty of Cession pledged protection for the aborigines' enjoyment of their property. The Act of May 17, 1884 creating a civil government for the Territory of Alaska guaranteed that the natives "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress." Several acts passed by Congress subsequently reiterated this. The judiciary also consistently recognized the right of the Alaskan natives to use and occupancy. Congress, however, neglected to clarify aboriginal title until 1971. During this century of uncertain tenure, American settlers, the federal government, and the territorial and state government made substantial inroads into native lands. Most of the aboriginal lands have been alienated in the twentieth century. As will be shown later, the United States Bureau of Land Management granted title to lands used by natives to various non-native individuals.[48]

During the early 1900s, the federal government established twelve reservations by executive order. An 1936 law which brought the Alaskan natives under the provisions of the Indian Reorganization Act, authorized the Department of Interior to establish reservations for them subject to the approval of the natives. In the early 1940s the federal government established six reservations and submitted proposals for additional ones. The natives, however, rejected them largely because of the activities of special interest groups. These non-native individuals aroused native opposition by frightening them with exaggerated tales of their fate on reservations. The plight of the reservation Indians in the lower United States encouraged this belief. In the next decade, ninety native villages petitioned for reservation of their land. Caught up in termination, the federal government at this time was not receptive.[49]

The 1958 Alaska Statehood Act reaffirmed native use and occupancy. It also authorized the state to choose 102,550,000 acres from the public domain which included aboriginal lands. This led to conflict with native groups who frequently lived on the lands selected by the state. During the 1960s the Aleuts, Eskimos, and Indians of Alaska, encouraged by American Indian groups, formed a united oppositon to alienation of their land rights. Special interest groups such as the oil companies and the state government also promoted a settlement so they could surge ahead in their exploitation of the land

and its resources. In 1966 Secretary of the Interior Stewart Udall placed a freeze on further allocation of Alaskan lands until the natives' claims had been settled. This culminated in 1971 in the enactment of the Alaska Native Claims Act. The aboriginal groups received clear title to forty million acres and compensation for relinquishing claim to the remaining Alaskan lands.[50]

In 1871 the federal government commenced a new policy for dealing with Indians, including the Alaskan natives who are legally referred to as American Indians. Congress adopted a law ending treaty making with tribes.[51] After this time the United States government handled Indian affairs by congressional and executive action.

This policy eventually led to additional appropriation of Indian lands by measures taken by Congress and actions by executive officials. The most important measure was the General Allotment Act, adopted in 1887, which broke up the reservations and assigned each Indian a homestead, generally 160 acres. The surplus land on each reservation was opened to settlers.[52]

All congressmen did not support enactment of the General Allotment Act. In 1880 a group in the House of Representatives expressed their dismay with the legislation in a minority report. They emphasized the land hunger that brought allotment to fruition.

The main purpose of this bill is not to help the

> Indian . . . it is to provide a method of getting at the valuable Indian lands and opening them up to white settlement. . . . If this was done in the name of Greed, it would be bad enough; but to do it in the name of Humanity, and under the cloak of an ernest desire to promote the Indian's welfare . . . is infinitely worse.[53]

Most native Americans opposed allotment. The tribes usually split into two factions--conservative and progressive. The latter supported allotment while the former, representing the majority, opposed it. The act failed to fulfill the expectations of the reform element while its results met the desires of Westerners.

The Dawes Act exempted the lands of the Five Civilized Tribes, the Osages, Miamis and Peorias, Sac and Fox, the Sioux in Nebraska, and the Senecas of New York. These tribes had exerted great pressure on Congress against allotment. Most of these tribes later came under the act's provisions, either through amendments to the Dawes Act or separate allotment statutes. Survey and assignments of allotments erased most tribally-owned lands except desert and mountainous sections that government officials considered unsuitable for agricultural purposes. As a result the Navajos and a few other tribes remained untouched by allotment. On many reservations the government started the allotment process soon after passage of the Dawes Act. Federal rules usually made Indian allotments inalienable for twenty-five years. The agreements made with the tribes provided for the sale of surplus lands to the federal government which were opened to settlement.[54]

An amendment to the Indian Appropriation Bill of 1889, authorized the formation of a federal tribunal, the Jerome Commission, to negotiate allotment agreements with the tribes of western Indian Territory. Between 1889 and 1904, the Jerome Commission concluded agreements with the Iowa, Sac and Fox, Potawatomi, Shawnee, Tonkawa, Pawnee, Cheyenne, Arapaho, Kickapoo, Kiowa, Commanche, Caddo, Apache, Ponca, Otoe, Missouri, and Kaw tribes. In 1889 the federal government removed the last obstacle to homesteading in the Unassigned lands in Indian Territory by purchasing the "residual interest" of the Seminoles and Creeks in those lands. The Cherokees sold the Cherokee Outlet in Indian Territory to the United States in 1893. During the early 1890s the federal government signed allotment agreements with the small tribes at the Quapaw Agency in northeastern Indian Territory. Congress passed a law in 1906 allotting all Osage lands among tribal members.[55]

In 1893 Congress authorized a commission to negotiate with the Five Civilized Tribes to change their land system and accept individual land ownership. After a period of resistance tribal leaders submitted to intense pressure from both the Dawes Commission and Congress and finally agreed to allotment. Between 1898 and 1906, leaders of the Five Civilized Tribes signed allotment agreements with the federal government, and by 1907 all of their lands had been divided among tribal members.[56]

Some Indians continued to oppose division of tribal

lands into individual parcels. The Keetoowah Society among the Cherokees and the Snake group among the Creeks refused to take allotments and attempted to stop the partitioning of their communal lands. Finally federal authorities forced the recalcitrants to accept allotments by threatening to imprison them.[57]

The federal government also extended the General Allotment Act to other tribes such as the Sioux. In 1889 Congress enacted legislation that divided the Great Sioux reservation into three smaller ones and provided for their eventual allotment. Beginning in 1904 the Sioux on Pine Ridge, Rosebud, and Devils Lake divided their reservations among tribal members while the government purchased the surplus land. In 1907 and 1910 Congress approved the sale of the former Indian lands to settlers. The Sioux retained some of the lands as tribal property.[58]

Allotment in severalty failed to accomplish assimilation; it produced a further decline in the Indians' economic position. In choosing their allotments Indians often chose land without regard for its agricultural or pastoral potential. They instead picked land near their old homes or relatives. The most valuable land soon passed out of their possession. Forests, fertile farm lands, and rich grassland first went to non-Indians. Native Americans leased or sold land unsuitable for agriculture to ranchers. Allotment left Indians in a worse state than before. For the most part, they became poverty

stricken, landless, and subsisted on the small income received from leasing their allotments.

In 1887 the tribes owned 138 million acres. By 1892 the federal government had obtained thirty million acres of this. The Dawes Act and its amendments established procedures that resulted in the loss of about ninety million acres. Most of the land remaining consisted of desert or semi-desert lands. The government declared sixty million acres as surplus lands and sold them to settlers. The Indians who received title in fee simple sold twenty-seven million acres or two-thirds of their allotted lands between 1887 and 1934. Indians also leased large portions of their property to non-Indians.

As indicated, most Indians, with their differing viewpoints and value systems toward land, failed to understand the Anglo-Saxon concept of private ownership, the economic value of land, and economic practices. Consequently, many Native Americans quickly sold or leased their lands at extremely low prices. Others became easy victims of white swindlers and speculators.

The disastrous leasing program that Congress approved in 1891 as an amendment to the General Allotment Act provided the means for unscrupulous non-Indians to obtain the use and ultimately the ownership of Indian lands. In 1900 Indians leased about thirteen percent of their allotted lands. In that same year Commissioner of Indian Affairs William Jones

stated that the policy of leasing ran counter to the goals of the General Allotment Act. Among some tribes the amount of leasing extended above the average rate. In 1898 the Omaha and Winnebago had leased eighty percent of their 140,000 acre reservation. By 1919 Cheyenne and Arapaho allottees leased about ninety-five percent of their lands in Oklahoma to non-Indians. Real estate agents assisted members of the Five Civilized Tribes in selecting their allotments and then leased the lands from the Indians. The agents made their profit by subleasing the property at higher rates. These speculators often encouraged members to select timber acreages that could then be profitably exploited by lessees.[59]

Some Indian agents advocated selling Indian lands. They believed that alienation of at least part of the allottees' land would force Indians to accept the white man's work ethic, adopt agriculture, and assimilate into white society. Another vocal force advocating sale of Indian lands included Western farmers, ranchers, businessmen, lawyers, and bankers. Congress listened to these special interest groups.[60]

Soon after 1900 Congress began enacting legislation permitting the removal of trust provisions on allotted lands and granting fee simple titles. In 1902 a clause in the Indian Appropriation Act removed the restrictions on alienation of lands inherited from original allottees. Four years later the Burke Act amended the General Allotment Act and authorized the Secretary of the Interior to award at his

discretion unrestricted title to competent Indians. In 1907 a provision in the Indian Appropriation Act allowed incompetent Indians to alienate their allotments with the approval of the Secretary of the Interior. This clause made possible the alienation of all allotted lands. The continual erosion of restrictions of trust lands paved the way for the sale of a large amount of Indian lands. After the Sisseton Sioux divided their reservation, they allotted 300,000 acres among tribal members and then sold 600,000 acres to the federal government as surplus lands. By 1909, after the restrictions on alienation had been removed, two-thirds of the Sisseton Sioux allottees had sold their land. In 1917 Commissioner of Indian Affairs Cato Sells instituted a liberal policy of removing restrictions on the trust lands. The administration created numerous commissions to determine the competency of Indians with restricted allotments. Between 1917 and 1921 the government issued about 20,000 titles in fee simple for Indian allotments. In the latter year the Board of Indian Commissioners investigated the Indian land situation and revealed that an extremely high percentage of Native Americans had alienated their lands. As a result, the government ended the Sells' policy and during the 1920s the Secretary of the Interior allowed fewer lands removed from their restricted status.[61]

Non-Indians took advantage of the removal of restrictions on Indian trust lands. They used numerous methods to

obtain land. Some Westerners purchased land at prices far below the fair market value. Others resorted to more underhanded tactics. One technique involved kidnapping a minor in order to consummate the marriage of an Indian youth to a white person. Soon after the wedding, the minor was pressed to sign over the allotment to the husband or wife and the latter would disappear. Another device used was a non-Indian persuading an Indian friend to write a will leaving all his property to him and then the Native American would die of undetermined causes. A few definite murder cases were discovered with one involving the bombing of two young children. Another practice used by speculators consisted of obtaining guardianship rights over minors or incompetent adults, and permissive state courts allowing the guardian to use the Indian's lands in his own self-interest. One notable case involved the unsuccessful attempt by a speculator to obtain guardianship of 161 Choctaw minors whose allotments covered valuable timberland.[62]

Another problem for Native Americans after the government persuaded them to divide their reservations into allotments was heirship lands. The death of an original allottee frequently left his lands shared by numerous heirs and additional deaths of heirs further complicated the situation. By 1920 some allotments had over fifty heirs and the number continued to proliforate during the following generations thus compounding the problem. Among the Sisseton Sioux in

1909 more than 80,000 acres of original allotted lands had been divided by heirship procedures into smaller and smaller plots. Over six million acres possess heirship status. The use or selling of these heirship lands require the consent of all heirs and this has proved impossible or extremely difficult to obtain. Consequently this has led over the years to de facto alienation of lands from Native Americans.[63]

Some speculators acquired Indian lands through county or state taxation of allotments. In the early 1860s Kansas authorities taxed the tax-exempt allotments of resident Indians and then seized the lands for delinquent taxes. Oklahomans in the early twentieth century also used a similar method in acquiring Indian property. Although Congress exempted the allotments from taxation, the lands sometimes appeared on the county tax rolls. A non-Indian cognizant of the incorrectly listed status of the allotment paid the taxes and remained silent until the statute of limitations expired. He then appeared to take actual possession of the land.[64]

The Merriam Report of 1928 revealed the low economic status of Native Americans and recommended that the federal government terminate the allotment policy. In 1934 Commissioner of Indian Affairs John Collier ended allotment and extended the restrictions on alienation of trust lands. Congress in that year passed the Indian Reorganization Act which among other things included the above provision. Since acceptance of the bill remained on a voluntary basis

many tribes did not adopt it. In the initial bill, Collier recommended the restoration of reservations and the consolidation of heirship lands under tribal ownership. These provisions, however, met resistance by some tribes and as a result Congress deleted the clauses. Certain provisions in the Indian Reorganization Act enabled the tribes to acquire additional lands and between 1934-1947 the Indian land base increased by 3,700,000 acres. And on a limited basis Indian tribes with the cooperation of the Bureau of Indian Affairs have continued to acquire trust lands up to the present time.[65]

The Indian Reorganization Act excluded the Indians of Alaska and Oklahoma, but in 1936 Congress passed the Oklahoma and Alaska Welfare Acts which extended similar provisions to the Native Americans residing there. Although the Secretary of the Interior possessed the authority to purchase lands for the Oklahoma tribes none of them have placed non-trust lands in tribal ownership.[66]

In the 1950s the federal government commenced a policy of terminating Indian wardship status. As some tribes fell under this policy they had to sell some of their reservation lands. Consequently the size of the Indian land base during this period eroded. Although the main thrust of the termination policy existed during the 1950s and early 1960s, it continued among some tribes until the early 1970s. Congress in 1953 and 1954 passed termination bills that ended the wardship status of some Indians, forced Native Americans to accept

individual ownership of reservation lands, and provided for the disposal of all tribal assets. This policy reflected new efforts to force Indians to assimilate. Many tribes lost their tribal status while some effectively resisted government attempts or escaped implementation of termination.[67]

The federal government removed trust status from about half of the eighty reservations in California, including the Robinson Rancheria reserve of the Pomo Indians in Lake County, California in 1963. After tribal members voted to accept termination they received patents to their land. By 1977, non-Indians owned over seventy percent of the former reservation lands.[68]

Menominee tribal status terminated in 1961. As one of the wealthier tribes, the federal government selected them as one of the first tribes to be released from government wardship. Many of the tribal members had to sell their allotted lands in order to pay taxes on the formerly tax-exempt reservation lands. The detrimental effect of termination on the Menominees finally resulted in reversal of the policy in 1973 and restoration of their tribal status.[69]

The federal government also selected the Klamaths as a model for termination. After implementation of the policy the Klamaths had to sell their reservation lands and the government purchased most of the Klamath lands and then formed the Winema National Forest. Since some of the tribal members

vigorously opposed termination the federal government retained 135,000 acres as trust lands and placed the property under the supervision of the United States National Bank of Oregon. In 1969 the Klamath shareholders in the trust lands voted to end the trust. Many tribal members took that stand because they believed they voted only to end improper management of their lands by the bank and would thereby regain control of their property. Instead the bank immediately put the lands on the market. After years of controversy, the federal government in 1973 purchased the 135,000 acres for sixty million dollars and added the land to Winema National Forest. All of the Klamath shareholders accepted their per capita payment except for one man, Edison Chiloquin, who refused to accept his check for slightly over $100,000. Chiloquin remained steadfast and stated that to take the money would be like "selling my people, my dead people." He added that "to me, the land is sacred--the money can't replace it." In 1975 the United States Forest Service allowed Chiloquin to build a traditional village and for this purpose closed off 800 acres from public access.[70]

During the 1970s the federal government ended its termination policy. In 1977 a new movement initiated by Western Congressmen, notably Lloyd Meeks of Washington, attempted to abrogate all Indian treaties. If passed the proposed bill would end protection of rights guaranteed them by treaty relating to land, water, fishing, and hunting. Meeks

introduced the legislation in support of Western sportsmen, commercial fisheries, and other special interest groups who opposed the Boldt decision acknowledging the Indians' right to fifty percent of the fish crop in their traditional fishing places. Other support came from the backlash caused by those Indians asserting large Eastern land claims and the exercise of increased tribal jurisdiction and sovereignty. Undoubtedly opposition also resulted from the adversaries of Indian reserved water rights.

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CHAPTER IV

APPROPRIATION OF THE INDIAN LANDED ESTATE:

PART TWO

During the twentieth century, several divisions within the Department of the Interior, allied with special public and private interest groups, continued to erode the Indians' land base and land resources. The Department of Reclamation, Bureau of Land Management, and U. S. Army Corps of Engineers have been the main government adversaries of the Indian. These agencies persistently have taken Indian land and water rights for dams, irrigation projects, forest reserves, and for other purposes.

A conflict of interest exists within the Department of the Interior which includes the Bureau of Indian Affairs, Bureau of Mines, Bureau of Sport Fisheries and Wildlife, Bureau of Land Management, National Park Service, and the Bureau of Reclamation. When an Indian claims a violation of his land or resource rights, Interior and Justice Department lawyers must represent Native Americans against adversary interests in government agencies also defended by lawyers from the same offices. Bureau of Indian Affairs officials often acquiesce to attorneys

in other departments and fail to fulfill their trust responsibilities. Powerful special interest groups such as lumbermen, oil and gas companies, state and city governments, ranchers, farmers, mining companies, hydroelectric corporations, and powerful Western private spokesmen add to the internal conflict within the federal government over the use of Indian land and its resources. Frequently the Bureau of Indian Affairs must rely on expert opinions concerning these issues and its main source comes from those departments that challenge Indian rights. As a result his interests are often ignored or eroded.

Under a 1920 law, the Federal Power Commission granted a license to the Wisconsin-Minnesota Light and Power Company, later a part of Northern States Power Company, to build a dam and to generate electric power on land owned by the Lac Court Oreille tribe in northwestern Wisconsin. The Indians objected but the Bureau of Indian Affairs leased the lands to the company for fifty years. The power company leased and flooded 500 acres. This inundated Indian towns, graves, timber, hunting grounds, and it ruined wild rice production. Between 1881 and 1934 another 5500 acres became alienated through congressional laws. All of the 6000 acres ultimately ended up in possession of the Northern States Power Company. It purchased the Indian land for extremely small sums. Real estate agents also bought Indian lands. Sometimes they used fradulent methods and then resold the lands to the power

company. When the expiration date for the lease approached, the Lac Court Oreilles attempted to regain possession of the 6000 acres. They opposed renewing the lease sought by the Northern States Power Company. They planned to place the lands in the Chippewa Flowage under the joint control of the Lac Court Oreilles and the National Forest Service as a wilderness area. A court decision maintained that the Federal Power Commission had complete jurisdiction in renewing the lease.[1]

Other instances of the federal government taking Indian lands over the objection of tribesmen occurred in the late 1950s and early 1960s. The Army Corps of Engineers in 1964 built Kinzua Dam in Pennsylvania that created Lake Perfidy in New York. The Army Corps of Engineers forced the Senecas to sell 10,000 acres in return for $3 million. The tribe bitterly opposed the sale of their lands. A tribal member reflected this view when he stated that land "is a spiritual as well as a sustaining resource." This action by a federal agency violated a treaty made in 1794 with the Senecas. A similar action occurred among the Tuscaroras of New York in the late 1950s. The government forced them to sell 553 acres for the construction of a reservoir. They received $850,000 while Niagara University obtained $5 million for 200 acres located near the Tuscaroras' ceded lands. Some of the tribesmen charged that they had been robbed of their lands.[2]

Many Native Americans and their white supporters con-

sider the Bureau of Reclamation the Indian's worst enemy. Since the early twentieth century much Indian land passed from Indian ownership through reclamation projects.[3] The results have been devastating for many reservation tribes. Congress passed numerous laws providing for reclamation projects on Indian reservations. One of the earlier statutes in 1904 directed homestead entry on the Yuma and Colorado River Indian Reservation in California and Arizona and the Pyramid Indian Reservation in Nevada. Each tribesman received an allotment of five irrigable acres while each white settler could obtain 160 acres of former reservation lands. In 1911 the government increased the Indian's allotment to ten acres. Besides receiving insufficient land these Indians also lost most of their reservation. The Reclamation Act also effectively denied vital water rights to the tribes on these reservations. Both the Quechans on the Yuma Reservation and the Pyramid Lake Indians suffered economically from the reclamation projects. The two tribes have fought persistently to recover their territories. The federal government also opened the Flathead Indian reservation of Montana to non-Indians through a reclamation project. In common with other Western Indian tribes, the results proved devastating for the Flatheads.[4]

The Army Corps of Engineers also has taken land from Western tribes for dams. In 1953 this government agency constructed Garrison Dam over the objection of the Fort Berthold,

North Dakota Indians. After six years of protest and the presentation of several alternative plans, the Three Affiliated Tribes lost the battle. Subsequently the Corps flooded one-fourth of their reservation including the fertile bottom lands that comprised the basis of their economy. Other crucial effects resulted from the inundation of their lands. The dam divided the reservation into five separate sections thereby complicating the existing checkerboard pattern of tribal lands. The community and kinship groups became scattered since the Corps removed and relocated the Indian residents by alphabetical order.[5]

Tribes in Washington also lost some of their lands for the construction of dams. Federal agencies took a portion of the Confederated Colville's lands for Grand Coulee Dam. The Wanapum Indians also had lands flooded by the construction of Priest Rapid Dam on the Columbia River. The inundation of other Native American lands along the Columbia River resulted when the Army Corps of Engineers built Dulles Dam.[6]

A more recent case involved the attempt to appropriate Indian land by the Bureau of Indian Affairs, Bureau of Reclamation, and Bureau of Land Management in the 1970s. Construction of Orme Dam for the Central Arizona Project would inundate most of Fort McDowell Indian Reservation. Federal and state wildlife agencies and several conservation and environmental groups joined the Yavapai tribe in opposing the

dam project. An Arizona Bureau of Mines report revealed that several geological faults ran through the Orme Dam site. Refusing to succumb to the Bureau of Reclamation's threat to condemn the Yavapai lands, tribal members voted to reject the federal offer of over $31 million for the Verde River bottomlands. This left the Bureau and the Department of the Interior with only two alternatives--to force condemnation or to select another site.[7]

The Bureau of Land Management has been one of the leading adversaries of the Alaskan natives' land interests. It approved grants to recreation groups, non-native homesteaders, the federal government for forest reserves, and the state for selection of lands allowed under the Alaska Statehood Act. Such disposal of the public domain which included lands used and occupied by natives required sufficient notice to all concerned parties so they would have the opportunity to protest the action. Frequently the Bureau provided inadequate notice to native inhabitants which prevented them from rendering necessary remonstrations. The only announcement given to natives consisted of an ad in an Alaskan newspaper. For those living in remote villages with poor avenues of communication this in reality provided little, if any, notification.[8]

The Bureau of Land Management continually failed to approve claims of residents of native villages for the land occupied and used by them. In the late 1960s almost fifty

villages, largely Eskimo, with the support of Bureau of Indian Affairs Area Director James Hawkins filed claims with the Bureau of Land Management for title to lands occupied and used by them. This action blocked the state selection of lands. The Bureau of Land Management refused to approve the applications. Other native villages including Tanacross persistently filed claims for the lands they used but the Bureau rejected them. In the early 1960s the Bureau granted title to the state for 63,533 acres of village lands. Even while the Tanacross asserted their land rights, the state attempted to sell town sites and the Bureau of Land Management promoted the sale of "wilderness estates" at the New York World's Fair. Exposure of these plans and the unclear title in the Tundra Times temporarily ended these efforts.[9]

The Athapascan village of Tyonek on Cook Inlet, situated on a 27,000-acre executive order reservation, encountered opposition from the Bureau of Land Management. Earlier in 1960 the Department of the Interior declared that the Indians held no title to the land or minerals. The uncertain status of the land concerned oil companies who wanted to lease it. The Bureau of Indian Affairs advocated affirming Indian title while the Bureau of Land Management opposed such action.[10]

The limited quantity of water in the Western states poses the same problem as the diminishing land for Native Americans. The loss of water rights threatens many Western tribes. It also endangers their fish production, and water

for irrigation and household use, all required for a viable economic level of tribal subsistence and well-being. Although these threats have existed throughout the twentieth century, the increased growth of Western states' population and their needs for drinking water, irrigation, hydroelectric power, and other requirements for a growing industrial and corporate society have increased the conflict between the Indians' rights to water resources and the needs of non-Indian communities. Since water increasingly assumed importance to economic exploitation by both and to their survival the issue will continue to be volatile in the West. In some cases the requirements and rights of the reservation Indians already have been circumvented to the requirements of non-Indians. But the unified and nationalistic stance of many Native Americans in recent years may serve to protect the water and other resource rights of the tribes.

The United States Supreme Court first enunciated water rights doctrine for Native Americans in Winters v. United States in 1908.[11] Since then the Winters' Doctrine has been accepted in the Courts. Later the court reaffirmed and elaborated on certain aspects of the Winters' Doctrine in Arizona v. California[12] and United States v. Cappaert.[13] In Winters v. United States the federal government brought litigation on behalf of the Ft. Belknap tribe of Montana against Winters and other settlers. The plaintiffs attempted to enjoin Winters from diverting water from the Milk River above

Fort Belknap Reservation. In its opinion the Supreme Court presented the idea of implied reservation of water. The court declared that when Congress established reservations, it intended to provide a homeland so the Indians could transform from a nomadic and uncivilized life to a civilized and pastoral one. Without water, the Indians could not survive on arid and valueless lands and the purpose of the reservation would be defeated. The court therefore determined that Congress in creating the reservation by treaty guaranteed the Indians a necessary amount of water.[14] The Arizona v. California decision added that the volume of water rights retained by the tribes could be determined by the necessary quantum required to meet not only present needs but also future requirements. The quantity should be determined by the potential irrigable acreage of the reservation. The court determined that reserved water rights pertained to executive order reservations as well as reserves created by treaties. Arizona v. California also affirmed the doctrine that Congress intended to reserve water for the tribes.[15]

The Supreme Court in Cappaert v. United States defined the Winters' Doctrine reserved water rights upon the creation of any reservation to the degree necessary to accomplish the purpose of the reservation. The implied rights included both ground and surface water. The opinion also declared that despite inequities to non-reserved users the Indians' reserved water rights were supreme.[16]

Until a recent decision the courts failed to decide whether the tribes could alienate their reserved water rights. In United States v. Powers the Supreme Court held that individuals who purchased allotted lands on the reservations received the water rights granted to the original allottees, although the exact degree of water rights for these successors remained undetermined.[17] In a recent decision the United States District Court for Eastern District of Washington elaborated on the water rights transferred to a non-Indian purchaser of allotted land. In Colville Confederated Tribes v. Walton, the court determined that the General Allotment Act by allowing non-Indians to purchase allotments implied that some water rights would be sold with the land. Those rights consisted of "in use" water rights; that is, rights to the quantity of water used at the time of conveyance of the acreage. No reserved water rights were conveyed to the non-Indian owners and also were lost to the tribe. The decision also declared that the tribe has priority to the amount of water necessary to satisfy its requirements, and these needs must first be met before the non-Indian owner receives any water. The court further specified the volume that the tribe could take to meet its current needs and the quantity left for appropriation to Walton as well as others with "in use" rights. The opinion also pointed out that this amount could change with future needs of the tribe and the quantity of water available in any year. The court stated that both

the tribe and Secretary of the Interior possessed jurisdiction over the regulation of tribal waters while the state of Washington maintained jurisdiction over the non-reserved waters within the boundaries of the Colville Indian Reservation.[18]

The Winters' Doctrine has remained supreme in the case of Indian water rights, although the Native Americans' reserved water rights frequently have been ignored for the benefit of Western special interest groups and federal agencies including the Bureau of Reclamation. This agency persistently argued that reserved water rights only extend to reservations created for agricultural purposes. But judicial opinions would seem to indicate otherwise. In Cappaert v. United States the Supreme Court declared that reserved water rights extended to include the purpose for the creation of the reservation.[19] In the Winters case the Court held that Indians could change "to agriculture and the arts of civilization."[20] Undoubtedly this covers both industrial and irrigational purposes. In United States v. Ahtanum Irrigation District the Ninth Circuit Court of Appeals recognized that Indian reserved water rights could be used for any beneficial purpose.[21]

A conflict within the Department of the Interior exists between the Bureau of Reclamation and the Bureau of Indian Affairs. The former agency is concerned with reclamation efforts that normally promote non-Indian development while the latter serves as trustee for Indian rights. The Department of Justice supplies lawyers for both departments.

In a recent court case, U. S. v. Truckee, Justice Department attorneys for the Paiute Pyramid Indians of Nevada argued that an earlier agreement made adjudicating Indian water rights to the Truckee River should be declared invalid since such a conflict of interest existed at the time of the Truckee River Agreement in 1934. The United States District Court of Nevada disagreed. It further stated that Congress in passing the Reclamation Act of 1902 and the Act of April 21, 1904, recognized that when conflict existed between the rights of Indians and purposes of the Reclamation Act that the former's rights became secondary to those of the Bureau.[22]

Although violations occurred throughout the twentieth century, the conflict over water rights assumed new levels in the 1970s. More interest in the needs of industry and municipalities led to this erosion of Indian water rights. The tribes have objected increasingly to the subversion of their rights and demand compliance with their reserved rights.

In California several tribes once possessed fertile lands that yielded abundant crops. The construction of water lines and canals diverting the water supply from the Indian reservations to the cities and agri-businesses annihilated their prosperity. The San Luis Rey Indians in southern California originally had sufficient water sources for their reservations until the Department of the Interior allowed two water companies to divert water from the San Luis Rey watershed to water the citrus and avocado groves as well as provide

water for Escondido and Vista. The tribes from Pala, Pauma-Yuima, La Jolla, Rincon, and San Pasqual have been engaged in litigation for a decade trying to regain their water rights. The San Luis Rey River near Pala reservation has become a dry streambed. The Rincon reservation receives only a small portion of the water assigned it in the contract. Although not located in the river basin, San Pasqual joined the suit since the canal crosses its lands.[23] The Saboda Indians in California also lost their water source to the residents of southern California. In the 1930s the Metropolitan Water District of Southern California constructed a tunnel through the San Jacinto Mountains to obtain water from the Bureau of Reclamation dams on the Colorado River. As a result the large underground water supply that fed the springs on Saboda lands flowed into the tunnel to southern California and cut off the water source for the Saboda Indians. The Bureau of Indian Affairs and the Department of the Interior continually failed to protect the water rights of this tribe. In 1976 the Indian Claims Commission decided in favor of the Saboda Indians and charged the federal government with neglecting its trustee responsibilities by not safeguarding their water rights.[24]

In 1963 and 1964 the Supreme Court adjudicated the reserved water rights of five Indian reservations in California, Arizona, and Nevada. In Arizona v. California the Chemehuevi, Cocopah, Yuma, Colorado and Fort Mohave Indian

Reservations received a total of one million acre-feet of water from the Colorado River. The decree resulted from Arizona's initiation of a lawsuit to determine the quantity of water each of the states of California, Arizona, Nevada, Utah, and New Mexico had a legal right to use from the Colorado River and its tributaries. In the late 1970s these Indian tribes are seeking additional allocations. They base their current litigation on an alleged failure to include all irrigable acres in the information gathered for the court in Arizona v. California.[25]

The Pueblos in New Mexico have suffered at the hands of state, local, and federal officials who ignore Indian water rights through diversion projects to supply urban and industrial needs. The Pueblos have attempted to protect their water rights to the Rio Grande River. The Pueblos' water shortage, already serious by the 1970s,became further endangered by state and federal attempts to develop industry and supply water to urban areas. New Mexico officials largely disregard the Winters' Doctrine. Middle Rio Grand Conservancy District officials commented that ultimately the municipalities and industries will obtain the limited water supply and irrigation will end. One NRGCD official also noted that water will become so scarce that the highest bidder will receive the water. The Northern Pueblos of Tesuque, San Ildefonso, and Jemez already have experienced water shortages.[26]

The state brought suit against the Northern Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque and other water

users on the tributaries of the Upper Rio Grande to ascertain their water rights. A state official remarked that New Mexico took this action in order to limit Indian water rights rather than protect them. The reason for the litigation rested with federal and state desire to determine the water distribution from the San Juan-Chama Project which transported water across the Continental Divide from the Upper Colorado River Basin to the Rio Grande River.[27]

The Southern Pueblos of San Felipe and Santo Domingo consistently have tried to join the suit in order to safeguard their water rights. The Department of Justice and Department of the Interior and the courts have opposed this action on the grounds that the case only involved the tribes on the upper Rio Grande. Interior Department officials admit that the San Juan-Chama dams on the northern tributaries would limit the amount of water flowing southward on the Rio Grande and thus diminish the water supply of the Southern Pueblos. Representatives of the San Felipe and Santo Domingo Pueblos maintained that the federal government opposed their entrance into the suit because they feared that the courts would uphold their historic water rights and bring an end to the San Juan-Chama reclamation project. Federal officials claimed that these Southern Pueblos would not be endangered since it would import water from the San Juan River for the Indians' usage. But the water supply of that river remains insufficient to meet all the needs of the various Indian tribes depending on it. The

Pueblos claimed that water from Angostura Dam on the reservation was channeled from the Rio Grande to Albuquerque and left the waterbed at San Felipe almost dry. Bureau of Reclamation officials planned to move San Juan-Chama water from Chochita Dam to Albuquerque in a channel running through and past the Pueblos thereby drying up the Rio Grande there and cutting off the water supply from the San Felipe River.[28]

The Pueblos believe that the state and Bureau of Reclamation attempts threaten the existence of their people. The All-Indian Pueblo Council and the people of the Southern Pueblos do not recognize any restrictions exist on their water and other resources. They view water as an inherent part of the land. The San Juan-Chama Project represented the Bureau of Reclamation and the state of New Mexico's attempt to promote industrial and economic growth. The project also limited the water supplied to the Indian reservations located south on the San Juan River in northwestern New Mexico and endangered the water rights of the Jicarilla Apaches, Utes, Yuma Mohaves, Chemehuevi, and Navajos.[29]

In 1976 the Tenth Circuit Court of Appeals reversed the district courts opinion by determining that New Mexico's water laws of prior appropriation did not limit the Pueblos' water rights since the federal government had never relinquished jurisdiction to the state. It further declared that the Winters' Doctrine did not technically apply to the Pueblos since they held fee simple title and had never received

reservations. The court in State of New Mexico v. Aamodt remanded the quantification of the Pueblos' water rights to the district court and directed it to follow the standards of Arizona v. California and if necessary consider the effects of the laws of Spain and Mexico on the Indians and water use.[30]

The San Juan-Chama Project was planned in conjunction with a scheme to build an irrigation system on the eastern part of the Navajo reservation. The Navajos agreed to allow the diversion of Navajo water from the San Juan River in order to obtain the irrigation system. Federal officials neglected the Navajo project and consequently the completion date drastically fell behind schedule. In 1976 the irrigation system commenced the first stage of operation.[31]

A plan among the states of Colorado, New Mexico, Utah, Wyoming, and Arizona to allocate water from the drainage system of the Colorado River Basin affected the Navajos along with other Indian tribes of the Basin. The Colorado River Basin Project involves many component systems including the Central Arizona Project. In 1967 Secretary of the Interior Stewart Udall revealed the plan for the latter. The Bureau of Reclamation along with a group of electric utility companies would construct a generating station near Page, Arizona, next to Lake Powell. The Black Mesa coal fields on the Navajo reservation would supply the coal for the plant and the necessary water would come from the Colorado River watershed. The project required the agreement of the Navajo tribe to limit its

water rights under the Winters' Doctrine. The details of the negotiations revealed that officials from the Department of the Interior and the Bureau of Indian Affairs failed to stress the historic water rights of the Navajos and instead emphasized the economic benefits that the tribe would obtain in the form of jobs and increased revenue. The latter seemed of utmost importance to tribal leaders. The information given them was derived from adversary interests such as the Bureau of Reclamation and the Colorado River Commission. Officials from the Department of the Interior and the Bureau of Indian Affairs failed to uphold its trust responsibilities by firmly dealing with the significance of the Navajo waiver of their reserved water rights as determined by the Winters' Doctrine. Bureau of Reclamation agents had too much at stake both in this project and future plans for the Southwest for the Secretary of the Interior to fulfill his duties as trustee.[32]

The Central Arizona Project affected other tribes within Arizona. The Gila River Pima-Maricopas in 1977 brought suit demanding that they receive seventy percent of the water from the Central Arizona Project and ten percent from the Salt River Project. They based their claim on their historic rights to the water and demanded that other allocations be halted until the resolution of water right claims. That same year the Salt River Pima-Maricopas tried to stop allocations of water by the Central Arizona Project claiming that they received an insufficient allocation for their irrigation needs.

In 1979 Department of the Interior officials promoted the negotiation of the water rights of the Central Arizona Tribes on the Salt River Reclamation Project.[33]

Other water projects within Arizona also endangered the required water supply of tribes and neglected application of the Winters' Doctrine that stated that reservations had prior claim to water to meet their present and future needs. When the Bureau of Reclamation constructed Coolidge Dam and Reservoir, the federal government promised that the Pima-Maricopas would receive additional water but the project diverted water from the Gila River resulting in drying up the stream along the Pima reservation. For centuries the tribe had relied on the water from the Gila to irrigate its farm lands. In 1976 the Gila River and Salt River Pima-Maricopas, the Ak-Chin Papagos-Pimas, Fort McDowell Mohave-Apaches (Yavapai), and Papagos sought the return of sufficient water to enable them to be self-sufficient. The Papagos, south of Phoenix, have little water remaining since non-Indians pumped ground water substantially lowering the water table. This made it almost impossible for the tribe to continue farming by irrigation.[34] State and federal agencies favor the use of the limited water supply by cities, agri-businesses, mining, and industrial interests to the neglect of the requirements of Indian communities and their reserved water rights. The tribes believe that the water rights issue, if continued along present lines, will lead to their extinction.

The Missouri River Basin presents another area where the combination of industrial interests, state desires for economic development, private interests, the Bureau of Reclamation, and the Army Corps of Engineers threatens the water rights of Native Americans residing on reservations in the states of Wyoming, Montana, North and South Dakota, and Nebraska. The desire to use the water source from the Missouri River Basin by industries interested in exploiting the coal, taconite, and other mineral resources within these states and reservations for energy development affect twenty-six tribes including the Sioux, Cheyenne, Crow, and Arikara. Starting in 1967 the Bureau of Reclamation agreed to sell water from the Missouri River and its tributaries to various industries. In Montana the Bureau of Reclamation issued industrial permits for water from the Tongue, Powder, and Big Horn rivers in excess of the actual water present in those streams. Water sold to the energy companies will leave little, if any, for agricultural interests and Indians. The industrial interests descended on the Yellowstone River Basin, a part of the Upper Missouri River watershed. Selling water to the energy corporations endangers the Crow and Northern Cheyenne tribes in Montana and the Arapaho and Shoshone tribes of the Wind River Reservation in Wyoming.[35]

Currently a number of tribes in Montana have pending litigation for the protection of their reserved water rights in respect to treaties and the Winters' Doctrine. The Crow

and Northern Cheyenne tribes initiated suits to safeguard their rights on the Tongue and Big Horn Rivers.[36] In 1938 the Supreme Court in U. S. v. Powers upheld the Winters' Doctrine for the Crow Indians' rights to water from the Big Horn River.[37] In 1979 federal authorities filed a lawsuit for the protection of water rights for five tribes. Tribal members on the Flathead, Blackfeet, Rocky Boys, Fort Peck, and Fort Belknap reservations oppose this recent action by the Departments of Interior and Justice. The tribes withheld permission because they wanted representation by their own lawyers rather than the "inept" attorneys of the Department of Justice. This distrust exists among many Indians including the White Mountain Apaches who declined the offered services of the Department of Justice in lieu of their own attorney. Pending legal action followed the endeavors of the Montana legislature. Senate Bill 76 proposes the extension of state jurisdiction over the settlement of water claims including Indian water rights. Representative Jack Ramirez, Montana, a leading opponent of their reserved water rights, maintained that the "vague" Winters' Doctrine provided a "vehicle which could allow the Indians to take over every drop of water that flows through Montana Indian Reservations." He advocates adjudication of Indian water rights by the state courts.[38]

The Department of the Interior,although divided on the tribes' water rights, persists in its policy. Officials within the Bureau of Reclamation maintain that Indian water

rights are limited to agricultural purposes thereby freeing water for the use of its allies, the industrial corporations. Judicial decisions differ with this interpretation, and uphold the superior rights of Indians to use the water for any beneficial use. The Winters' decision and the United States Supreme Court decree in U. S. v. Ahtanum Irrigation District both upheld the Indians' right to use their reserved water for any beneficial use, which would include industrial as well as agricultural use. The stance of the Department of the Interior and the Bureau of Indian Affairs seemingly reflects their reluctance to fulfill trustee obligations in protecting the Indians' water rights. Some tribes asserted their right of tribal sovereignty and established tribal water codes. This action has caused some concern among officials of the Bureau of Reclamation, Department of the Interior, and the coal industry. Many tribal leaders believe that their rights will be protected only through their own efforts. Twenty-six tribes form the Missouri River Basin Tribes Rights Coalition, with the objective of resisting current efforts of the Western states to subjugate Indian water rights and extend state jurisdiction over them.[39]

Comments made in the Bureau of Reclamation's environmental impact study on energy development within the Missouri River Basin revealed the attitude held toward the social impact on the tribes, especially those on the Fort Peck, Fort Berthold, Lower Brule, and Crow Creek reservations. The

report stated that energy development would materially affect the prosperity of the Indian communities although it could also destroy Indian culture. The statement added that the effects would promote the assimilation of the Native Americans into the greater American society. Officials in the Bureau of Reclamation advocate a policy and apply rhetoric similar to the promoters of the General Allotment Act and Termination.[40]

The state of Washington, like California, has persistently eroded the reserved water rights of Indians. In 1908 non-Indian farmers obtained an agreement from the Bureau of Indian Affairs which authorized the diversion of Ahtanum Creek. The Yakima tribe lost seventy-five percent of the creek's natural flow, leaving only twenty-five percent for their use. After years of protest, the Supreme Court in 1964 ruled in their favor although it allowed the seventy-five percent quota to stand with some limitations on the seasons it could be applied. Although the court upheld the Winters' Doctrine, state officials continued to issue water permits to non-Indians. This practice has led to the over-appropriation of water on Indian reservations in the state. Washington officials often neglected to inform involved Native Americans that the state issued such licenses.[41]

The Colville Confederated Indians in Washington challenged the jurisdiction of Washington to grant water permits on the Colville Reservation. Although affirming the Winters'

Doctrine, a recent court decision determined that Washington state officials could issue water licenses to non-Indian land owners within the boundaries of Indian reservations. In Colville Confederated Tribes v. Walton the United States District Court for the Eastern District of Washington declared that the state of Washington had jurisdiction to regulate non-reserved waters located within the limits of Indian reservations. The court stipulated that the state of Washington had control only over excess waters not appropriated to the tribe based on its reserved water rights.[42] A month before the Colville decree, the U. S. District Court for the Western District of Washington in U. S. v. Bel Bay Community and Water Association, overruled its earlier decision that the state of Washington had no jurisdiction over ground water on the Lummi Indian Reservation. The first opinion granted partial summary judgment. The court based its decision on the Winters' Doctrine and Cappaert v. United States along with the Washington Constitution which prohibited state jurisdiction over Indian water rights.[43] The court also referred to Tweedy v. Texas Co. which declared that federal law governed all reserved waters within a reservation even when non-Indians owned some of the land within its boundaries.[44] In the later ruling of U. S. v. Bel Bay Community the court withheld judgment until the case could be tried "on its merits."

Another instance where the Department of the Interior

failed to fulfill its duties of federal supervision concerning Indian water rights occurred among the Paiutes of western Nevada. A water diversion project carried out by the Bureau of Reclamation threatened to dry up the Truckee River that supplies the water for the Paiutes. Pyramid Lake provides the only economic resource for the tribe. As a result of the water diversion program, Pyramid Lake was decreased to one-third of its former size. This destroyed the ecological balance of the lake which led to the death of most of its fish. The Paiutes initiated litigation in the federal courts seeking to establish their historic right to sufficient water from the Truckee River. The Department of Justice finally represented the tribe thereby attempting to fulfill the government's trustee duties to the Paiutes. Its lawyers argued that an earlier agreement adjudicating the tribes' water rights to the Truckee River should be invalidated because of strong conflict of interest in the federal government with Department of Justice lawyers defending both the Indian and the Bureau of Reclamation. The U. S. District Court of Nevada in U. S. v. Truckee disagreed and determined that the tribe's water rights had been adjudicated in the 1934 Truckee River Agreement and the subsequent decision of United States v. Orr Water Ditch Company. The Orr Ditch decree prohibited any later claims by the litigating parties on the water rights concerning the Truckee River and its tributaries.[45]

In the mid-1970s judicial interpretation of the

McCarren Amendment in relation to Indian reserved water rights caused grave concern for many Native Americans. In 1952 Congress had enacted the McCarren Amendment which allowed the United States to be joined in state court cases determining federal rights to the use of water.[46] In New Mexico the state engineer and Pecos Valley Conservancy District brought suit to adjudicate the reserved water rights of the Mescalero Apache Indian Reservation in the Rio Hondo River system. In 1976 the New Mexico Supreme Court declared that the McCarren Amendment gave state courts concurrent jurisdiction over Indian water rights. The court remanded to the district court the adjudication of the tribe's reserved water rights.[47] The United States Supreme Court reversed its traditional policy on Indian water rights by removing them from the sole jurisdiction of the federal courts. In the conjoined decision of Colorado River Water Conservation District v. United States and Akin v. United States the Supreme Court declared that states and the federal government have concurrent jurisdiction over the adjudication of water rights including reserved Indian water rights. It based its opinion on the McCarren Amendment and two earlier Supreme Court decision.[48] The court referred to U. S. v. District Court for Eagle County[49] and U. S. v. District Court for Water Division 5[50] as recognizing the jurisdiction of state courts over federal rights to the use of water. Neither of these cited decisions discussed Indian water rights. This landmark decree led to in-

tense apprehension for many Indians who consider state courts as a forum consistently hostile to Indians. State judges as elected officials tend to be responsive to the desires of their constituency. They generally hold that Indians have no special rights above that of other citizens. A large number of recent decisions support this view. Native Americans fear that their guaranteed rights will be circumvented to the needs of non-Indian interests.

Partially in response to this apprehension the Department of the Interior in 1978 recommended that any litigation concerning Indian water rights occur only in the federal courts. The Assistant Secretary of the Interior, Forrest Gerard, presented the proposal in a speech delivered at the Missouri River Basin Conference. President Jimmy Carter accepted the four suggestions made by the Department of the Interior and incorporated them in his water message to Congress on June 6, 1978. Noting the Indian reaction to the extension of jurisdiction to the state courts, Gerard advised that Native Americans would be extremely reluctant to submit their reserved water rights to state judicial jurisdiction. Gerard stated that this would work to the detriment of state and Indian interests in settling water controversies. He added that federal courts with their background in federal law would provide a better forum for deciding such litigation. The Assistant Secretary also announced three other recommendations including the compilation of an inventory of all Indian

water claims by the Bureau of Indian Affairs and federal development of additional water resources for tribes. The remaining recommendation consisted of initiating a policy of negotiation between the Department of the Interior, tribes, states, and private interests in settling water claims. The government contended that negotiation provided a less expensive, divisive, and time-consuming approach and would offer a more satisfactory settlement. Gerard mentioned three controversies being negotiated or already settled by the Department of the Interior. He pointed out that the Department of the Interior had been negotiating with seven Arizona tribes, Arizona officials, reclamation representatives, and irrigation and mining interests to find a satisfactory solution for all parties. The Assistant Secretary of the Interior stated that Indian water claims threatened the survival of the Central Arizona Project and the economic development of Arizona. Gerard implied recognition of Indian rights but seemed more concerned with the effect the claims would have on state development than with adherence to historic Indian water rights. Gerard also noted the Department's current discussions with the San Luis Rey River disputants in southern California as well as with the Salt River parties in Arizona over Indian reserved water rights. He also revealed the Department of the Interior's role in making a multi-million dollar adjudication of a water rights controversy between the Gila River Pima-Maricopa Indians and Kennecott Copper Company.[51]

Many Indians have opposed Carter's Indian water policy and contended that it advocated the surrender of their water rights. They favor litigation and fear that a policy of negotiation will work to their detriment. They believe the Carter policy will lead to termination and they place it on the same disastrous level as the General Allotment Act. Indian spokesmen maintain that the proposed secret agreement between the Yakima Tribal Council and Washington State officials provided an example of the results of the negotiation policy promoted by the Carter administration. If approved the compact would alienate two-thirds of the water belonging to the Yakima reservation to non-Indian sources. After its public disclosure, previously uninformed tribal members along with other Indians voiced intense opposition to the plan.[52]

During the twentieth century various federal agencies obtained Indian lands against the wishes of the tribes involved. During World War II the government took thousands of acres from the Pine Ridge Sioux reservation for a gunnery range. The government promised to return the lands after the conclusion of the war. In 1964 the federal government declared these lands as surplus and four years later the National Park Service attempted to obtain them in order to establish a national monument and park. Finally in late 1977 the Department of the Interior announced that these lands would be returned to the Oglala Sioux tribe with trust status. The Forest Service in coalition with lumber interests attempted to prevent the Taos

Indians from regaining their sacred Blue Lake and surrounding area.[53] Again these same interests contrived to obtain valuable timber lands of the Colville and Klamath tribes.

The Bureau of Indian Affairs continually failed to uphold its trustee duties in the leasing and protection of tribal lands during the twentieth century. The Bureau of Indian Affairs frequently did not obtain the highest rates possible, ineffectually regulated leasing, and sometimes leased Indian land without permission. This government agency leased lands to oil and gas companies on the Shoshone and Arapaho portion of the Wind River Reservation in Wyoming, and Turtle Mountain Reservation in North Dakota without the Indians' permission. Some Osages in Oklahoma reported that Bureau agents leased their land without their knowledge and also that they received no money from the transactions. Among the Navajos the Bureau of Indian Affairs often failed to obtain fair market value on leases. At Fort Hall, Idaho non-Indian lessees received a ninety percent reduction on their rates if they installed a well or irrigation system and these improvements usually proved to be of inferior quality. Some leases on the reservation lands provided Native Americans with less than one percent profit made by the leasors in their exploitation of the property. Some Indians charged the Bureau of Indian Affairs with not adequately supervising leasing such as in the case of a Comanche woman in Oklahoma. The agency leased her allotment to an unemployed high school

student with no collateral. Earlier his grandfather, an individual with a poor record for lease payments, unsuccessfully applied for a lease on the allotment. The youth did not make the payment on time but the Bureau extended the lease. The Comanche woman had not received a lease payment.[54]

A well-known example of private exploitation of Indians' land promoted by a lack of sufficient supervision by the Bureau of Indian Affairs involved the Agua Caliente Indians of California. This tribe owned valuable lands in Palm Springs until the federal government allotted the lands among tribal members in 1959. The lands retained their trust status. The Bureau of Indian Affairs transferred its trusteeship to the state courts who then appointed trustees. Under a 1957 California law, the state courts possessed broad powers to assign conservators to landowners considered incapable of handling their affairs. Edmund Peter Silva, an Indian conservator, maintained that by 1961, "everybody was grabbing himself an Indian." The guardians pocketed large amounts of lease money, kickbacks, and high fees while the Indian received only a small portion of his income. Some conservators sold the land without the Indian's knowledge. After years of allegations and protests by Native Americans, Department of the Interior agents investigated and revealed the validity of the charges.[55] As indicated, opportunists used similar tactics to obtain powers of guardianship over incompetent Indian adults or minors during the early part of

the twentieth century in Oklahoma. They, as well, exploited the leasing of the ward's land to their own economic benefit.

Critics of the Bureau of Indian Affairs disapprove of a number of methods used in leasing. They object to "Blank Check" leases in which the Indians signed leases without the particulars being specified. The lessee then fills in the details and Bureau of Indian Affairs agents enforce these leases. Opponents of Bureau of Indian Affairs leasing practices also criticized the process referred to as the "90-day authority." This involved the leasing of land without the owners permission and after a lapse of ninety days the Bureau of Indian Affairs confirmed the lease. The Oto in Oklahoma claimed they had to honor leases approved by this method. Critics deprecated Bureau of Indian Affairs reliance on the United States Geological Survey's supervision of gas leases. They charged the latter agency of making only occasional superficial checks that in effect allowed corporations to establish their own rates for leases. Some tribes complained about the Bureau of Indian Affairs' policy of approving ninety-nine year leases. They claimed that prior to the implementation of this type of lease few land developers came to the reservations but that under the new policy in the last decade many real estate investors have invaded the reservations, particularly in the Southwest. Some tribal members accuse the Bureau of Indian Affairs of supporting these businessmen often to the disadvantage of the Indians. This

occurred on the Cochiti Reservation near Santa Fe, New Mexico. Tribal members contended that originally the U. S. Army Corps of Engineers insisted that a dam be constructed on reservation lands and, after the tribe refused to negotiate, Corps spokesmen told them to accept the proposal or face condemnation of their lands. After completion of the dam, the Bureau of Indian Affairs stated that since the Cochiti reserve possessed recreational potential the tribe should invite land companies to submit plans for development. Tribal governor Celestino Quintana asserted that "We were faced with no choice" but to cooperate with the Bureau of Indian Affairs and the development companies. As a result, one-third of the reservation became a subdivision called Cochita Lake that covered 7,500 acres. The lease agreement provided that the tribe receive five percent of the revenue from the sale of lots and a larger percentage on other properties within the development.[56]

Critics disapprove of the Bureau of Indian Affairs procedures for appeals concerning leases because they often work to the Indian leasor's disadvantage. The lengthy appeal process allows a recalcitrant lessee free use of the land or additional time to exploit it. If the Bureau of Indian Affairs finally determines the lessee failed to fulfill his part of the contract, it abrogates the lease. The Indian lessor, however, generally loses income on the transaction.[57]

According to some Native Americans the Bureau of

Indian Affairs did not fulfill its supervisory duties when it freely granted rights-of-way across their lands, often with little or no compensation for such easements. The Osage Indians of Oklahoma complained that the Bureau of Indian Affairs in turn was reluctant to obtain right-of-way across lands owned by non-Indians. Such easements obtained at county expense proved unpopular with the non-Indian electorate and county commissioners wanted to secure their votes.[58]

Other Indians have observed Bureau of Indian Affairs failure to enforce trespass restrictions on Indian lands. In Minnesota a resort owner constructed a canal across the property of the Consolidated Chippewas at Leech Lake. On the Fort Berthold Reservation in North Dakota white ranchers grazed their cattle on the tribal reserve without obtaining lease permits.[59] Tribes increasingly assume responsibility for enforcing trespass laws on their reservations. The tribal councils enact licensing and other regulatory laws for both tribesmen and non-Indians. Non-Indians have challenged a number of these actions of tribal sovereignty in the courts.

Some Native Americans charged the Bureau of Indian Affairs with using methods promoting the alienation of Indian lands. The agency has the authority to approve and regulate the selling of Indian trust lands. The Indian might desire to sell his land to the tribe or another Indian but the Bureau either sells the land at public auction to the highest bidder or restricts the sale to a particular individual

selected by the Bureau's realty agent. The Bureau of Indian Affairs often questions wills that left land to an Indian's heirs by declaring that the document failed to provide "adequate provision" for the heirs or that the land should not be divided among heirs and then proceeds to place the land on the open market to be sold to the highest bidder. Another method approved by the Bureau of Indian Affairs that sometimes leads to alienation of Indian land derives from the power of Bureau realty officers to decide when land can be efficiently divided. A non-Indian obtains a share in property owned by several Indians and then seeks to purchase the remaining interest from the Native American owners. If unable to persuade them to sell the land, the individual frequently convinces the Bureau of Indian Affairs officials to declare that the land can not be partitioned and the realty officers allow him to purchase the shares from the Indians at forced sale.[60]

Another system used to alienate Indian lands arose when a destitute Native American tried to obtain welfare but could not because he owned land. The Bureau of Indian Affairs then assisted the Indian in selling his property only to discover that the money from the land transaction made him ineligible for welfare benefits. The Bureau then held the funds in trust for the Indian who received the money in gradual payments.[61]

By the 1970s many Native Americans still failed to

exploit their land resources because many difficulties faced them. A large amount of land, over six million acres, possessed heirship status thus making it arduous to use the property. The "checkerboard" separation of Indian and non-Indian land created another obstacle. Much of the Indians' real estate, as well, consisted of sub-marginal lands. Many Native Americans also lack sufficient capital to develop effectively their land, lack the inclination to adopt alien patterns of farming or ranching, or do not possess requisite business skills. These latter reasons promote leasing to non-Indians. On the Pine Ridge Reservation whites have leased over half of the land.[62] Many tribes increasingly move in the direction of developing their land resources either in agri-business, industrial development, or recreational facilities. Tribes such as the Navaho, Northern Cheyenne, and Crow represent only a few examples of the aboriginal peoples playing a more active role in the exploitation of their lands either through business or in obtaining better leases for their remaining resources.

END NOTES

[1]Akwesasne Notes 3 (Late Summer 1971): 7; Ibid., 5 (Late Summer 1973): 40; Ibid., 5 (Early Autumn 1973): 22; Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission, 510 F. 2d 198 (D. C. Cir. 1975).

[2]Akwesasne Notes 2 (April 1970); 31; Wilcomb Washburn, Red Man's Land, White Man's Law (New York, 1971), pp. 148-49.

[3]United States, Congress, Joint Economic Committee. Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development. A Compendium of Papers . . . 91st Cong., 1st sess. (1969), 2: 460 et seq.

[4]32 Stat. 389 (1902); 33 Stat. 189, 225 (1904); William Veeder, "Greed and Bigotry: Hallmark of American Indian Law," American Indian Journal 3 (December 1977): 13-14; 36 Stat. 1063 (1911).

[5]Speeches by Fort Berthold Tribal Council, in Vine Deloria, ed., Of Utmost Good Faith (New York, Bantam Edition, 1972), pp. 310-21; see generally Roy Meyer, "The Fort Berthold Reservation and the Garrison Dam," North Dakota History 35 (Summer-Fall 1968): 217-264.

[6]Akwesasne Notes 6 (Early Winter 1974): 38.

[7]Wassaja 4 (March 1976): 1, 18; Wassaja 4 (June 1976): 1; Wassaja 4 (August 1976): 11; Wassaja 4 (Sept. 1976): 1, 17; Wassaja 4 (Oct. 1976): 1, 18, 19; Wassaja 4 (Nov-Dec. 1976): 12; Wassaja 5 (March 1977): 14; Akwesasne Notes 5 (Late Summer 1973): 14.

[8]Debo, History of the Indians of the United States, pp. 324-25, 332-33.

[9]Ibid., pp. 326, 329-30, 338-39.

[10]Ibid., pp. 325-26.

[11]207 U. S. 564 (1908).

[12]373 U. S. 546 (1963); Final Decree, 376 U. S. 348 (1964).

[13]426 U. S. 128 (1976).

[14]207 U. S. 564, 576-77 (1908).

[15]373 U. S. 546, 598, 600, 601 (1963).

[16]426 U. S. 128, 138, 143 (1976).

[17]305 U. S. 527, 531-33 (1939).

[18]460 F. Supp. 1320, 1328-33 (E. D. Wash. 1978).

[19]426 U. S. 128, 138-139 (1976).

[20]207 U. S. 564, 566 (1908).

[21]330 F. 2d 897, 914-15 (9th Cir. 1964).

[22]No. R-1987-JBA (D. Nev., Dec. 12, 1977), 5 Indian Law Reporter F 13-14 (1978).

[23]Akwesasne Notes 2 (April 1970): 5, 31; Wassaja 5 (Sept. 1977): 37.

[24]Akwesasne Notes 2 (April 1970): 31; Wassaja 4 (April 1976): 1, 3; Wassaja 5 (May 1977): 1, 10.

[25]Decree of March 9, 1964, 376 U. S. 340; Arizona v. California, argued waiting for decision, 47 U. S. L. W. 3343 (Nov. 21, 1978); Wassaja 7 (May 1979): 12, 19-20.

[26]Akwesasne Notes 5 (Late Summer 1973): 20.

[27]Akwesasne Notes 2 (April 1970): 5; Akwesasne Notes 2 (July-Aug. 1970): 23; Akwesasne Notes 2 (Sept. 1970): 7; Akwesasne Notes 5 (Late Summer 1973): 20-21.

[28]Ibid.

[29]Ibid.

[30]537 F. 2d 1102, 1111-13 (10th Cir. 1976), cert. denied 45 U. S. L. W. 3572 (Feb. 22, 1977). This case is also referred to as New Mexico v. U. S.

[31]Akwesasne Notes 5 (Early Summer 1973): 23; Akwesasne Notes 8 (Early Summer 1976): 22-23; Wassaja 4 (June 1976): 8.

[32]Oklahoma Journal (Okla. City), July 1, 1969; Akwesasne Notes 5 (Early Summer 1973): 23; Akwesasne Notes 8 (Early Summer 1976):

22-23; Monroe Price and Gary D. Weatherford, "Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin," Law and Contemporary Problems 40 (Winter 1976): 97-131.

[33]Wassaja 5 (Jan. 1977): 13; Wassaja 5 (Feb. 1977): 13; Akwesasne Notes 11 (Late Winter 1979): 23.

[34]43 Stat. 475 (1924); United States, American Indian Policy Review Commission , Task Force One Report on Trust Responsibilities and the Federal-Indian Relationship Including Treaty Review. Final Report to the American Indian Policy Review Commission (Washington, 1976), pp. 210-14; Monroe Price, Law and the American Indian (New York, Kansas City, and Indianapolis, 1973), p. 328; Wassaja 4 (June 1976): 8; Wassaja 4 (Oct. 1976): 18; Wassaja 4 (Nov-Dec. 1976): 9; Akwesasne Notes 5 (Early Summer 1973): 21; Wassaja 8 (Early Summer 1976): 23-23.

[35]Akwesasne Notes 9 (Summer 1977): 18-20; Akwesasne Notes 11 (Late Winter 1979): 23; see generally William H. Veeder, "Water Rights in the Coal Fields of the Yellowstone River Basin," Law and Contemporary Problems 40 (Winter 1976): 77-96.

[36]Northern Cheyenne Tribe v. Tongue River Water Users Association, Civil No. 76-6 (D. Mont., filed Jan. 10, 1975); U. S. v. Bighorn Line Canal, Civil No. 75-34 (D. Mont., filed April 17, 1975).

[37]305 U. S. 527 (1939).

[38]Wassaja 7 (Jan-Feb. 1979): 5; Wassaja 7 (May 1979): 4, 9, 12; Akwesasne Notes 11 (Late Winter 1979): 23.

[39]Wassaja 7 (March 1979): 1.

[40]Akwesasne Notes 9 (Summer 1977): 20.

[41]330 F. 2d 897, 899, 915 (9th Cir. 1964); Akwesasne Notes 9 (Autumn 1977): 29; Wassaja 7 (March 1979): 6.

[42]460 F. Supp. 1320, 1333 (W. D. Wash. 1978).

[43](W. D. Wash., Sept. 26, 1978). 5 Indian Law Reporter F-198.

[44]286 F. Supp. 383, 385 (D. Mont. 1968).

[45]During the 1970s the Paiutes of Pyramid Lake initiated a number of lawsuits concerning their water rights; Pyramid Lake Tribe v. Morton, 354 F. Supp. 252 (D. D. C. 1973):

U. S. v. Truckee-Carson Irrigation District v. Secretary of Interior, 71 Frd. 10 (1977), (D. Nev. 1975); U. S. v. Truckee (D. Nev., Dec. 12, 1977), 5 Indian Law Reporter F 13-14 (1978). Akwesasne Notes 2 (April 1970): 31; Akwesasne Notes 2 (Sept. 1970): 7; Wassaja 4 (June 1976): 13.

[46]66 Stat. 560 (1952). The McCarren Amendment is also known as the McCarren Water Rights Suit Act.

[47]State ex. rel. Reynolds v. Lewis 545 P. 2d 1014, 1015, 1018 (N. M. 1976).

[48]424 U. S. 800, 809-10 (1976).

[49]401 U. S. 520 (1971).

[50]401 U. S. 527 (1971).

[51]Speech by Forrest Gerard, "Indian Water Policy Review," May 24, 1978, in 5 Indian Law Reporter M 40-42 (1978); President Jimmy Carter, "Water Policy Message," in Indian Law Reporter 5 (1978): M-43.

[52]Wassaja 6 (June 1978): 1, 3; Wassaja 6 (July 1978): 16; Wassaja 7 (March 1979): 6 and passim; Wassaja 7 (April 1979): 1, 7; Wassaja 7 (May 1979): 1, 7, 9; Akwesasne Notes 11 (Late Winter 1979): 23-24.

[53]Akwesasne Notes 2 (Oct. 1970): 46; Wassaja 5 (Sept. 1977): 38; William Meyer, Native Americans (New York, 1971), pp. 44-45.

[54]Edgar S. Cahn and David W. Hearne, eds., Our Brother's Keeper: the Indian in White America (New York, 1969), pp. 85, 88-91; Wassaja 4 (Aug. 1976): 3; Kevin Gover, "Oklahoma Tribes: A History," American Indian Journal 3 (June 1977): 12-13.

[55]Akwesasne Notes 2 (April 1970): 31.

[56]Akwesasne Notes 4 (Summer 1972): 14; Cahn and Hearne, Our Brother's Keeper, pp. 88-91.

[57]Gary Jones, "Enforcement Strategies for Indian Landlords," American Indian Law Review 2 (Summer 1974): 45-48.

[58]Cahn and Hearne, Our Brother's Keeper, pp. 89-90.

[59]Ibid., p. 89.

[60]Akwesasne Notes 2 (June 1970): 22; Cahn and Hearne, Our Brother's Keeper, pp. 74-75, 117; Warren Cohen and Philip

Mause, "The Indian: the Forgotten American," Harvard Law Review 81 (June 1968): 1826.

[61]Cahn and Hearne, Our Brother's Keeper, p. 74.

[62]For discussion of heirship problem see Ethel J. Williams, "Too Little Land, Too Many Heirs--The Indian Heirship Land Problem," 46 Washington Law Review 709 (1971).

CHAPTER V

APPROPRIATION OF THE HAWAIIAN LANDED ESTATE PART ONE

James Cook's discovery of the Sandwich Islands in 1778 brought an era of change to native Hawaiians. Increasing contact with traders and missionaries from Europe and the United States transformed native culture and drastically diminished the Hawaiian population.

Cook's discovery profoundly influenced the future course of Hawaiian history. The publication of his Pacific travels announced the presence of the Hawaiian Islands and revealed the rich Chinese market for furs collected in the Pacific Northwest.[1] Consequently a prosperous trade dominated by Americans developed between the Northwest coast and China. After the American Revolution, Great Britain closed many trading centers to American ships. Seeking new markets, New England traders developed the triangular China trade. Traveling from Boston, the traders based themselves in Hawaii. From there they traded for furs among the Pacific Northwest tribes, then proceeded to China to trade them for tea, silk, and other goods which they carried to New England. The Hawaiian Islands were an excellent spot for obtaining water, wood, and fresh provisions and for wintering.

Trading ships began to frequent the Hawaiian Islands after 1785. Until 1789 British trade dominated in the Pacific when American commerce surpassed it. Early traders bartered nails, pieces of iron, and trinkets for Hawaiian vegetables, meat, water, and firewood. The trade favored the mariners but Hawaiians coveted Western goods. After the Hawaiians became more adept in commercial transactions, they demanded a more equitable exchange and additional items including guns, ammunition, and cloth. After 1810 sandalwood became an important Hawaiian exchange item.[2]

Within a decade after Cook's visits, Britishers, Spaniards, Russians, and Americans realized the rich trade potential of the Hawaiian Islands and they recommended that their governments establish some form of control over the archipelago. In 1789 a Spanish naval officer, Ensign E. J. Martinez recommended to the viceroy of New Spain that Spain colonize the Hawaiian Islands and prohibit trade with other nations. Although the viceroy remained uncertain about the proposed endeavor, in 1791 he sent Lieutenant Manuel Quimper to explore the islands. Spain, however, was declining as a maritime power and thus was unable to carry out Martinez's recommendations. In 1790 John Meares, a British subject, who had visited the Hawaiian islands in 1787 and 1788, stated that the Islands possessed great commercial potential for Great Britain and observed that Providence, by allowing a Britisher to discover the islands, intended them to become a part of

her empire. George Vancouver, a British navigator, visited Hawaii in 1792, 1793, and 1794 and attempted to extend British sovereignty over the islands. In 1794 the Hawaiian alii, the island chiefs, agreed to cede Hawaii to Great Britain. Although Vancouver believed the alii formally ceded the Hawaiian Islands, the chiefs conceived of the transaction on a different level. They believed that they had arranged a defensive alliance which assured British protection from their enemies. Unfamiliar with Western practices and terminology, the Hawaiian chiefs could not understand the role of a colony. Vancouver agreed that the chiefs retained their power and authority. At any rate the British government did not ratify the agreement, although many foreign nations apparently assumed that Great Britain had established jurisdiction over the islands. In 1816 a British naval officer proposed that Great Britain establish a military base on the islands because a colony there would benefit British commerce and perhaps check Russian expansion in the Pacific. This recommendation also was not acted upon.[3]

Between 1815 and 1817 Russia threatened Hawaiian sovereignty. A German, Georg Anton Scheffer, received a commission from Alexander Baranov, director of the Russian American Company, to recover the cargo of a wrecked vessel at Kauai, to arrange for trade between the Hawaiian Islands and the Russian American Company, and possibly to secure "a footing" in the islands. Baranov promised to provide

Scheffer with three vessels to carry out the mission. Posing as a naturalist, Scheffer gained the favor of Kamehameha I, king of the islands, who granted him the use of land to raise food. Scheffer then told Kamehameha I of his mission to recover the cargo of the wrecked Russian vessel. Scheffer went to Kauai and established a close relationship with Kaumualii, the island's chief, by his skills as a physician and promises to help free the Kauai chief from Kamehameha I's rule. Scheffer became the virtual ruler of Kauai until 1817 and placed the island under Russian dominion. Kaumualii agreed to grant the Russian American Company a monopoly over Kauai's sandalwood, the right to establish plantations on the island, the possession of one-half of the island of Oahu, and absolute control over four harbors on Oahu. Since Kaumualii did not control Oahu, Scheffer arranged to provide him with 500 Russians and a vessel to enable Kaumualii to conquer Oahu. Kaumualii agreed to pay for the vessel with sandalwood and other supplies. Scheffer then returned to Oahu to institute the terms of the agreement made with Kaumualii. Scheffer built a blockhouse at Honolulu and flew the Russian flag over it. The Russians also entered a heiau, a Hawaiian sanctuary. Aroused by these Russian activities, Kamehameha I ordered the Russians to leave the Hawaiian Islands. Scheffer left Oahu but returned to Kauai and erected a fort and exchanged a ship with Kaumualii for valuable tracts of land. Protests lodged by foreign traders, mainly American, against Scheffer's

ventures, Kamehameha's order for Kaumualii to oust the Russians, and perhaps Kaumualii's distaste for Scheffer's domination, combined to persuade Kaumualii to expel the Russians. After a show of resistance by the Russians, Kaumualii forcibly drove them off Kauai. Scheffer journeyed to St. Petersburg with hopes of persuading Czar Alexander I to conquer the Hawaiian Islands. The directors of the Russian American Company attempted to persuade the Czar to consider colonization there. The Russian government's refusal evidently rested with the belief that Great Britain would protect the islands and the Czar hesitated to antagonize the British. According to some reports, Baranov repudiated Scheffer's activities. Otto von Kotzebue, a Russian naval officer who visited the Hawaiian Islands in 1816 and 1817, assured Kamehameha I that the Russian emperor did not sanction Scheffer's aggression. This evidently strengthened Kamehameha I's resolve to expel Scheffer and his men.[4]

Commercial intercourse with foreign traders had far-reaching repercussions in the internal affairs of the Hawaiian Islands. The Hawaiian chiefs, impressed with guns, eagerly demanded and received arms and ammunition from many of the traders. Possession of Western military war materials and training by foreign residents in Western techniques of warfare caused the Hawaiian chiefs to increase their inter-island wars. Many natives died in these contests, crops were neglected and much land was idle. More importantly for the

future of the islands, the Hawaiians' use of guns enabled Kamehameha I to unify the islands. By 1795, Kamehameha controlled all of the Hawaiian Islands except Kauai and in 1810 Kaumualii agreed to accept Kamehameha I as sovereign although Kaumualii retained actual control of Kauai until his death in 1824.[5]

Foreign contact altered the land tenure system slightly during the early period of the trading era and set the stage for substantive modifications in later years. After Hawaiians commenced commercial activities with Westerners, the natives, especially the chiefs, developed a desire for the products of Western technology and an awe for the skills and knowledge of the foreigners. As a result, the chiefs and Kamehameha I eagerly requested foreign seamen to work in the islands as carpenters, shipbuilders, masons, interpreters, blacksmiths, physicians, gunnery instructors, and advisors. In return the chiefs gave the foreigners land. To Hawaiians this meant the free use rather than title to land. Early residents accepted Hawaiian customs including the land tenure system. Their property rights paralleled those of the natives or chiefs, with their tenure being revocable at the will of the higher chiefs, or the king. If the foreigners conducted themselves properly, their tenure remained fairly stable. Many of the settlers received the status of chiefs. They paid tribute to the chiefs and king and in turn received tribute from the commoners residing on their lands.[6]

Some of the early residents including Englishmen Isaac Davis and John Young and the American Oliver Holmes closely associated with Kamehameha I and became his trusted advisors. The alii accepted them as chiefs and Kamehameha I appointed Young governor of Hawaii and later Oahu. Holmes occasionally assumed the same position on Oahu. In 1795 Kamehameha I left Davis in charge of Hawaii while the King waged war on some of the other islands.[7]

Many of the early Western residents encouraged Hawaiian dependence on white skills. Archibald Campbell residing in the Islands in 1808 observed that foreigners in the king's service refused to instruct natives in Western arts. Boyd, the king's carpenter, believed, as did many other whites, that he should not teach the natives since their acquisition of Western knowledge or skills would lessen his status. Isaac Davis noted that the natives would cease to encourage trade with foreigners if the Hawaiians acquired abilities to make and utilize foreign materials. John Adams, a Hawaiian chief, requested Campbell to teach him to read but Davis refused, explaining, "They will soon know more . . . than ourselves."[8]

Only five white residents lived in the Hawaiian Islands in 1790 but by 1817 nearly 200 resided there. The size of the foreign community varied greatly because many were transient seamen who intended to remain in the islands for a short time. Many sailors deserted their ships or their captains released them while in the harbors. Frequently maritime traders pre-

ferred to recruit native Hawaiians to replace the white sailors since Kanakas were considered superior mariners. Vancouver recommended that Kamehameha expel sailors and prohibit most foreigners from residing in the islands because of their propensity for drinking and carousing. Kamehameha I desired only industrious whites, but he refused to deport sailors because of their knowledge of firearms. In late 1814 and early 1815, however, he ordered all whites without land assignments to leave the islands. In 1820 Liholiho (Kamehameha II) attempted to banish undesirable white residents.[9]

While Kamehameha I ruled the Hawaiian Islands, the land tenure system remained virtually unchanged from ancient times. After 1795, Kamehameha I owned all of the land in the Hawaiian Islands except Kauai and in 1810 he obtained that island. He subdivided the lands according to ancient custom, although he gave the largest districts to the highest alii. To a considerable degree Kamehameha I allowed the heirs of deceased chiefs to retain possession of the ahupua'as and ili ku's. Kamehameha's policy of requiring the higher chiefs to remain with him continuously somewhat altered the land system. This mandate led to a high degree of absentee landlordism. The actual management of the alii's lands fell to subordinate chiefs or konohiki. In the pre-contact period, the higher chiefs actually resided within their ahupua'a or ili ku.[10]

The organization of the royal government closely

paralleled that of the land system. Kamehameha I added one important feature to the government structure by installing a governor over each island except Kauai, where Kaumualii, the former king of that island, remained the ruler until his death in 1824. On the other islands Kamehameha changed governors frequently. This alteration resulted from Kamehameha's plan to prevent rebellion and break the close ties of loyal attachment of the higher chiefs' to their home region and their commoners. Also with the higher alii continually in his royal court, he required agents to oversee the affairs of the islands. The duties of the governor largely centered on ensuring the efficient collection of taxes by the konohiki.[11]

With the onset of a relatively peaceful era, the king no longer required warrior chiefs to defend his lands and this brought an end to the need for redivision of lands. This factor along with the increasing power of the higher alii, resulted in only a few reallocations of lands in 1819 when Kamehameha II ascended to the throne. Consequently most of the lands remained in the possession of the chiefs who had received them from Kamehameha I. In 1825 the hereditary holding of lands became a legal part of the land tenure system when the council of chiefs who appointed Kamehameha III as sovereign sanctioned this principle.[12]

Trade with foreigners brought a change from a subsistence economy with land valued for its use and resources to

a commercial economy with the land and its products assuming commercial value in which the commodities could be exchanged for foreign goods. The chiefs' desire for trade, foreign goods, and liquor led them to exact increasingly excessive demands from the makaainana which had the effect of worsening the commoner's material welfare and producing greater insecurity in their land tenure. At the same time the alii's wealth and stability in property rights increased. The high demand of food-stuffs required for trade with the increasing number of traders visiting Hawaiian shores caused the chiefs to require larger amounts of produce and to extend the work load of the commoners in their production of yams, hogs, and vegetables. During the 1790s trade for sandalwood began with the Hawaiian chiefs, although it did not become a major item of trade until after 1810. The sandalwood era affected the land tenure system in several ways. The mountainous areas assumed a high value whereas formerly they possessed only a nominal value. Kamehameha I placed a royal monopoly on the sandalwood until 1819 when the chiefs forced his successor, Kamehameha II, to share the trade with them. Trade for sandalwood undermined the native land tenure system. The chiefs, especially the konohiki, became capricious in their treatment of the makaainana and made oppressive demands of the commoners. Frequently the makaainana remained in the mountains for months at a time felling trees, dragging the logs on their backs for long distances over rough terrain

in order to store the sandalwood in the chiefs' warehouses. Consequently the farming activities of the commoners suffered. At times, cultivation and fishing virtually ceased. The makaainana often produced only slightly more than the amount required by the chiefs and konohiki. Enforcement of kapus on fishing grounds during the spawning season ended which resulted in the depletion of breeding grounds for fish. Deep sea fishing, a cooperative effort, also virtually ceased. The inattention to fishing and farming organization materially affected the food supply of the commoners and the efficient utilization of the land and sea.[13]

The growth of the whaling industry after 1820, its subsequent use of the Hawaiian Islands as a refreshment place, and the influx of commercialists associated with whaling, augmented the economic oppression of the commoners commenced during the China trade and sandalwood eras. If the makaainana failed to meet the excessive labor and tax requirements the konohiki often removed the commoners from their lands and reassigned the fields. The chief who often maintained a paternal attitude toward the makaainana on his lands in the period prior to the development of a trading economy, became concerned only with his own selfish needs. As a result of the commercial emphasis within the Hawaiian economy, many commoners moved to the towns springing up on the coast. Urbanization undoubtedly resulted from the oppressive demands of the alii and the lure of town life.[14]

After 1820, Hawaii developed as an American frontier. New England experienced a period of both commercial and religious expansion. Many New England missionaries, traders, and merchants turned toward the Hawaiian Islands. The archipelago soon became essentially an American colony with the settled traders, merchants, and missionaries acquiring extensive internal and external power among the Hawaiians. By the 1840s these American settlers controlled the government and economy although the native Hawaiian chiefs and king nominally retained power until 1893.

The influence of these new immigrants led to intensive alterations within Hawaiian society and ultimately transformed the native land tenure system into one based on Western concepts of property. By obtaining extensive influence with the chiefs and king as trusted advisors, infiltrating the native government in important positions, and acquiring possession of land within the kingdom these Americans overturned the native land tenure system and government through internal subversion.

In contrast to the American Indian, the foreign invaders secured control of the Hawaiian government and undermined the native land system in a comparatively short period of time. The ancient Hawaiian property and governmental system largely provided the requisite factors enabling the whites to quickly subvert the native order. The Hawaiians' high respect for individuals with superior power, knowledge,

and skills, led the alii to accept Westerners as equals or chiefs. The Hawaiians were accustomed to following the dictates of chiefs who possessed superior power and abilities. Having a natural tendency of adaptability the natives quietly accepted what fortune bestowed upon them. Hawaiians were accustomed to transferring their loyalties and subservience to different chiefs; they continued this practice with resident foreigners many of whom received the status of chiefs. The chiefs exacted such excessive tribute and services from commoners that they had little incentive to save and were customarily prodigal in sharing their possessions. The Hawaiians transferred to the whites this habit of giving away all or any amount of their possessions. The chiefs allowed the foreigners to use land and accept the customary tribute in the same manner as the alii. Since many Westerners possessed technology and knowledge of Western civil and diplomatic law, the chiefs relied heavily on the settlers' abilities in dealing with the imperialistic nations whose citizens frequently visited Hawaiian shores. Another important reason for the foreigners' ascendancy to positions of power lay with the Hawaiians' awe of Western military superiority. Hawaiians followed certain Western patterns of international relations to retain their independence as a nation. This led to a high degree of reliance upon foreign residents who became trusted advisors. Also Hawaiian leaders realized the need for compromise with the imperialistic nations when

they appeared with their gunboats to require the Hawaiians to guarantee security of foreign property. The settlers' acquisition of land and native dependence on Westerners set the stage later for alienation of Hawaiian land and sovereignty.

Although the process of dispossession occurred with relative ease, the Hawaiians did not alter their government or land tenure system without resistance. Their opposition to change surfaced in the form of slow compromise with the chiefs succumbing to foreign pressure by degree. Finally when foreign advisors had assumed effective control of the government and Hawaiians could no longer forestall the pressure of the settlers and gunboats, the old order collapsed.

Although numerous visitors commented on the insecurity of land tenure and the need for change, agitation for revision of the property system developed only after 1820 among residents and foreign representatives. The later immigrants to the Hawaiian Islands consisted of merchants, traders, as well as missionaries. These individuals, largely New Englanders, brought with them close ties to their culture and its concepts of a highly-developed sense of individual ownership of property. They opposed the native system of ownership resting with the king and with the inhabitants possessing only the usufruct with revocable tenure. These later colonists differed remarkably from the earlier residents who accepted the native land system and customs. Normally the

first settlers retained only a loose relationship with their country and families, thus enabling them to have more flexibility in their attitudes toward the native order. The Hawaiians by treating these early residents as chiefs, bestowed a status and subsequent wealth upon them superior to that which they possessed among their own countrymen. Their high position and prosperity rested with the maintainance of the native land system with the superior property rights of the king and chiefs. Evidently few of these men had commercial or entrepreneural ambitions of promoting a personal empire which necessitated the acquisition of land in fee simple. The later settlers, however, were concerned with increasing their own material welfare as well as promoting the economic prosperity of the Hawaiian nation. They saw the native land system as an impediment to such economic advancement.

After 1800 a few whites established trading posts or businesses in the Hawaiian Islands. After 1820 the flourishing sandalwood trade and within a decade the prospering whaling industry led to increased settlement by New England commercialists in the islands. They requested land for the erection of their houses, stores, and warehouses. The king and chiefs granted usage of plots of land but retained ownership of the land. Foreigners in service of the alii also continued to receive the use of land. Some settlers obtained lands by marrying native women and by becoming naturalized citizens. The foreigners' tenure paralleled that of the chiefs and was

revocable. However, once haoles, or whites, secured land they tended to consider it in terms of Western property rights. They proceeded to lease, buy, or sell the land to fellow foreigners. This attitude often brought them into conflict with the chiefs who held to the traditional concepts of property. After 1830 numerous cases arose of violation of the native property system by foreigners.[15]

The chiefs frequently bestowed the use of fertile lands to the New England missionaries who began arriving after 1820. The missionaries accepted these lands to provide subsistence for their families and to instruct the commoners in Western techniques of land utilization. Their policy consisted of showing the makaainana the best methods of cultivation and husbandry. They also instructed the commoners in constructing stone walls around the farm lands in order to protect the fields from cattle and horses which freely roamed the countryside and often destroyed crops. These animals, descended from livestock left by Vancouver and early traders, had proliferated. The missionaries also encouraged industry among the commoners. They believed the native's lack of initiative resulted directly from the property system which stultified the makaainana's motivation to farm lands adequately. The missionaries and commercialists as representatives of Western culture believed in continual hard work. The Hawaiian attitude contrasted greatly with the Western. They believed in exploiting the soil or waters only to the

extent of meeting their immediate needs. The missionaries opposed the native land tenure system because they viewed it as a detriment to the commoners' prosperity and their continued existence as a race. They urged private ownership of land by the natives, alleviation of the oppressive system of taxation, and the enactment of laws promoting native industry. Both missionaries and commercialists advocated the transformation of the native land tenure system to one conforming to Western concepts of private ownership.[16]

The haole rationale for changing Hawaiian land tenure resembled that applied by whites to Indians. Western morality and desire for land constituted the major factors motivating appropriation of the native's land.

Most missionaries sincerely believed that owning land in fee simple would save the Hawaiian race from extinction. They maintained that the traditional Hawaiian feudal system of land tenure exploited the natives and encouraged them to be lazy and unproductive. Haoles asserted that insecurity of land tenure and excessive taxation of the products of the soil comprised a major obstacle to industry. Economic progress and prosperity would not come until natives toiled the soil with industry. Both missionaries and commercialists contended that private ownership of land and secure rights to its produce would promote sedulity and motivate the commoners to increase production. Inspired by self-interest the natives would augment their productivity. Each commoner would

become attached to his land and would have "his home, his house, his cattle, the products of his own industry to love, to defend." The natives would become small independent farmers with flourishing and productive farms. Furthermore, prosperous natives would be inclined to propagate more children thus arresting the decline in native population. The haoles, mainly New Englanders, also believed that in order to become civilized a people must accept the concept of private property and become cultivators of the soil. Some of the missionaries wanted the natives to own land but opposed white ownership.[17]

After 1820 hostile feelings developed between the missionaries and many of the commercialists. The former condemned the commercialists for encouraging unChristian behavior while the latter denounced the missionaries for inducing the natives to adhere to Puritan practices which hindered activities of the foreigners. Businessmen charged missionaries with promoting idleness and lack of industry among the natives by keeping them from the fields to instruct them in religion and educational pursuits. Missionaries defended their activities by arguing that religious and educational enlightment encouraged the natives to become industrious. They also maintained that since the climate enabled the natives to labor for only short periods in order to meet their needs, time remained for instruction in religion, morality, and learning.[18]

A majority of the foreigners, excluding many mis-

sionaries, wanted land for agricultural, commercial, and private use. Demand for private ownership of land increased in the 1830s and 1840s when the foreign community realized the profitability of agriculture in the Hawaiian Islands. American expansion into California and the Pacific Northwest in the 1840s opened new markets for Hawaiian produce. Most haoles were reluctant to invest heavily in land that could be taken from them at any time and which they could not sell.[19]

Whites also argued that possession of individual property by foreigners would increase the prosperity of the Hawaiian Islands including that of the natives. The haoles asserted that their industry would provide models for the natives and motivate them.[20]

The haoles believed that land should be used to its utmost potential. They contended that under the native land tenure system Hawaiians failed to exploit the land to its maximum utility. Westerners claimed that the natives, indolent and idle at that time, did not exploit fully the land, and wasted the fertile soil. With individual ownership, haoles could develop the land. They contended they should have that right. The whites failed to consider the conflict between native concepts of land utilization and Western ideals of land usage. The natives normally worked the soil to the degree required to satisfy their families' immediate needs. Westerners viewed agricultural pursuits along commercial lines. Extensive production above that required for their own sub-

sistence was needed to promote commercial enterprises and increase the prosperity of the Hawaiian Islands.[21]

Adding to the haoles' desire for land for commercial and agricultural pursuits was the prevailing belief that the native race was quickly becoming extinct. Strong indications supported this idea because the native population had decreased dramatically since their first contact with whites due to the introduction of venereal disease, measles, other diseases, and exploitation by Westerners in the sandalwood industry and other enterprises. The haoles sought to insure that the land would be theirs when the aboriginal population expired.

Proponents of alodial land tenure advocated several plans which insured that both natives and foreigners would receive sufficient land for production. One advocate suggested that the government award to each commoner five times the amount of land which he cultivated. If the natives did not toil their fields, then the lands would revert to the government which would place the lands on the market at a price conducive to foreign investment. After the natives obtained their allotments, sufficient land would remain for foreign purchase.[22]

Foreign residents frequently requested the aid of representatives of their home governments to persuade the Hawaiian government to grant more secure property rights and individual ownership of land. Most naval officers visiting

Hawaiian shores urged Hawaiian leaders to institute changes in the land system. This sustained pressure reinforced the inward forces working to destroy the ancient land tenure system.

In 1825 Lord Byron arrived at the Hawaiian Islands on the British ship H. B. M. S. Blonde, which carried the bodies of King Kamehameha II and the queen, who had died while visiting Great Britain. Lord Byron attended the meeting of the council of chiefs which conferred the kingship on the deceased king's younger brother, Kauikeaouli, and he delivered a speech on civil and political affairs. Byron and Kalanimoku, the young King's appointed guardian and regent, recommended that the Hawaiian chiefs adopt the principle of inheritance of lands. The council of chiefs approved the proposal. Sustained pressure to adopt this change before Byron's advent had softened resistance. The chiefs were ready for the change. Byron's recommendation represented a climax to an extended campaign.[23]

The following year, Captain Thomas C. Jones of the U. S. S. Peacock visited the Hawaiian Islands and forced the Hawaiians to sign a treaty which required the chiefs to pay all outstanding debts which they had accumulated over a period of years to American traders involved in the sandalwood and whaling industry. Although the United States Congress never approved the treaty, the terms of the agreement affected the property rights of foreign residents in the islands. The Hawaiians acted on the assumption that it had been ratified.[24]

During the 1820s and 1830s the American government's commercial agent, John Jones, frequently requested the American Secretary of State to send American warships to the islands on a semi-annual basis. Jones believed the presence of American vessels in Hawaiian anchorages would ensure security of property for the American residents and provide protection for the growing commercial activities of the Americans.[25]

Jones, with European diplomats in the Hawaiian Islands, frequently brought foreign property claims to the attention of the Hawaiian government. They tried to force the acceptance of the Western property system on the Hawaiians. Often the foreign representatives attempted to intimidate the king and chiefs into approving the claims through the use of abusive language and threats of force by foreign warships.[26]

After 1836 British, American, and French naval officers regularly tried to persuade or compel Hawaiian officials to conclude treaties which provided certain guarantees for foreign property. These representatives believed it was their duty to enforce property rights of their countrymen residing in the islands. The presence of warships and consultations by naval officers with the chiefs led to a reconsideration of the property system and encouraged the changes urged by the commercial residents and missionaries.

In September, 1836,Commodore E. P. Kennedy of the U. S. S. Peacock arrived at Oahu and attempted to settle complaints from the foreign community, especially those of

Americans. Kennedy discussed with Kamehameha III and the major chiefs such issues as the nature of foreign tenure, property rights, the privilege of transferring property and the right to lease agricultural land. Kinau, governor of Oahu and Kuhina-nui, maintained that when the king allowed foreigners to use lots for houses and buildings he never alienated his right to the land. When the possessor of the lot left the islands or died, the land reverted to the king. Kinau further stated that the king would agree to the sale or transfer of such property if the transferee met the king's approval.[27]

During another conference Kamehameha III contended that he would lose his right to the land if he allowed the free transfer of property and that he would soon alienate the entire country from his sovereignty. Although the King approved the leasing of agricultural lands on a selective basis, he refused to sanction the principle of leasing because he had not given the matter sufficient thought.[28]

Commodore Kennedy failed to reach an agreement with the King but left a letter stating his views on foreign property rights. Kennedy hoped that the talks would lead the chiefs to guarantee the right of transfer of property and the leasing of agricultural lands. Kennedy, in agreement with many foreign residents, asserted that the Jones treaty of 1826 inferred the existence of such rights and privileges for American residents. The American Commodore argued that

such property rights would increase the prosperity of the Hawaiian nation.[29]

C. K. Stribling, the acting commander of the U. S. S. Peacock, recommended that the Hawaiian government change its land tenure system in order to insure the prosperity and continued existence of the Hawaiians. He urged the chiefs to place a fixed rent on the tenants' land with the remainder of the produce assured to the cultivator. Stribling also suggested that the chiefs institute a policy providing for security of property for both natives and foreigners, equal and moderate taxation for the natives, cessation of compulsory labor, and the leasing of agricultural lands to foreigners for cotton, coffee, and sugar production. A crew member of the U. S. S. Peacock in a letter to the editor of the Sandwich Island Gazette stressed the need for security of land tenure since this would lead to an increase in land cultivation and halt the decrease in the native Hawaiian population.[30]

The efforts of Lord Russell, British commander of the H. B. M. S. Acteon, and the British consul, Richard Charlton, in late 1836 led to a treaty between the two nations which contained a Hawaiian guarantee of certain property rights for foreign residents. The treaty came at the height of foreign agitation for alodial ownership of land. The British representatives did not gain the right for foreigners to own land. The pact reaffirmed the king's ownership of the land. One of

the major issues which Charlton brought forward dealt with the security of ownership of buildings. Prior to Russell's arrival, Hawaiian officials had seized the house of an Englishman, George Chapman. Charlton and Russell pressed for the restoration of the house in the same condition as when taken and finally the King agreed to the demands. Lord Russell intended to obtain a treaty which guaranteed security of property for foreigners. He presented to the King a treaty written by a British resident but Kamehameha III refused to agree to some of its terms. The chiefs produced their own treaty which the British officials considered unsatisfactory and then threatened an end to the friendly relations between England and the Hawaiian Islands unless the Hawaiians agreed to more liberal terms. Under the threat of force and after much debate the chiefs and Kamehameha III concluded a treaty which acknowledged foreign ownership and protection of buildings and the right for haoles to transfer property with the prior knowledge of the king. The treaty also enabled the heirs of a deceased resident or the British consul to settle the debts and estate without interference by Hawaiian authorities. Lorenzo Lyons, a missionary, stated that Lord Russell's activities frightened the Hawaiians into "selling" land to the foreign residents. In 1837 Henry A. Pierce, a resident American businessman, remarked that the visits of the American, English, and French warships during the preceding sixteen months had "established inviolability of property

and persons, and the natives taught and made to fear the 'Laws of Nations'."[31]

Another instance of foreign naval officers impairing the King's control of land occurred in 1839 when the French frigate L'Artemise arrived in Honolulu. Captain C. P. T. Laplace primarily was concerned with the religious freedom of French Catholic priests and their Hawaiian converts. On the day of his arrival, July 9, Laplace delivered an ultimatum to the King stating that unless he agreed immediately to five demands which he listed, the frigate would attack Honolulu. One demand ordered Kamehameha III to grant a plot of land to the Catholic priests for the erection of a church in Honolulu. Laplace offered his ship as a place of safety for all foreigners except Protestant missionaries whom he considered responsible for the Hawaiian policy of persecution of French priests and Catholics. In the absence of the King from Honolulu, Kekauluohi, the kuhina-nui and the governor of Oahu agreed to the terms. Before leaving the Hawaiian Islands, Laplace signed a treaty with Kamehameha III which guaranteed the protection of French residents in their "persons and property".[32]

The visits of the American, British, and French warships between 1836 and 1839 secured the protection of certain property rights for foreign residents in the Hawaiian Islands. The British and French treaties specifically guaranteed these privileges for their subjects while the American position remained uncertain. In 1839 P. A. Brinsmade, the American

commercial agent, sought to ascertain the status of American residents. Kamehameha III stated that Americans enjoyed the same rights and privileges granted to British and French residents. The previous year William Richards, an American political advisor to the Hawaiian government, had sent a proposed treaty to officials of the United States government. In it the chiefs and King reiterated their views on the native land tenure system and American property rights in the islands. The proposed treaty declared that Americans could "hire and occupy" houses and warehouses "in accordance with the laws and customs of the country." It reaffirmed the king's ownership of all lands in the islands and stated that any house-lots taken within ten years would be reimbursed by the Governor. State Department officials placed the document in their files without attempting to gain Senate approval for it.[33]

The next major foreign interference in internal land matters occurred in 1842 when Lord George Paulet arrived in the Carysfort at Honolulu. Paulet specifically visited the Hawaiian Islands at the request of former British Consul Richard Charlton who had brought a list of charges against the Hawaiian government for alleged unfair treatment of British subjects. Lord Paulet immediately demanded a personal interview with the King but the Hawaiian government denied his request and instead suggested that Paulet speak with Gerrit P. Judd, the King's representative. Lord Paulet then issued an ultimatum consisting of six demands to be met

by the following afternoon or the Carysfort would attack Honolulu. Paulet offered asylum to English residents on board a British ship and Commodore John C. Long provided his vessel as a place of safety for American residents. The foreign residents, fearful of a British attack, began moving their possessions on board the ships until they learned that the King acquiesced under protest.[34]

One of the major demands and one which would involve the Hawaiian government in a lengthy period of litigation and difficulties with the British government concerned a land claim of Richard Charlton. Charlton had brought a claim for certain lands in the center of Honolulu in 1840 and the Hawaiian government had refused to acknowledge title to most of the land claimed by the British consul. Paulet ordered the immediate removal of the attachment the Hawaiian government had placed on Charlton's property, surrender of all land claimed by him, and reparation for losses incurred by him and his representatives as a result of the government's proceedings. Not content with the King's agreement to the demands including the Charlton claim, Alexander Simpson, the acting British consul, and Paulet required the King to sign a confirmation of the 299-year lease allegedly given Charlton in 1826. Charlton had appointed Simpson as his replacement when he returned to England to report his difficulties with the Hawaiian government. The Hawaiian government refused to acknowledge the appointment until Paulet forced its acceptance of Simpson's position as one of the six demands.[35]

Paulet and Simpson also interfered in the internal affairs of the Hawaiian nation by ordering the King to reverse certain court decisions and pay large indemnities to foreigners. Kamehameha III refused to agree to these demands and after many conferences with the British officials, Judd and Kamehameha III decided that Paulet and Simpson were seeking to take possession of the islands. After some consideration of ceding the Hawaiian Islands to France, the United States, or both, Hawaiian officials decided to cede the islands provisionally to Great Britain under protest and with the understanding that the Hawaiians would rely on the British government's sense of justice to restore the islands to the King once it learned of Paulet's activities. The provisional cession was decreed on February 25, 1843, and included provision for the operation of a provisional government. The King and chiefs retained authority to rule on native affairs while a commission comprised of Kamehameha III or his deputy, Lord Paulet, and two other British officers would deal with affairs concerning the foreign residents. No sales, leases, or transfer of land by the commission or by natives to foreigners would occur until the Hawaiian representatives had returned from England. Paulet dispatched a ship to London with the details of the proceedings occurring in the Hawaiian Islands. Without Paulet's knowledge the Hawaiian government also sent a report to the British government which it gave to an American merchant, James F. B. Marshall, who traveled on the British ship as business agent for Ladd and Company.[36]

When the Hawaiian officials in London learned that the British government had appointed William Miller as the new British consul and delegated to him the authority to settle the affair in the Hawaiian Islands, they wrote Lord Aberdeen requesting that he adjudicate the matter in England. The Hawaiian government distrusted Miller and believed that Aberdeen would render a just decision. The latter agreed to accept jurisdiction. The King's representatives in London, Willaim Richards and Timothy Haalilio, possessed the necessary authority to accept the British ruling. Charlton fully documented his charges while the report given to the British Lord by the Hawaiian officials contained only partial substantiation. The Hawaiian government was hampered in preparing its case since it did not have access to the Hawaiian archives and had no knowledge of the exact nature of the charges brought by Charlton. The Hawaiian government did not dispute Charlton's holding of a tract of land granted to him by Kalanimoku which he had occupied since 1826, but did refuse to acknowledge Charlton's right to an area of land surrounding this plot which in 1840 Charlton claimed as being part of the original grant. The Hawaiian government argued that Kalanimoku never awarded Charlton the land. Kalanimoku had retained this land and her retainers and heirs had lived on these lands since 1826. Hawaiian officials furthermore maintained that the grant was invalid since Kaahumanu instead of Kalanimoku was regent in 1826 and the land was hers and not Kalanimoku's

and that the latter could not give away land without Kaahumanu's consent.[37]

Lord Aberdeen rendered a judgment in favor of the Hawaiian government on all issues except the Charlton land claim. Lord Aberdeen's verdict stated that the final decision rested with the genuineness of the grant and the power of the person executing it. The power of the person hinged on who was regent in 1826 and Aberdeen stated that the evidence submitted indicated that Kalanimoku occupied the office of regent at that time and therefore possessed the authority to give the land to Charlton. The decision also indicated that the entire area claimed by Charlton lay in the original grant. Aberdeen declared that the final decision of the authenticity of the grant must be decided in Hawaii upon an examination of the deed to clarify whether the signatures were genuine. If the deed proved to be authentic then the Hawaiian government must immediately restore all the land in question to Charlton or his representatives.[38]

Upon learning of Aberdeen's decision, Haalilio and Richards rejoiced at the favorable settlement of most of the claims but objected to the verdict on the Charlton land claim. They submitted new evidence which well-substantiated their arguments but Aberdeen refused to alter his decision. Haalilio and Richards accepted the verdict but attempted to obtain indemnities for losses and damages inflicted in the Hawaiian Islands by Paulet and Simpson. Aberdeen refused to

award these and justified his position by stating that Kamehameha III did not have to cede the islands. If Paulet had carried out his threat of a siege then the Hawaiian government would have possessed a basis for seeking compensation.[39]

British Consul Miller decided that the signatures on the title were genuine. Hawaiian government officials believed the grant was invalid, aside from the authenticity of the signatures. They interpreted Aberdeen's orders broadly by substantiating that certain chiefs, natives, and white residents held the land outside of the enclosed area occupied by Charlton and that the former British Consul never had indicated otherwise until he submitted his claim in 1840. Miller considered the actions of the Hawaiian officials as an attempt to evade Aberdeen's decision and consulted with the British government who then ordered the Hawaiian government to give the contested lands to Charlton. Miller delivered these demands to the Hawaiian officials and the King acquiesced in August, 1845.[40]

Hawaiian attempts to have the British government review the decision continued. In 1847 the British government reaffirmed its previous ruling. Conflict over the Charlton land case continued as a source of trouble for several more years.[41]

Paulet's seizure of the Hawaiian Islands caused much concern on the part of Americans for the security of their lands because they realized that the manner in which they

had acquired and held their lands would not secure a title under British law. American subjects including the missionaries opposed British rule and desired Hawaiian independence. Even President John Tyler on December 30, 1842, stated that the extent of American interests in the Hawaiian Islands gave the United States a special interest in the continuation of Hawaiian independence. The American commissioner, William Hooper, objected to Paulet's activities, thought the Hawaiian Islands should be independent, and believed the United States should exert influence in order to gain foreign recognition of Hawaiian independence. Hooper also pointed out the unjustness of Paulet's demands and that the Hawaiian government ceded the Islands under protest. The American commissioner suggested to the United States Secretary of State, Daniel Webster, that the American government should persuade Great Britain to restore sovereignty to the King. Hooper also questioned whether the United States should allow a foreign naval officer to usurp the powers of the Hawaiian government.[42]

British Admiral Richard Thomas arrived at Honolulu in July, 1843, and restored sovereignty to Kamehameha III. Thomas declared that the Hawaiian government had ceded the islands unwillingly. Thomas maintained that Great Britain did not authorize Paulet's actions. Thomas concluded a treaty with the Hawaiian government which contained ten articles including one which restored Charlton's land to his possession. The treaty also guaranteed the protection and respect for the rights of British subjects.[43]

Restoration of the islands to Hawaiian rule relieved American residents. Hooper believed that the Americans were better off as a result of Paulet's proceedings. The Hawaiian government had settled all American claims. Also France and Great Britain clearly desired Hawaiian independence. Prior to Paulet's arrival, a general fear existed that France would seize the Hawaiian Islands. All three nations desired the neutrality of the islands because of their strategic position in the Pacific trade.[44]

The frequent urging of foreign naval officers to change the land tenure system, the interference of foreign diplomatic representatives in internal land affairs, the forced recognition of property rights for foreign subjects, the increasing influence and control of the native government by haoles, and intensified remonstrations on the part of foreign residents combined to influence the King and chiefs to alter the land tenure system. They resisted as long as prudence allowed but finally the forces demanding change prevailed. Even so, the transformation from a relatively feudal property system to one based on Western concepts of individual ownership of land occurred over a period of years and with much difficulty.

END NOTES

[1]James Cook and James King, A Voyage to the Pacific Ocean, 3 vols. (London, 1784).

[2]For a listing of the ships with their respective national registry see Bernice Judd, Voyages to Hawaii Before 1860, enl. and revised, by Helen Lind (Honolulu, 1974). John Ledyard, Journal of Captain Cook's Last Voyage, ed. by Kenneth Munnford (London, 1783; reprint ed., Corvallis, Oregon, 1963), pp. 67-68, 103-04, 109; George Dixon, A Voyage Round the World . . .2d ed.(London,1789), pp. 89-113; Nathaniel Portlock, A Voyage Round the World . . . (London, 1789), pp. 58-91 passim, 146-197 passim; George Vancouver, A Voyage of Discovery to the North Pacific Ocean, and Round the World . . . in the Years 1790, 1791, 1792, 1794, and 1795 . . . 3 vols. (London, 1798), 1:154, 157-58, 172, 179; and Joseph Ingraham, The Log of the Brig Hope . . . Hawaiian Historical Society Reprint no. 3 (Honolulu, 1918), pp. 3-35 passim.

[3]John Meares, Voyages Made in the Years 1788 and 1789 From China to the North West Coast of America (London, 1790; reprint ed., Amsterdam, Netherlands and New York, 1967), xcv; Archibald Campbell, A Voyage Round the World, pp. 114-15; Letter by George Vancouver, printed in Sandwich Island Gazette, October 7, 1837; Vancouver, Voyage of Discovery, 3:29-32, 48, 54-57; Kuykendall, The Hawaiian Kingdom (Honolulu, 1938), 1: 21; Harold Bradley, The American Frontier in Hawaii, the Pioneers, 1789-1842 (Stanford, 1942), p. 52.

[4]Peter Corney, Early Voyages in the North Pacific, 1813-1818 edited by Glen C. Adams (London, 1821; Reprint of 1896 ed. Honolulu, Fairfield, Wash., 1965), pp. 132, 156-59, 184-85; Otto von Kotzebue, A Voyage of Discovery . . . 3 vols. (London, 1821; reprint ed., in 2 vols., Amsterdam, Netherlands and New York, 1967), 1:303-05. For detailed study see Richard Pierce, Russia's Hawaiian Adventure, 1815-1817 (Berkeley and Los Angeles, 1965).

[5]Vancouver, Voyage of Discovery, 1:157-58, 179, 2: 186, 198, 3:67, 71; Ledyard, Journal of Captain Cook's Last Voyage, p. 109; Meares, Voyages, pp. 354-56; Campbell, Voyage Round the World, p. 105; Corney, Early Voyages, p. 185; Missionary Herald (hereafter cited as MH), 23 (1827): 273; and

Gabriel Franchere, Narrative of A Voyage to the Northwest Coast of America in the Years 1811, 1812, 1813, and 1814, trans. and ed. by J. V. Huntington (Redfield, N. Y., 1854; reprint ed., edited by Milo M. Quaife, Chicago, 1954), p. 36.

[6]Campbell, Voyage Round the World, pp. 95, 98, 103-06, 111-12, 120, 126-28, 160; Kotzebue, Voyage of Discovery, 1:292, 302, 309, 345; Vancouver, Voyage of Discovery, 3:17, 66-68, 140; Ross Gast and Agnes Conrad, Don Francisco de Paula Marin and the Letters and Journal of Francisco de Paula Marin (Honolulu, 1973), pp.199-242 passim (hereafter cited as Marin, Journal).

[7]Vancouver, Voyage of Discovery, 2:122, 140; and Kotzebue, Voyage of Discovery, 1:333.

[8]Campbell, Voyage Round the World, pp. 107-109.

[9]Vancouver, Voyage of Discovery, 3:67-68; 2:181; Franchere, Narrative of a Voyage, p. 41; Meares, Voyages, p. 350; Marin, Journal, pp. 214-15, 242-43; Campbell, Voyage Round the World, p. 126; Corney, Early Voyages, p. 133; MH 17 (1821): 283.

[10]Malo, Hawaiian Antiquities, p. 195; Campbell, Voyage Round the World, p. 137; Ii, Fragments of Hawaiian History, pp. 16, 69-70, 116; Hiram Bingham, A Residence of Twenty-One Years in the Sandwich Islands . . . 3 ed. rev. (Hartford, 1849; reprint ed., N. Y., Washington and London, 1969), p. 49; John Jones to John Q. Adams, Dec., 31, 1822, Dispatches from United States Consuls in Honolulu, 1820-1903, vol. 1 (hereafter cited as USDS, Dispatches); Ellis, Narrative of A Tour of Hawaii, p. 306; Kotzebue, Voyage of Discovery, 2:191.

[11]Kotzebue, Voyage of Discovery, 1:333, 2:191; Jarves, History of the Hawaiian Islands, p. 86.

[12]Jarves, History of the Hawaiian Islands, p. 122; Kuykendall, The Hawaiian Kingdom, 1:119-20.

[13]Kotzebue, Voyage of Discovery, 3:199-200; Marin, Journal, p. 201; Ingraham, Log of the Brig Hope, pp. 18-20; Campbell, Voyage Round the World, p. 152; Corney, Early Voyages, pp. 133, 157, 180-81, 188, 191, 194, 215, 228; Kuykendall, Hawaiian Kingdom, 1:88-89; The Voyage of the Racoon; A "Secret" Journal of a Visit to Oregon, California, and Hawaii, 1813-1814, ed. by John Hussey (San Francisco, 1958) p. 36.

[14]John Jones to John Q. Adams, Dec., 31, 1822, USDS, Dispatches, vol. 1; Ellis, Narrative of A Tour of Hawaii, pp. 49, 309-10; MH, 19 (1823): 184; MH, 25 (1829): 116;

Jarves, History of the Hawaiian Islands, p. 193; Levi Chamberlain, Journal, July 25, 30-31, 1823,Hawaiian Mission Children's Society Library; C. S. Stewart, A Residence in the Sandwich Islands, with an introduction and notes by William Ellis, 5th ed., and enl. (Boston, 1839), p. 104.

[15]Franchere, Narrative of a Voyage, p. 41; Kotzebue, Voyage of Discovery, 1:333; MH, 18 (1822): 249, 278; MH, 20 (1824): 282; MH, 21 (1825): 40; Interior Department Letter Book 2, Jan. 25, March 10, 1849, Hawaii State Archives (hereafter cited as AH).

[16]The Missionary Herald and Polynesian are filled with remarks by missionaries and commercialists about the need for alteration of the land tenure system. For example see, MH, 25 (1829): 209, and Polynesian, July 6, 1844, July 8, 1848. Also see fn. 17 below.

[17]Quote from editorial in Polynesian, October 25, 1845; Polynesian, July 6, 1844, April 24, 1847; Sandwich Island Gazette, December 2, 1837; Stewart, A Residence in the Sandwich Islands, pp. 117-18.

[18]John Colcord, Journal, MSS, pp. 28-29, AH; James Hunnewell to Levi Chamberlain, April 25, 1832, Hunnewell Papers, Hawaiian Mission Children's Society Library; Chamberlain, Journal, Aug. 31, Oct. 26, 27, 1826; Sandwich Island Gazette, Sept. 16, 23, April 15, 1837; MH, 22 (1826): 173-74; MH: 25 (1829): 209.

[19]Polynesian, March 13, 1841, June 8, 1850, Jan. 25, 1851, Feb. 8. 1851.

[20]Foreigners urging alteration of the land tenure system used this argument until Kamehameha III changed the method of land ownership. For example see R. C. Wyllie to William Lee, July 24, 1849, Foreign Office and Executive File, AH (hereafter cited as F. O. & Ex.).

[21]Colcord, Journal, p. 54; MH, 17 (1821): 246; MH, 25 (1829): 184, 248; Stewart, Residence in the Hawaiian Islands, p. 139; Sandwich Island Gazette, April 21, 1838; Polynesian, July 6, 1844. Many early traders remarked about the industriousness of the natives. For example see Dixon, Voyage Round the World, p. 131; Campbell, Voyage Round the World, pp. 94-95, 129.

[22]Polynesian, July 8, 1848.

[23]Stewart to J. Evarts, July 14, 1827, in Stewart, Residence in the Hawaiian Islands, Appendix, p. 337; Kuykendall, Hawaiian Kingdom, 1:119-20.

[24]Chamberlain, Journal, October 7, 1836; John Jones to Henry Clay, Feb. 8, 1826, USDS,Dispatches, vol. 1; treaty in United States, House of Representatives, Ex. Doc. 48, 53d Cong., 2d sess., (1893), pp. 276-277.

[25]Jones to John Q. Adams, Dec. 31, 1822, USDS, Dispatches, Vol. 1; USDS,Dispatches, Jones to Henry Clay, July 1, 1827; USDS,Dispatches, Jones to Louis M. Lane, Dec. 31, 1834.

[26]For example see Chamberlain, Journal, March 18, 1833.

[27]Ibid., October 4, 7, 1836; W. S. Ruschenberger, A Voyage Round the World . . . in 1835, 1836, 1837 (Philadelphia, 1838), pp. 495-97. Kamehameha III also stated this view in his letter to King William IV, in Proposed Treaty with England, 1836,F. O. & Ex.

[28]Ruschenberger, Voyage Round the World, p. 496.

[29]Chamberlain, Journal Oct. 7, 1836 , Kennedy to Kaukeauli (sic), October 7, 1836, F. O. & Ex.

[30]C. K. Stribling to Kenou, October 1, 1836, F. O. & Ex.; Also in Ruschenberger, Voyage Round the World, pp. 497-500; Sandwich Island Gazette, Oct. 8, 1836.

[31]Kamehameha III to William IV, Nov., 16, 1836, William Richards MSS, AH; Charlton to Kamehameha III, Jan. 7, 1836, F. O. & Ex.; Kauikeaouli Proclamation, Nov. 16, 1836, F. O. & Ex.; Statement of Chiefs, Nov., 1836, F. O. & Ex.; Charlton to Kamehameha III, Nov. 7, 1836, F. O. & Ex.; Chamberlain, Journal, Nov., 8, 12, 15-16; Sandwich Island Gazette, Nov. 19, 1836; treaty, in House Exec. Doc 48, 53d Cong., 2d sess., p. 278; Lorenzo Lyons, Makua Laiano, the Story of Lorenzo Lyons, Compiled from Manuscript Journals, 1832-1886 , compiled by Emma Lyons Doyle, rev. and enl. (Honolulu, 1953), p. 92 (hereafter cited as Doyle, Journal); Kuykendall, Hawaiian Kingdom, 1:153.

[32]The Sandwich Island Gazette and F. O. & Ex. files for 1837 provides extensive information on the persecution of Catholics in Hawaii. Colcord, Journal, p. 30; Chamberlain, Journal, July 9, 13, 1839; Peter Brinsmade to John Forsyth, July 17, 1839 and enclosures, Notice by Brinsmade to American residents, July 9, 1839, and Laplace to Brinsmade, July 10, 1839, USDS, Dispatches, Vol. 1.

[33]Hunter Miller, United States Treaties and Other International Acts of the United States of America, ed. by Hunter Miller (Washington D. C., 1937), 5:626-27.

[34]Charlton to Kamehameha III, Sept. 26, 1842, F. O. & Ex.; William Hooper to Daniel Webster, March 7, 1843, and enclosures, Paulet to Kamehameha III, Feb. 16, 17, 1843, and Kamehameha III to Paulet, Feb. 17, 1843, USDS, Dispatches, vol. 1; Charles Kanaina to Timothy Haalilio, March 5, 1843, F. O. & Ex.

[35]Chamberlain, Journal, Feb. 17, 1843; Kekuanaoa to Simpson, Sept. 30, 1842, F. O. & Ex.; Kamehameha III and Kekauluohi to Simpson, Oct. 8, 1842, F. O. & Ex.; Paulet to Kamehameha III, Feb. 17, 1843, enclosures with Hooper to Webster, March 7, 1843, USDS, Dispatches, vol. 1.

[36]Kuykendall, Hawaiian Kingdom, 1:222; Chamberlain, Journal, Feb. 24, 1843; Richard Armstrong to Reuben Chapman, March 3, 1843, photostat copy in Anderson Papers, AH; Paulet's proclamation establishing the provisional government and other documents concerning cession in enclosures with Hooper to Webster, March 7, 1843, USDS, Dispatches, vol. I.

[37]Haalilio and Richards to Aberdeen, March 6, 21, April 3, 1843, F. O. & Ex., Peter Brinsmade to William Richards, Aug. 4, 1843, F. O. & Ex.; Aberdeen to Haalilio and Richards, Sept. 12, 1843, F. O. & Ex.; Haalilio and Richards to Aberdeen, Sept. 20, 1843, F. O. & Ex.

[38]Aberdeen to Haalilio and Richards, Sept. 12, 1843, F. O. & Ex.; Haalilio and Richards to Kamehameha III, Sept. 30, 1843.

[39]J. P. Judd to Commissioners in Europe, Feb. 27, 1843, British Commission Documents, AH; Kekuanaoa to Haalilio, March 6, 1843, F. O. & Ex.; Kekuanaoa to Richards, March 6, 1843, F. O. & Ex.; Aberdeen to Haalilio and Richards, Sept. 30, 1843, F. O. & Ex.; Kuykendall, Hawaiian Kingdom, 1:225.

[40]John Ricord, An Award Upon the Meaning of Lord Aberdeen's Letter . . . (Honolulu, 1844), pp. 23-76, in USDS, Dispatches, vol. 2; Report of Minister of Foreign Relations to Hawaiian Legislature, Aug. 1, 1846, in Polynesian, Aug. 22, 1846; Letter of H. W. Addington, Foreign Office, H. B. M., Dec. 27, 1845, and William Miller to R. C. Wyllie, Aug. 12, 1845 in Polynesian, Aug. 22, 1846; R. C. Wyllie to G. F. Seymour, Sept. 1, 1846 in Polynesian, June 5, 1847.

[41]Judd to Wyllie, Feb. 15, 1845, F. O. & Ex.; Report of Minister of Foreign Relations to Hawaiian Legislature, May 4, 1847, in Polynesian, June 5, 1847; Wyllie to Seymour, Sept. 3, 1846, in Polynesian, June 5, 1847. The Polynesian on Sept. 11, 18, 1847, published a number of letters beteen Wyllie and William Miller concerning the Charlton case. The Privy Council also discussed the Charlton controversy, Privy Council Records, vol. 2 passim, AH.

[42]John Tyler, Dec. 30, 1842, in Richardson, Messages and Papers of the Presidents, 4:211-14, also in H. Ex. Doc 48, 53d Cong., 2d sess., p. 280; Chamberlain, Journal, Feb. 20, 24, 1843; Judd to Haalilio, March 10, 1843, F. O. & Ex.; Hooper to Webster, March 7, 1843, USDS, Dispatches, v. 1; Kamehameha III to President of the United States, enclosure with Hooper to Webster, March 11, 1843, USDS, Dispatches, vol. 1.

[43]Colcord, Journal, pp. 49-50; Chamberlain, Journal, July 27, 29, 1843; Thomas' Declaration, July 31, 1843 and copy of treaty, enclosures with Hooper to Webster, August 15, 1843, USDS, Dispatches, vol. 2; Judd to Richards, Aug. 1, 1843, F. O. & Ex.; John Ii to Haalilio, Aug., 4, 1843, F. O. & Ex.

[44]Hooper to Webster, Oct. 10, 1842, USDS, Dispatches, vol. 1; Hooper to Webster, Aug. 15, 1843, USDS, Dispatches, vol. 2; Hooper to Secretary of State, Sept. 1843, USDS, Dispatches, vol. 2.

CHAPTER VI

APPROPRIATION OF THE HAWAIIAN LANDED ESTATE PART TWO

Until the 1840s Kamehameha III persisted in claiming ownership of the land, although the representatives of foreign nations forced him to grant some guarantees to security of property to foreigners. As of 1836 the King reasserted that foreigners and natives alike held their plots of land at the will of the king and he reaffirmed his power to dispossess them.[1]

In 1839 Kamehameha III granted some major concessions in the Declaration of the Bill of Rights. This document as well as the constitution of 1840 revealed the signs of foreign influence in both concepts and phraseology. Kamehameha III surrendered his right of arbitrary dispossession of foreigners and natives from their lands or building lots. The Bill of Rights also strengthened the practice of hereditary inheritance of land and property. Kamehameha III limited this principle by stating that if an individual held three or more divisions of land then one-third of it reverted to the king. The laws of 1839 with some modifications became part of the constitution of 1840. These included a large number of laws providing for the security of land held by natives and

foreigners. One article allowed landless natives to acquire uncultivated land provided they would farm it and receive the landlords' cooperation in this endeavor. The provision also placed restraints on the arbitrary dispossession of a native by the landlord. It, however, reaffirmed the ancient idea that a landlord could remove a commoner who failed to till his farm. The laws included penalties for those chiefs and landlords who continued to oppress tenants. The constitution provided that there would be only one landlord with the exception of the King, over each makaainana. This did not occur until after the Mahale in the late 1840s. Sections clearly established a uniform system of poll taxes, labor taxes, and land taxes to relieve people from excessive exactions by chiefs and konohikis. Other articles enunciated new fishing rights and use of water for irrigation. The Bill of Rights and the laws reasserted in the constitution did not completely alleviate the abuses of the land system because the concepts embodied within them went against the ancient usage system.[2]

The constitution of 1840 established a constitutional monarchy. While it reaffirmed the king's ownership of the land, Kamehameha III acknowledged that the chiefs and commoners had an ownership interest in the lands. The following section from the constitution revealed this concession:

> Kamehameha I was the founder of the kingdom, and to him belonged all the land from one end of the islands to the other, though it was not his own private property. It belonged to the chiefs and

> people in common of whom Kamehameha I was the head and had the management of the landed property. Wherefore there was not formerly, and is not now, any person who could or can convey away the smallest portion of land without consent of the one who had or has direction of the kingdom.[3]

The Hawaiian government issued a proclamation in 1841 which attempted to persuade foreign landholders to sign written leases for land in their possession unless they already had formal leases. A fifty-year limit was placed on the leases. For long term leases the rent would be high while low rents would prevail for short term leases. The government's attempt failed since the haoles opposed leases because they wanted title in fee simple and they believed the government's action was an attempt to deprive them of their rights. The foreign landholders applied Western concepts of alodial tenure once they received possession of land and persisted in the belief that the lands belonged to them. The government did not press the issue of the leases since it realized it possessed insufficient power and the fear of foreign intervention existed especially since they had not gained international recognition of independence at this time. A letter to the American Consul explained the government's position:

> We renounce the right of dispossessing them (the foreigners) at pleasure. We lay no claims whatever to any property of theirs, either growing, or erected on the soil. That is theirs, exclusively. We simply claim the soil itself, but do not claim that even that should be restored, though from of old we have never had the smallest idea of alienating any portion of our land. But if the soil be not restored then we claim a reasonable rent. We prefer not to make a direct assessment, but rather negotiate. . . .[4]

Kamehameha III and the chiefs had refrained from granting leases. The first significant departure from this policy occurred in 1835 when they signed a fifty year lease with the American-owned mercantile firm of Ladd and Company. The agreement stipulated that the firm could employ natives without any interference from the chiefs. The contract reflected the strength of American influence with the Hawaiian rulers. The missionaries supported the efforts of P. A. Brinsmade and the other company officials in securing a lease for the purpose of establishing a sugar plantation at Kaloa on Kauai. The missionaries thought highly of Brinsmade, a former theology student, and some believed he would promote the development of industry among the Hawaiians in his agricultural project. In 1841 the Hawaiian rulers signed another agreement with Ladd and Company for additional lands, contingent on formal recognition of Hawaiian independence by the United States, Great Britain, and France. The Hawaiian government concluded only a small number of formal leases and usually avoided the practice.[5]

The Hawaiian government, attempting to prevent future alienation of land, issued a proclamation in 1842 which prohibited the sale of land and fixed property, the transfer of such property, and their seizure for debts. An exception was allowed for individuals leaving no personal estate. In this case the land and fixed property upon it could be sold at an auction but only to natives whose rights of possession would parallel those of other natives. The government reaffirmed

its ownership of land and the requirement of the King's and premier's approval of leases.[6]

During this period numerous foreigners became naturalized citizens. This was done by some in order to satisfy the government requirement that its officials be Hawaiian citizens and by others to gain security for their lands. Agitation for land reform for both natives and foreigners continued to grow during the early 1840s. Most foreign subjects wanted alodial tenure, although some missionaries and naturalized government officials advocated individual ownership for Hawaiian citizens while opposing alien possession of titles in fee simple and even leases for large acreages for commercial and agricultural activities. Judd, a former medical missionary, and Levi Chamberlain, a missionary, and other government officials maintained this view. Sincerely concerned with the welfare of the natives and Hawaiian nation, these individuals believed that individual ownership by natives would alleviate the distressed economic and social state of the commoners. These haoles, as well, feared alienation of the land to foreign subjects.[7]

Hawaiian newspapers as well as reports of conferences between government officials and foreign consuls revealed that Hawaiian rulers were on the verge of commencing major land reform. In August, 1844, Hawaiian Minister of Foreign Affairs Judd wrote to British Pro-Consul Wyllie that the Hawaiian envoys in Europe were obtaining necessary information

for settling all land claims. Judd declared that the next legislature would adopt an "equal, just, and uniform system" for the adjudication of land titles. Later that year The Polynesian postulated that the government would soon reform the land tenure system.[8]

On May 21, 1845, Judd delivered a report to the legislature which recommended establishing a committee to investigate the validity of land titles, to award new written titles for authentic claims, to review the land tenure system, to grant security of tenure to landholders, and to sell government lands in fee simple to Hawaiian subjects. Attorney General John Ricord drafted the results of the provisions agreed to in the legislative council and the legislature enacted the terms with some amendments as the second organic act on April 27, 1846. The article which established the Board of Commissioners to Quiet Land Titles was separately passed on December 10, 1845, and became effective on February 7, 1846. The Land Commission received the authority to determine the validity of both native and foreign claims to land possessed prior to the enactment of the above act. The law required the Board to give public notice of the provisions of the act and for ninety days its decisions could be challenged in the Supreme Court. Claimants had two years to file claims, although the legislature later extended this limitation until March 31, 1855. If the Board of Commissioners determined that the claim was authentic, it awarded title to

the landholder. To receive a royal patent, the awardee presented the award to the Minister of the Interior and paid a commutation in order to receive relinquishment by the government of its interest in the land. Normally the commutation consisted of one-third of the unimproved value of the land, although the Privy Council on June 8, 1847, reduced the rate of commutation to one-fourth for house and building plots. During the first two years of operation the Board of Commissioners largely determined the validity of foreign claims to house and building lots and leased land. Few natives presented claims during this period.[9]

The second organic act also established a land office with the authority to regulate Hawaiian land matters. The legislation allowed the government to sell land in fee simple to Hawaiian citizens but not to foreigners. Hawaiians and aliens could lease government lands although foreigners were restricted to a fifty-year limit on their leases. The Land Commission wrote "The Principles Adopted by the Board of Commissioners to Quiet Land Titles, in their Adjudication of Claims Presented to them" which enunciated the history of land tenure in the Hawaiian Islands and the rules which the Commissioners would follow in settling claims. The document declared that the tenants, landlords, and King or government shared rights in the lands of the kingdom. It made the distinction between the king's private lands as a landlord and lands held by the King as head of the government.[10]

Transition to a land tenure system based on alodial ownership depended on devising a judicious manner of dividing the lands between the King, government, chiefs, and tenants. Until the undivided rights to the land were settled, clear title often could not be granted and this state of affairs hindered the landholders, including the government, from selling land. The Board of Commissioners commenced investigation of the problem and debate ensued for two years among the chiefs, King, and members of the Privy Council and legislature. Arising out of the ancient property system, the King possessed public lands as the head of government and private lands as a landlord. It was therefore recognized that an equitable distribution of lands must be given to the King, government, and chiefs, with a right of interest reserved to the tenants. Judge William Lee suggested a plan of division which allowed the King to retain his lands as private property and the remaining lands to be divided euqally among the government, chiefs, and tenants. The adoption of these rules by the Privy Council provided the basis for the division of the lands of the kingdom although they were not adhered to strictly. A committee was appointed to oversee the division of lands between the King and chiefs. The government retained a share interest in the land of both groups after the division until they commutated that interest.[11]

The Great Mahele or division between the chiefs and King began on January 27, 1848, and continued until March 7.

Individually 245 chiefs or konohikis divided their lands with the King. To receive title to the lands, the chiefs presented their claims to the land commission. To abrogate the government's claim to a share of the chiefs' land, the konohikis had to relinquish a portion of their lands to the government for commutation of that interest or pay one-third of the value of the unimproved lands. Kamehameha III and the Privy Council waived the commutation fee for some chiefs. By the summer of 1850 many of the konohiki had received titles in fee simple after giving a portion of their lands to the government. Some of the chiefs failed to apply for the awards and sporadically until 1892 the legislature enacted laws allowing the konohikis or their heirs to acquire titles. The King divided his lands into two parts: the larger section becoming government lands and the smaller part remaining as his private lands or Crown Lands.[12]

The completion of the division of the land between the King, government, and chiefs cleared the way for the natives who retained an interest in the lands to acquire ownership of their kuleanas or farms. To complete the transition from the ancient Hawaiian land tenure system to a Western pattern of alodial ownership the restrictions existing on individual ownership of the chiefs, government, and King's lands had to be removed by extinguishing the tenant's claim. This meant providing a means by which natives could own the land they used. After the Mahele, members of the Privy Council dis-

cussed the best methods of protecting the native's interest in the land. The need for establishing a single system of ownership throughout the Hawaiian Islands was accompanied by the haoles' belief that individual ownership would transform the natives from what they described as lazy, indolent people to industrious farmers. In 1847 Wyllie recommended that the government give fee simple title to the natives. He contended that alodial ownership would cause the commoners to increase both agricultural production and their population. Wyllie also promoted the immigration of "good people" to the islands and argued that it would stimulate native cultivation and would "show them how to make money--how to use it, and how to keep it--that would give your people examples of industry, thrift, sobriety and virtue. . . ." A widespread fear that the French or Californian filibustering activities would lead to a foreign takeover of the Hawaiian Kingdom also encouraged the government to grant alodial titles to tenants. If either event occurred, the only method of assuring natives security in their land tenure was to give them individual ownership in accordance with Western concepts of property rights.[13]

Judge Lee, at the request of the Cabinet, prepared a plan for native ownership of land which the Privy Council passed on December 21, 1849, and the legislature subsequently enacted it on August 6, 1850. The legislation allowed every native to receive title to the land he occupied and culti-

vated with the exception of town lots in Honolulu, Hilo, and Lahaina. The commoners had to present their claims to the land commission and upon verification of their authenticity, the tenants received a title in fee simple to their kuleanas. The recommended that the commoner combine his separate tracts into one continual tract by negotiating with other tenants prior to the surveyor's arrival. The tenant had to pay for the survey of his kuleana. Those houselots which existed separate from the cultivated land were limited to one-fourth of an acre. According to the terms of the legislation, the tenants retained the right to use firewood, house timber, aho cord, thatch, or ti leaves for their personal requirements from the landlord's lands although they had to obtain the konohiki's consent. The natives also retained the right-of-way as well as the right to use water sources on the landlord's land. Any native unable to establish claims or receiving insufficient lands could purchase plots ranging from one to fifty acres from government lands set aside on each island. The makaainana would pay a minimum of fifty cents an acre.[14]

The kuleana grant was not the first opportunity offered some native Hawaiians to own their lands. After 1845 the Hawaiian government experimented by granting fee simple titles to commoners in the Makawao district on Maui and in Manoa valley on Oahu. The missionaries aided in surveying the land, explaining the government's plan to the natives, and per-

suading the commoners to purchase the land. Altogether the natives purchased approximately 130 parcels of land, each ranging from one to ten acres.[15]

Some of the makaainana took advantage of the kuleana grant and presented 13,514 claims by 1855. The land commission approved 9,337 kuleana grants. Some of the reasons for the failure of the Board to award all the original claims included overlapping claims, the death of the claimant, or a tenant's failure to appear before the Commissioners to support his claim. Some relinquished claims for their kuleanas to the chief of the ahupua'a or ili ku in which their lands existed. The size of the award varied with the surveyor largely determining the diminsions of the grant. Some of the surveyors, using differing surveying methods, often crude and inaccurate, included only the fields cultivated at the time of the survey while others took into account the Hawaiian system of letting a field lay fallow for several years and therefore included those fields in the kuleana grant. Most of the kuleanas awarded consisted of less than ten acres. Natives from Kaiwiki signed a petition questioning one surveyor's capabilities. In response to the natives' complaint, A. G. Thurston, land clerk in the Department of the Interior, remarked that "ignorant natives cannot be judges of the correctness of what they know nothing about."[16]

Many Hawaiians unfamiliar and afraid of the alien system of alodial tenure failed to make claims for their

kuleanas. The missionaries persuaded some of the commoners to obtain titles in fee simple. Undoubtedly many of the makaainana did not desire individual ownership and would have preferred to maintain a system with which they were familiar. Some tenants arranged with their former landlords to continue certain features of the ancient land system. The commoners agreed to labor for three days each month on the konohiki's land in exchange for the right to continue using the landlord's land for grazing purposes. Most of the natives failed to understand the Western concept of individual ownership of land and could not comprehend a property system in which everyone did not have the right to use the land and its products.[17]

The Land Commission proceeded slowly in settling the claims, partly due to the number of counterclaims. At the end of the distribution in 1855, the Crown lands consisted of about 1,000,000 acres; the chief's lands, about 1,500,000 acres; the government lands, about 1,500,000 acres. In contrast the common people received a little less than 30,000 acres. Only twenty percent of the adult Hawaiian population received land. Prior to the kuleana grant, many natives had moved to the cities. The only way these commoners could acquire land was to purchase the government lands set aside for that purpose on each of the islands.[18]

Some haoles feared native alienation of their lands to foreigners. Some suggested that the government institute

safeguards to prevent natives from selling their lands. During a Privy Council meeting, Wyllie recommended that each title granted to natives should bear advice from the King stating that the commoners should not sell their lands "for an inadequate consideration." The government neglected to carry out this suggestion or to provide any protection for the natives. Enacting measures to guard against alienation was not in line with the philosophy of that time.[19]

Reverend Richard Armstrong and Judge William Lee, members of the Privy Council, revealed their concern about the possible repercussions of granting individual ownership to the natives and they voiced their apprehension in statements addressed to the commoners which the native newspaper, the Elele, published in its columns. These government officials explained the nature of the kuleana grant legislation and cautioned the natives against alienating their lands. Judge Lee stated "Two courses . . . are open for you. Either to secure your lands, work on them and be happy, or to sit still, sell them and then die. Which do you choose?" Armstrong advised the natives to cultivate their lands, be industrious, and to teach their children in productive activities and Western learning. Armstrong maintained that the Hawaiians' prosperity and continued existence as a race depended only on themselves since they could own land; and the natives could either sell the land, fail to cultivate it, or farm it. Other haoles expressed a similar sentiment and believed that

foreigners should encourage the natives to develop habits of industry as well as a sense of the value of land. Many members of the foreign community believed that individual ownership of land by the commoners would transform natives into industrious farmers, but several later commented on the persistent lack of industry among natives.[20]

When the Hawaiian government granted aliens the right to buy and sell land in fee simple in 1850, the transformation of the native land tenure system was completed. In the previous decade foreigners increased their remonstrations about the abundance of idle lands throughout the islands and agitated for alien ownership of land which they contended would lead to general prosperity in the Hawaiian Kingdom and settlement of respectable foreigners. Even after 1845 residents with valid titles to lands could secure alodial titles on the same basis as Hawaiians, by applying to the land commission; however, most foreigners remained dissatisfied with the government's property system. Those aliens entitled to fee simple titles resented the commutation fee of one-third or one-fourth of the unimproved value of the land which the government required of all Hawaiian subjects receiving royal patents. Foreigners objected to this payment because they evidently believed they were paying for land which they already owned.[21]

American and British consuls supported the foreign residents in their belief that aliens should receive fee sim-

ple title for lands possessed for as long as five years. Foreign representatives actively interfered in internal land matters by trying to convince the Hawaiian government to alter its land policy toward aliens. American Consul William Hooper believed his government should intervene and force the Hawaiian government to guarantee additional property rights to American citizens. In 1845 Hooper objected to the Hawaiian government's auctioning of the estate of Joseph Bedford, an American citizen. He argued that he should have the responsibility of settling the estate since the lands belonged to Bedford. Hawaiian officials contended that the lands belonged to Bedford's Hawaiian wife, therefore giving the government jurisdiction over the estate. Hooper opposed the public auction of the lands which the government supposedly restricted to Hawaiian subjects.[22]

British Consul Miller also attempted to convince his government to support land claims of British subjects. Miller with the aid of British Rear Admiral Sir G. F. Seymour tried to persuade Hawaiian officials to acknowledge the land claims of a British subject, James Ruddock, and eliminate the necessity of proceeding through the normal channels of the Hawaiian courts and the Land Commission. After Miller presented Ruddock's case to the British government, it directed Ruddock to settle his case directly with the Hawaiian tribunals. Earlier in 1844 Robert C. Wyllie, the acting British Pro-Consul in Miller's absence, followed a more tactful ap-

proach in presenting the claims of British residents to the Hawaiian government. Wyllie also published many articles in The Friend concerning the land problem. In his "Notes", Wyllie recommended "a liberal policy in order to encourage industry, awaken the energies of the people, and develop the agricultural resources of the country."[23]

Even more than the other foreign Consuls, United States Commissioner Anthony Ten Eyck who arrived in the Hawaiian Islands soon after the passage of the Land Act in 1846, gave adamant support to the foreigners in their protests. He became the spokesman for the interests of the foreign community and soon earned the enimity of Hawaiian officials who withdrew their recognition of Ten Eyck as American Commissioner in 1848. Ten Eyck tried to persuade the Hawaiian government to agree to treaty recognition of American rights to acquire alodial title to land in their possession, with a small commutation fee, but Hawaiian officials refused to grant such concessions.[24]

Widespread discussion of the rights of long-term settlers to the lands they held led the Hawaiian legislature to enact a law in June, 1847, which allowed aliens to receive royal patents in fee simple for lands in their possession at that date. The government required the foreign claimants to pay the regular rate of commutation. The legislation restricted the alien's rights of private ownership since the act stipulated that foreigners could sell their lands only to Hawaiian subjects.[25]

Even after passage of this act, Ten Eyck continued his efforts to obtain a treaty which would allow foreigners to secure alodial title to the land in their possession, without a commutation fee, and which would permit them to purchase land in fee simple. Ten Eyck suggested that Hawaiian denial of such rights justified foreign intervention. American Secretary of State James Buchanan refused to support Ten Eyck and advised him to refrain from trying to dictate land policy to the Hawaiian government and suggested that he restrict his activities to upholding valid claims of American citizens. Buchanan noted that American recognition of Hawaiian independence precluded interfering in the internal affairs of the Hawaiian Kingdom. The Secretary of State also informed Ten Eyck that most nations refused to grant fee in simple titles to aliens.[26]

Foreigners remained dissatisfied with their limited property rights. Agitation continued for the establishment of a land system comparable to the one existing in the United States. Numerous editorials and letters to the editor of the government newspaper, The Polynesian, advocated the selling of lands to aliens and Hawaiian citizens on an open market. Westerners complained of the lands laying idle because of what they termed native laziness and they argued that the continued prosperity of the nation depended on alien ownership of land. Haoles decried the slowness of land commission procedures and suggested that the government survey the land,

grant fee simple titles to all natives, then place the remaining lands on sale to aliens and natives at a public auction at a nominal price. Some haoles suggested that a landholder who failed to cultivate his land should lose possession of the acreage while other aliens recommended that the government levy a tax on all uncultivated lands in order to force the chiefs to sell lands which they refused to alienate. This idea of taxing uncultivated lands persisted even after the aliens obtained the right to purchase and convey lands since the haoles still desired to acquire additional land. Aliens supported their demands for unrestricted rights of buying and selling land by arguing that such a policy would promote Hawaiian prosperity, encourage native acquisition of the habits of industry by foreign example, insure foreign residents' allegiance to the Hawaiian government, and curtail their request for foreign intervention in Hawaiian land matters.[27]

Foreign-born officials in the Hawaiian government differed in their views on giving aliens the privilege of buying and selling land. Judd opposed granting them that right while he believed that the old settlers should have fee simple title to land already in their possession. Wyllie held the opinion that haoles should have the right to purchase and convey land without any restrictions. Wyllie urged the chiefs to sell land to foreigners. He contended such transactions would get them out of debt and increase the value of their remaining

land. He denounced the Hawaiians' traditional belief that "mere possession of land constitutes wealth" and enunciated the Western concept that "land is of no value unless there are men to buy it or lease it, and to cultivate it." William Lee, a member of the Board of Commissioners and chief justice of the Supreme Court of Law and Equity, commenting on Wyllie's views expressed in his "Report on Land, Capital, and Labor," objected to the impression given that Wyllie believed that the King had deprived foreign residents of their rights. Lee stated that he favored a liberal policy toward foreigners and

> No one has a stronger desire to see the lands of this Kingdom thrown open to the permanent possession and enjoyment of the natives and those who will cultivate them. But to unlock these lands, and promote the great cause we have at heart, agriculture, and the good of the Hawaiian nation, we must avoid anything, like harshness, and move the King by persuasion. [28]

On July 10, 1850,the Hawaiian government acquiesced to the internal forces advocating alien alodial ownership of lands and unrestricted rights of alienation. A new statute required the courts to settle any land disputes. The law included the provision that any landholder who requested intervention by foreign governments or their representatives would forfeit his lands to the Hawaiian government and further stipulated that this clause must be contained in every deed for it to be valid.[29]

After 1850 when aliens gained the right to purchase and sell lands without restriction, alienation of Hawaiian lands

proceeded at an even greater rate. A large majority of the natives failed to obtain title to their lands. The tenants often did not comprehend the concept of alodial tenure, did not understand the procedures to follow in filing for claims, or lacked the necessary funds to hire the services of a surveyor. A haole purchased the entire island of Niihau because the native tenants failed to file claims for their kuleanas.[30]

Both the chiefs and natives readily sold their lands to foreign capitalists. Unfamiliar with the concept of private ownership of land, the Hawaiians parted with their lands, often, for small sums of money. Commoners and chiefs frequently acquired debts and mortgages to haoles and consequently lost their lands. Unacquainted with the rights and obligations of alodial tenure, some natives did not realize that they surrendered all rights to the use of the land when they sold their kuleanas. Other natives lost their lands by neglecting to pay taxes levied on their property. When native landowners died without heirs or intestate, their lands reverted to the chief or owner of the ahupua'a in which the kuleana was located and this further promoted the process of haoles obtaining title to Hawaiian land. The increase in plantations also tended to separate the natives from the soil.[31]

Foreign capitalists acquired many of the kuleanas either by purchase or indirectly through leases. The kuleanas comprised the best farm land in the Hawaiian Islands. The haoles signed long term leases which, in effect, led to alienation.

The plantation owners frequently obtained leases for many contiguous kuleanas and the tracts became one undivided field. Since the boundaries became erased, a returning commoner could not distinguish his fields from the other kuleanas. In the twentieth century haoles also have gained the use of land through leasing. The Hawaiian Homes Commission Act, enacted by Congress in 1921, set aside large acreages of sugarlands for leasing to sugar companies. This effectively prevented native Hawaiians from later obtaining any of these lands. More significantly in 1964 the state legislature amended the Hawaiian Homes Commission Act to allow leasing of part of the home lands to non-Hawaiians. By the late 1970s haoles rented 112,000 acres at low rates and with long term leases. Although the Commission can abrogate the lease when it needs the land, it refused to terminate leases when native Hawaiian applicants requested the leased land as homesteads. Since a number of the leaseholders have political or economic influence in the state, it remains questionable whether the land at a later date will be withdrawn for native Hawaiian homesteading purposes.[32]

Large landholders have used adverse possession in the nineteenth and twentieth centuries to obtain kuleanas. Adverse possession is a legal method of acquiring title to land by possessing it for a statutory period under certain conditions. The Land Court, established in 1903, has been the arena for most of the legal proceedings. Prior to that time,

land barons used the Western technique in the Circuit Court after 1870 when the statute was enacted. The state title examiner has reported that native Hawaiians represent the group that usually loses title most frequently. In the fall of 1978, twenty-six cases were pending in the Land Court. Of the twenty-three applications examined, fifteen were Hawaiians. One of the applications involved the Waterhouse family and Rice Corporation. On Kauai in Kipu Kai and Kipu they claim adverse possession of 4,000 acres. After examining the title abstract and other records, the state title examiner observed that native Hawaiians owned most of the land. On Maui the Hana Ranch through Hanahuli Association, Ltd., attempts to secure kuleana lands situated within or near the ranch. Adverse possession endangers the land of Hawaiians in Puna, Hawaii, Keanae and Kula on Maui, and Halawa Valley on Molokai. In fall, 1978, a number of cases involving adverse possession pended in the Circuit Court. The Dillingham Corporation seeks title to land located in Mololoo-Hoopuloa on Hawaii. If successful, 130 pure and part-Hawaiians will be affected detrimentally. They comprise one of the last traditional Hawaiian fishing villages. Richard Smart of Parker Ranch, the second largest landholder on Hawaii, Grove Farm, the third largest landholder on Kauai and Pioneer Mill, a subsidiary of Alexander and Baldwin, the largest landholder on Maui, each currently have applications in the Circuit Court.[33]

Plantations, ranches, large corporations, big estates,

wealthy families, and churches have used adverse possession in procuring the natives' kuleanas. A claimant of real property can perfect title to land by going to the Land Court or civil court. In the latter judiciary, he applies the laws of quieting title or of adverse possession. In the Land Court, the applicant can clear the title only through adverse possession. A title received through adverse possession in Circuit Court can be disseized by applying the same principle but not if awarded in the Land Court.[34]

The claimant has to fulfill all of five prerequisites to obtain ownership. His possession must be exclusive, actual, continuous, hostile, open and notorious for the entire statutory period. Any number of methods can be used to satisfy the element of actual possession. The intruder can build a house or other structure, graze cattle, raise crops, construct a drainage ditch, irrigate the acreage, erect fences, and lease the land to another party. He does not have to live on the land. The tenant or lessee must acknowledge the claimant's ownership to establish the claim. If the adversor took possession of the land after 1963, he must have continuous or unbroken possession for at least twenty years. An adverse possessor who entered onto the land before that year, only needs such possession for ten years. "Tacking" can satisfy the requirement in the following situation. An adversor dies and leaves the real property to an heir in a will. The inheritor occupies the land for a period of time and then sells

the acreage to a third party who proceeds to live on the land. The entire years of possession by the three "owners" counts toward the statutory period because there was privity between the three individuals. When there are no legal agreements between the parties, "tacking" does not satisfy the criterion of continuous possession. The adverse possessor has to show hostile intent. He must claim the land as the owner. Exclusive possession satisfies another prerequisite. No party other than a tenant or lessee may use the land during the statutory period. To meet another requirement the claimant must possess the land in an open and notorious manner. Use of the property must be clearly evident and in such a way to alert the true owner that someone had adversely possessed his land. The construction of a house or fence or other visible signs such as an irrigation ditch would satisfy this criterion. Even when the real owner has a deed or chain of title showing ownership, an adverse possessor obtains a new title and terminates the old title when he meets these five elements. A claimant does not have to pay taxes on the land, although doing so can strengthen his case. Even when the real owner pays the property tax, it does not prevent a claim of adverse possession.[35]

The law of adverse possession has presented a strict standard but only in cases where the real owners contests the claim. The land barons often win their cases through default. Usually the real owners never appear in court to

protest the proceedings. A number of reasons account for this failure. Testimony delivered to a committee of the 1978 Hawaii Constitutional Convention revealed that many native Hawaiians did not know about or understand the law. They also feared the judicial process. Another explanation rests with the method of notifying those with any claim to the property. The adverse possession law requires the applicant to publish a legal notice in a newspaper addressed to all potential owners. The ad tells them to appear in court on a certain date if they want to protest the proceedings. This method of notification has its deficiencies. Many people do not read the notices, understand the legal language, or receive the newspaper. Consequently many Hawaiians affected by the proceedings remain unaware of the hearings and do not appear in court to contest them. A lack of financial resources limits the number of native Hawaiians who protest adverse possession. They do not have sufficient money to hire an attorney or engage in expensive litigation. Another factor enabling claimants to easily obtain parcels of land involved the failure or inability of Hawaiians to transmit the location of their property to their heirs. Consequently the descendants of Kuleana owners often do not know the site of the land or that they hold part-interest in a particular acreage.[36]

The problem of heirship that plagues American Indian land titles has created favorable situations for adverse possessors in Hawaii. The fact that many individuals hold a

share-interest in a small parcel of land often prevents all of the owners from using the property. This happens particularly with the hui land. With multiple owners the title remains clouded and without a clear title none of the shareholders can get a mortgage or loan on the property. This creates vacant land that potential adverse possessors take advantage of. Another difficulty arising out of heirship problems promotes the use of this Western property law. An outsider can purchase part-interest from one of the owners and force the sale of the land or declare adverse possession.[37]

Looking at some of the statistics of past cases involving adverse possession provides some idea of the extent of its use. In 1968 the Land Court awarded title to Molokai Ranch, formerly American Sugar Company, for 8,471 acres. The state title examiner revealed that the ranch had no claim for all of the land because some of it lay outside of the boundaries set forth in the application and some were not claimed. Nevertheless the court issued title for the entire acreage. Previously in 1955 the Court awarded 50,761 acres to Molokai Ranch while thirty years earlier the American Sugar Company acquired 5,221 acres. Although the ranch did not receive all of the land through adverse possession, it did obtain large amounts of it by this method. The Molokai Ranch owns one-third of the entire island of Molokai. The Castle estate acquired kuleanas in Kailua and Kaneohe through adverse possession in both the Land Court and Circuit Court. They based

their applications on a deed that excluded kuleanas and other small holdings situated within each of the ahupua'as. Although the Hawaii Circuit Court found the paper title defective, it awarded title to 1500 acres or almost all of the Waikane Valley to the McCandless family because its members had fulfilled all the requirements for adverse possession. The Mormon Church through its business extension, Zions Security Corporation, obtained ownership of large areas in Laie, Oahu through adverse possession. The Hawaii Circuit Court index lists over ten pages of individuals, mainly Hawaiians who lost land to the corporation.[38]

Within the last decade Hawaiians have become more active in contesting claims of adverse possession. In 1973 a group of Hawaiians pressed a bill through the state legislature that extended the statutory period required for adverse possession from ten to twenty years. Informed Hawaiians have striven to enlighten the natives about adverse possession. Geneology has assumed immense importance and increasing numbers have used the state archives to trace their family line back to an original kuleana owner and locate his grant. Native Hawaiians and their supporters persuaded the 1978 Hawaii Constitutional Convention and the citizens of Hawaii to approve an amendment abolishing adverse possession except in cases involving tracts of less than five acres.[39]

Hawaiians also have lost their land because of heirship problems. If a person purchased a share in property

owned by more than one individual, he can force the division or sale of the land. The huis, an organization owning land in common, especially have been victimized by this method. For example William Kinney, a haole married to a native, inherited over 3,000 acres in Haena. He believed the land should belong to native people of the area so he organized the Haena Hui and sold them 2,500 acres for $1 an acre. Through the years haoles obtained shares in the Hui. In the 1960s the outsiders petitioned the court for a division of the Hui lands. By 1976 only a small part of the original Hui lands remained in the possession of native Hawaiians.[40]

Haoles sometimes used unscrupulous methods to deprive the natives of their lands. As in the case of Indians, some non-Hawaiians acquired lands by getting a native to sign a document with a cross mark without knowing what he had signed. Later they discovered they had conveyed away their land. In the 1920s and 1930s the MacBride Sugar Company on Kauai induced the kuleana owners to exchange their fertile lands and water rights for other property located on the beach. Since the natives were fishermen most of them agreed to the exchange. One of the company representatives threatened one woman who refused to sell her lands with government eviction. After these natives died, company officials evicted the heirs from their new lands. The original agreement included a clause, unknown to the Hawaiians, that gave natives who initially signed the papers only tenure to occupancy for life.[41]

By the 1860s only about 6500 natives or one-eighth of the Hawaiian population still possessed freeholds. Fifty years later full-blooded Hawaiians owned only three percent of the land, while part-Hawaiians held six percent, and the Bishop Estate, established for the educational benefit of Hawaiians, owned nine percent. Descendants of the chiefs held title to most of these lands. By 1936 commoners retained only about 1680 acres of the original kuleana lands. Plantation owners, ranchers, and speculators acquired much of the commoners land, and leased or bought a large amount of the crown and government lands. By 1862 foreigners controlled by ownership or lease three-fourths of the land on Oahu except in one district where they only controlled one-half. By 1886 haoles had purchased about two-thirds of all the government lands sold.[42]

The Claus Spreckels affair of the 1880s augmented the alienation of land from the Hawaiians. In 1880 Claus Spreckels, a major sugar plantation owner, purchased all of Princess Ruth Keelikolani's rights to one-half of the Crown lands for $10,000. Although Keelikolani did not have a clear title, the legislature wanted to settle the claims being asserted by Spreckels. It, therefore, granted Spreckels fee simple title to 24,000 acres of good sugar land which consisted of an entire ahupua'a on Maui in exchange for his claim to one-half interest in the Crown lands.[43]

A number of factors generated a greater demand for land

by haoles. In the 1840s and 1850s the discovery of gold in California and the subsequent settlement of the state as well as the growing expansion in the Pacific Northwest precipitated a large trade with the Hawaiian Islands. Ranchers, plantation owners, and land speculators obtained large acreages either in the form of leaseholds or freeholds from Hawaiians. A desire to attract permanent settlement by Americans in the islands also motivated haoles to acquire additional land and to remonstrate for the selling of government lands.

Foreign agitation for placing Hawaiian lands on the market did not end at the time aliens acquired the right to purchase and sell lands in fee simple. Editorials and letters to the editors of the Hawaiian haole newspapers clearly reflected this continued desire for land. Some foreigners attacked the Hawaiian government's policy of land division and complained that the Land Commission operated in a slow, tedious, complicated way which hindered island prosperity. A segment of the foreign community suggested that the King should initially have asserted his ownership of all the lands, awarded titles to the occupants of the lands, and then sold the remaining lands on the open market at nominal prices. Other foreigners recommended that the government alter its policy in order to stimulate settlement and agriculture in the islands. They advocated that the government conduct an inventory of the government and crown lands, survey them, and lease or sell the lands on the open market. The king's

private lands, or the Crown lands, had diminished in size by 1865 due to continued sale, and as a result the legislature in that year made the Crown lands inalienable. Some haoles wanted the Hawaiian government to remove this restriction.[44]

Sanford Dole advocated selling government and Crown lands to promote settlement of the islands by small landholders. Dole proposed that the government purchase most of the Crown lands, sell the unoccupied government and Crown lands in plots consisting of forty to 160 acres, and sell the acreages held by leases as they expired. An English resident proposed another method which would place additional lands on the market. He suggested that the government seize a native's kuleana if he did not cultivate it efficiently and then add the farm to the government lands.[45]

Several land acts passed in 1884 and 1895 intended to promote homesteading. Actually this legislation attracted few settlers and had the opposite effect of enabling speculators and large landholders to acquire additional lands. Speculators took advantage of the 1884 land act which permitted the acquisition of small plots consisting of less than twenty acres and much of the land ended up in the control of the plantations. The land act of 1895 enacted by the legislature of the Republic of Hawaii had the same effect as the earlier legislation. This law provided for leasing of lands for not more than twenty-one years and was limited to 1200

acres per applicant. A 1000-acre limitation was placed on the auction sales of public lands, which were formerly the Crown and government lands. Individuals or plantation owners usually devised a way to evade the 1000-acre limitation. The act provided for the homesteading of smaller plots of land in three ways: a right-of-purchase lease for twenty-one years with the option of buying the land after three years; a cash freehold which allowed a purchaser to pay one-fourth of the value of the land immediately and then pay the remaining amount with interest in small installments, and receive a fee in patent when all payments had been made; and homestead leases from eight to sixty acre tracts, tailored largely for native Hawaiians. These latter leases were inalienable and after six years of occupying the land, improving it along definite preset conditions, the holder could obtain a 999-year lease. Acreage limitations ranged from 100 to 1200 acres depending on the type of land, applied to the right of purchase lease and cash freehold agreement. Only a small percentage of Hawaiians made use of the homestead lease. Haoles usually opted for the right to purchase leased land. The land acts of 1884 and 1895 augmented the alienation of lands from Hawaiians.[46]

When haoles overthrew the native government in 1893, the Provisional Government claimed title to both the Crown and government lands which became the public lands of the new government and later in 1894 those of the Republic of

Hawaii. With the loss of independence as a sovereign Hawaiian nation, the natives also lost their public domain to a haole-dominated government. Although the natives could acquire lands by the provisions of the land act of 1895, few possessed the financial resources to obtain farms. According to the Annexation Treaty of 1898 with the United States and the Hawaii Organic Act of 1900 which created the United States Territory of Hawaii, the Republic of Hawaii transferred title to its public lands to the United States, although the actual management of the lands remained with the territorial government with its land laws remaining in force.[47]

During the second half of the nineteenth century the Hawaiian economy became dominated by the plantation system, and by the end of the century control of the lands was concentrated in the hands of a relatively few haole families. This concentration of lands continued throughout the twentieth century. By 1967 a few owners held title to ninety-five percent of the lands in the state of Hawaii: the state owned almost thirty-nine percent, the United States government almost ten percent, seventy-two private owners of over 1000 acres each held forty-seven percent with seven owning nearly thirty percent. The Bishop Estate, established by Princess Bernice Pauahi Bishop, held title to nine percent of the land. The haoles, through domination of the board of directors controlled the use of these lands and leased them primarily to large landholders. A further breakdown by

island revealed the concentrated ownership of lands. Each of the islands of Niihau and Lanai were owned almost entirely by one family or corporation while the United States government owned the island of Kahoolawe and used it for military purposes. On Molokai the state held title to thirty-one percent, private individuals two percent, one ranch corporation forty-five percent, and seven other landowners twenty-one percent. The state and federal government owned forty-four percent of the lands of Kauai while ten landowners held title to fifty percent. On Oahu, nine large landholders own almost fifty-one percent with the Bishop Estate controlling fifteen and one-half percent. The state and federal government owned almost forty-eight percent and eleven private landholders had forty-nine percent. Five large landowners held title to thirty percent of the land on the island of Hawaii while the state and federal government owned fifty-two percent. The system of leasing intensified the high degree of concentrated ownership since ranching and plantation companies lease much of the public and private lands in large acreages.[48]

Alienation of the native Hawaiians from most of their lands and ultimately the loss of their sovereignty as an independent nation did not occur within a vacuum. Hawaiian resistance assumed a more subtle form than that frequently displayed by American Indians in their contest against white control of their sovereignty and lands. They did share certain stances in their opposition to white expansion such as

passive resistance, occasional legal maneuverings, and compromise. Hawaiians, however, succumbed to white domination much easier and quicker than the American aborigines.

Hawaiians frequently revealed their fear of foreign control of their land and nation. During his tour of Hawaii in 1822 William Ellis remarked that the natives believed they would become an extinct people and foreigners would obtain their lands if the chiefs allowed the missionaries to reside in the Hawaiian Islands.[49] The native Hawaiians believed that if their lands were alienated they would lose control of their government. This view originated with the ancient land tenure system in which the government and control over the lands were inseparable. The natives also feared that a rapid increase of the foreign population and wealth would eventually place haoles in control of the government. These attitudes led the chiefs to oppose foreign ownership of land and increased immigration. Numerous foreigners complained of the chiefs' reluctance to sell their land to whites and to grant them security of property. The haoles' power and influence proved too strong for the Hawaiian government to withstand; its officials gradually compromised. The chiefs and King played a game of tactical delay. Kamehameha III continued to reassert his sovereignty and his ownership of the land while granting piecemeal concessions to haoles. The Hawaiian government tried to preserve the quasi-feudal land tenure system by slowly reforming it along Western lines. Even after the

overthrow of the old feudal land system, some chiefs refused to sell their lands to haoles.

A display of strong opposition to haole ascendancy in the Hawaiian government, naturalization of haoles as Hawaiian citizens, and their accompanying right to hold land occurred in 1845. The anti-foreign agitation among the natives revealed their fear of foreign domination in land matters and governmental affairs. Commoners from Lahaina and Wailuku on Maui petitioned the King and chiefs for the removal of all foreigners from government positions and to end naturalization of aliens. Natives from Kailua, Hawaii presented a petition to the Hawaiian rulers protesting sale of land to foreigners and granting them citizenship. The Hawaiian government responded to the demands by explaining the need for foreigners in government service because only haoles had the requisite knowledge and skills to conduct relations with foreign nations and maintain Hawaiian independence. Hawaiian officials argued that naturalized subjects had to be loyal to the King and protect his sovereignty from foreign infringement. The response also enunciated that it was only fair to grant naturalized citizens the same right to purchase land as the natives possessed. The chiefs reaffirmed the government position that aliens could not own land. The King reiterated this view during a tour of Maui in December, 1845, and January, 1846. Apparently these explanations eased the fears of the Hawaiian people because anti-foreign agitation subsided. In 1855

opposition to foreign ownership of land resurfaced. Natives from Lanai presented a petition enunciating their belief that foreigners should not be allowed to purchase land.[50]

Some natives revealed their reluctance to accept a land system based on individual ownership by establishing huis which provided a transitional system between the old land tenure system and the new order of alodial ownership. A group of natives obtained communal title to a tract of land then allotted specific plots to individual families to farm, while retaining common rights to pasture and gathering areas. Some of these huis continued to exist into the twentieth century but they have been plagued with heirship problems and other difficulties.[51]

A major native resistance to haole attempts to obtain control of Hawaiian soil and sovereignty occurred during the discussion of a reciprocity treaty with the United States in the 1860s and early 1870s. In order to persuade a reluctant United States Congress to agree to a reciprocity treaty, American haoles wanted to arrange for the cession of Pearl Harbor and a ten to twelve-mile area surrounding it to the American nation for a coaling and repair station. They believed that such a treaty was vital to the growth and prosperity of the Hawaiian nation since it would allow the sugar plantations to export their crop to the United States duty-free. American advisers urged King Lunalilo to support the treaty with its provision of the cession of Pearl Harbor. Most

haoles, with the exception of British subjects and Catholic priests, endorsed the proposed treaty. Extensive debate developed over the issue among both haoles and natives. Opponents of the reciprocity treaty argued that such concessions would eventually lead to United States control of the Hawaiian Islands. Advocates maintained that the future of the Hawaiian nation and its prosperity depended on acceptance of the treaty. They contended that other nations had ceded lands willingly to other foreign powers, that the cession would not endanger the sovereignty of the Hawaiian Kingdom, and it was right to cede land when the good of the country demanded it. The procession forces charged those haoles opposing the treaty with stirring up native prejudices by presenting unfounded arguments such as the treaty provided the first step toward annexation, subsequent alienation of lands and sovereignty, and that natives would share a fate similar to that of the American Indian. Those favoring the treaty asserted that it would stop haole demands for annexation to the United States because reciprocity would bring the same benefits desired by the annexationists while strengthening the Hawaiian government.[52]

Many of the haoles supporting the treaty believed that annexation to the United States would come eventually but that it should be postponed until the natives desired it or became extinct. Although Henry A. Peirce, the American minister in Hawaii, preferred annexation, he recommended to the American Secretary of State that the United States should agree to the

proposed treaty because it would tie the two nations together "with hooks of steel." The Pacific Commercial Advertiser supported the treaty and observed that reciprocity was necessary for the prosperity of the Hawaiian nation. The editor of this haole newspaper in Honolulu also stated that the treaty would continue United States influence until annexation occurred at the time of native depopulation. Peirce accused the pro-annexationists of stirring up the natives' feelings in opposition to the reciprocity treaty with its cession of Pearl Harbor in hopes of causing a native revolution which would bring American intervention and then American possession of the Hawaiian Islands.[53]

The haoles were aware of widespread native opposition to cession of Pearl Harbor but dismissed it by rationalizing that whites knew what was best for Hawaiians and that the natives were motivated by irrational, ignorant, and prejudicial fears. On several occasions large numbers of natives met to listen to white and native opponents of the treaty and cession. At one meeting in June, 1873, the natives passed resolutions opposing the cession of Pearl Harbor. Most of the Hawaiian opponents did not oppose reciprocity per se but rather ceding Hawaiian land and abdicating sovereignty over it. Some of the natives objected to reciprocity because they feared that it would lead to alienation of Hawaiian sovereignty. Lunalilo and his cabinet finally acquiesced to massive native protest and withdrew their offer of the

reciprocity treaty with its cession of Pearl Harbor. The commercialists verbally attacked the ministers for their changed position and demanded their resignation but Lunalilo requested the ministers to retain their government positions.[54]

In 1875 the United States and the Hawaiian Kingdom agreed to a reciprocity treaty which did not include the cession of Pearl Harbor. One of the provisions of the treaty limited Hawaiian sovereignty by requiring the Hawaiian government not to lease or cede a harbor or any territory to any foreign nation. After 1875, natives increasingly opposed reciprocity. The influx of foreigners and the increase of American interests in the islands resulting from the reciprocity agreement along with the treaty's limitation of Hawaiian sovereignty led to the native reaction. Hawaiian legislators protested that reciprocity would culminate in annexation. The agitation caused the formation of a new ministry in 1878 with more native representation. A strong nationalistic movement developed by 1880 with the legislature controlled mainly by natives. The Hawaiians' nationalistic sentiment, economic depression, and political, moral, and financial excesses in government policy led to the Revolution of 1887.[55]

Native opposition failed to prevent the cession of Pearl Harbor in 1887. In that year the United States Congress reviewed the reciprocity treaty and added an amendment which gave the United States the "exclusive right to enter the

harbor . . . and to establish and to maintain there a coaling and repair station for the use of vessels of the United States." The Hawaiian government at first refused to agree to the revised treaty but finally acquiesced. The king reluctantly approved the Pearl Harbor cession although he realized that native Hawaiians opposed it. King David Kalakaua and his reform cabinet based their decision on the American Secretary of State's assurances that the concession of Pearl Harbor was coterminous with the existence of the treaty and that no loss of Hawaiian sovereignty occurred with the transaction. The United States failed to improve the harbor during the remaining years of the Hawaiian Kingdom which came to an end in 1893.[56]

In 1887 the haoles forced a constitution on Kalakaua which greatly restricted his authority as sovereign and limited the rights of natives. Many Hawaiians were upset with the "Bayonet" constitution and wanted the King to regain his former prerogatives. Robert Wilcox, a part-Hawaiian, led an insurrection in 1889 but the reform government quickly brought it to an end. Other Hawaiians formed a party called the Hui Kalaiaina to restore the constitution of 1864 and native control of the government. Native leaders attempted and sometimes secured limited control of the Hawaiian government until the Revolution of 1893. The clashing of two nationalities for supremacy culminated in the overthrow of the monarchy.[57]

Native Hawaiians opposed not only the Pearl Harbor

cession but also haole attempts at annexation to the United States which occurred regularly during the second half of the nineteenth century. Many chiefs, Prince Alexander Liholiho, native newspapers, and mass meetings held by native leaders expressed the opposition of Hawaiians to annexation. Opponents raised racial arguments in support of their views. They suggested that Hawaiians would become enslaved and would lose their lands like Indians. In 1851 when a French takeover appeared imminent, Kamehameha III secretly had agreed to cede the Hawaiian Islands to the United States in the event of a French seizure but the feared usurption failed to materialize. During 1852 and 1853 a large number of haoles actively favored annexation to the United States. In 1854 some of the King's ministers persuaded Kamehameha III that internal threats of revolution by haoles and proposed Californian filibustering endangered the continued existence of the Hawaiian Kingdom. In February of that year, the King authorized Robert C. Wyllie to commence negotiations with the United States for annexation. The Hawaiian government agreed to an annexation agreement which the American commissioner, David L. Gregg, submitted to the United States Secretary of State for his consideration. The King became reluctant to continue the negotiations after the threat of the overthrow subsided. The King's death in December, 1854, and the ascendancy of the nationalist Alexander Liholiho to the throne as Kamehameha IV brought an end to the annexation discussions. Liholiho withdrew the offer of annexation.[58]

A minority of haoles continued to desire immediate annexation to the United States. During the discussion of the reciprocity treaty from 1868-1873, annexation became a subject of debate. American supporters of annexation presented it as a preferable alternative to reciprocity and the only means which would insure lasting prosperity and stability of government and property. Many haoles failed to support annexation because they believed the time was not right for it, although many of them contended that manifest destiny made annexation inevitable at a future date. A number of newspapers in the United States also expressed this sentiment that the Hawaiian Islands would "sooner or later become American property." Secretary of State William Seward favored annexation but believed that American concern with economic entrenchment due to Reconstruction would prevent extension of American sovereignty over the islands.[59]

During the early 1890s some American residents advocated annexation while others preferred reform of the Hawaiian government and continuation of the monarchy. A small group of determined American haoles with the aid of the American minister John L. Stevens and American troops, overthrew the native government in 1893. Queen Liliuokalani surrendered her authority to the United States because of the active involvement and presence of United States troops. She believed the United States government would restore her sovereignty once it learned of the illegal activities of

Stevens and the use of military in the overthrow of the legitimate Hawaiian government. The Queen requested the United States government to restore the Hawaiian Kingdom as a sovereign nation. Native Hawaiians opposed the overthrow of their government and Queen. Since the Harrison administration had previously indicated its support of annexation, the Provisional Government immediately sent representatives to Washington to negotiate an annexation treaty. The Senate was considering such a treaty within thirty-two days after the establishment of the Provisional Government.[60]

Congress delayed action on the annexation treaty until President-elect Grover Cleveland took office. Cleveland questioned the proceedings in the Hawaiian Islands and appointed James H. Blount to conduct an investigation of the American role in the revolution. Blount's report indicted the actions of the American Minister, the American naval forces, and some haole residents. As a result of Blount's findings Cleveland requested the American revolutionaries to restore Queen Liliuokalani to the throne. The officers of the Provisional Government refused and Cleveland refused to use force to restore the monarchy.[61] In 1898 the annexation efforts successfully culminated in annexation largely because of the Spanish American War. The United States government recognized the importance of the Hawaiian Islands to America's position in the Pacific. Hawaii became an incorporated territory of the United States in 1900 with enactment

of the Hawaii Organic Act. This ended any native hopes of restoring the sovereignty of the Hawaiian nation.

Several motives impelled haoles to overthrow the royal Hawaiian government, establish a provisional republic, and seek and eventually gain absorption by the United States. Certainly a principal one was to guard their tenure in the rich agricultural lands of the islands which they had methodically stripped from the native Hawaiians during the nineteenth century.

END NOTES

[1]See Chapter 5, pp. 175-178.

[2]Marshall Sahlins and Dorothy Barrere, eds., "William Richards on Hawaiian Culture and Political Conditions of the Islands in 1841," Hawaiian Journal of History 7 (1973): 3, fn. 11; Polynesian, July 4, 1840, May 8, Feb. 6, August 28, Sept. 18, Oct. 16, 1841.

[3]Constitution, published in Polynesian,Feb. 6, 1841.

[4]Proclamation by Kamehameha III and Kekauluohi, May 31, 1841, F. O. & Ex.; Judd to Secretary of ABCFM, Sept. 5, 1844, F. O. & Ex.; Privy Council Records, vol. 2, p. 146, AH: Report of the Attorney General to the Legislature, Aug. 1, 1846, published in Polynesian, Aug. 15, 1846; Judd, Remarks on Ten Eyck's Draft of a New Treaty with the United States, Feb. 20, 1848, F. O. & Ex.; Polynesian, June 17, 1841; Kamehameha III to American Consul, July 22, 1841, Notes From the Hawaiian Legation in the United States to the Department of State, 1841-1899, vol. 1 (hereafter cited as Notes From the Hawaiian Legation).

[5]Colcord,Journal, p. 55; Ruschenberger, Voyage Round the World, p. 497; Polynesian, June 17, July 17, Nov. 13, 1841, July 3, 1847; Bradley, American Frontier in Hawaii, pp. 236-40.

[6]Thurston, Lorrin, ed., The Fundamental Law of Hawaii (Honolulu, 1904), p. 121; Hooper to Kekuanaoa, Feb. 19, 1845, F. O. & Ex. and USDS, Dispatches, vol. 2.

[7]Ruschenberger, Voyage Round the World, p. 497; Judd to Richards, Aug. 2, 1842, F. O. & Ex.; Judd to Secretaries of American Board of Commissioners for Foreign Missions, Sept. 5, 1844, F. O. & Ex.; Polynesian, May 31, 1845, Aug. 8, 1846; Hooper to Secretary of State, Aug. 28, 1845, USDS, Dispatches, vol. 2; Record of the Legislature, 2:95-96, March 12, 1846; Polynesian, May 1, 1847.

[8]J. P. Judd to R. C. Wyllie, Aug. 22, 1844, F. O. & Ex.; Polynesian, Oct. 12, 1844.

[9]Report of the Minister of Interior, published in Polynesian, May 31, 1845, July 11, 1846, May 8, 29, June 19, July 3, 1847, July 1, 1848, June 24, 1854; Privy Council Records, 2:432, Kuykendall, Hawaiian Kingdom, 1:281.

[10]The Polynesian published "The Principles . . ." on June 19, 1847; Many letters in the Interior Department Letter Book 2 reveal the sale and leasing of lands to non-Hawaiians.

[11]Polynesian, May 29, Sept. 25, 1847; Privy Council Records, 2:308 and passim; Records of Legislature, 2: Oct. 15, 1846-May 24, 1847 passim; Judd to Kamehameha III and Privy Council, Dec. 17, 1847, F. O. & Ex.; Wyllie, Suggestions on the Proposed Division of Lands, Dec. 13, 1847, F. O. & Ex.; Lee to Wyllie, Dec. 14, 1847, F. O. & Ex.; Lee to Kamehameha III, Dec. 14, 1847, F. O. & Ex.; Lee, Suggested Four Principles on Division of Lands delivered in Privy Council, Dec. 14, 1847, F. O. & Ex.; Judd, Memo of Resolutions of Discussion in Legislature, Dec. 11, 1847; Privy Council Records, 4:250-60, 264-277, 280-90.

[12]Privy Council Records, 3:219-20, 231-34, 687, 761-63; Interior Letter Book 3, Aug. 19, 1850; Polynesian, June 26, 1852; Pacific Commercial Advertiser, Sept. 13, 1860; Kuykendall, Hawaiian Kingdom, 1:288.

[13]When the government sold lands to Hawaiian citizens, it reserved the rights of natives; for example see Kalama to Henry Swanton, Mar. 13, 1849, Interior Department Letter Book 2. Privy Council Records, 3:384, 404, 415-18; 711-12, 741-43, 755-73; Quote from Wyllie, Report on Land, Capital and Labor, Dec. 1, 1847, F. O. & Ex.; Wyllie to Judd, Nov. 19, 1849, F. O. & Ex.

[14]Privy Council Records, 3:417-18; Act of Aug. 6, 1850, published in Polynesian, Sept. 7, 1850; Interior Department Letter Book 3, Sept. 25, Dec. 8, 1851; Polynesian, Feb. 2, Dec. 14, 1850.

[15]Polynesian, Aug. 15, 1846, June 2, 1849; J. S. Green to editor, Polynesian, Sept. 26, Oct. 3, 1846; G. M. Robertson to John Richardson, Interior Department Letter Book 2, Nov. 17, 1848.

[16]Polynesian, May 17, 1851, April 9, 1853, July 3, 1857; Alexander , "Brief History of Land Titles in the Hawaiian Kingdom," pp. 123-24; Hobbs, Hawaii: A Pageant of the Soil, p. 62; Kuykendall, Hawaiian Kingdom, 1:293; for example of survey, see Edward Perkins, Na Motu: or, Reef-Rovings in the . . . Hawaiian . . . Islands (New York, 1854), pp. 149-55; quote in Thurston to D. B. Lyman, Jan. 8, 1852, Department of Interior Letter Book 3.

[17]Polynesian, May 15, 1852.

[18]Hawaiian Annual (1900), p. 30.

[19]Polynesian, March 23, 1850; Kuykendall, Hawaiian Kingdom, 1:292.

[20]Armstrong and Lee's letters trans. and printed in Polynesian, Feb. 16, 1850; Polynesian, June 2, 1849, Feb. 2, 1850.

[21]The act allowing aliens to purchase and convey land, published in Polynesian, July 13, 1850; Judd, Remarks on Ten Eyck's Draft of a New Treaty with the United States, Feb. 20, 1848, F. O. & Ex.; Polynesian, Sept. 16, Nov. 25, 1848.

[22]Hooper to Kekuanaoa, Feb. 19, 25, 1845, F. O. & Ex.; Kekuanaoa to Hooper, Feb. 18, 24, 1845, USDS, Dispatches, vol. 2; Hooper to Sec. of State, Aug. 28, 1845, USDS, Dispatches, vol. 2.

[23]Seymour to Wyllie, Sept. 1, 1846, in Polynesian, June 5, 1847; Wyllie to Patrick Blake, Sept. 17, 1846, in Polynesian, June 5, 1847; Wyllie to Earl of Aberdeen, Sept. 6, 1844, F. O. & Ex.; quote from Kuykendall, Hawaiian Kingdom, 1:277.

[24]Ten Eyck to Sec. of State, Oct. 1, Dec. 21, 1846, March 27, May 25, June 2, 1847, USDS, Dispatches, vol. 3; Judd, Remarks on Ten Eyck's Draft of a New Treaty with the United States, Feb. 20, 1848, F. O. & Ex.; Wyllie to Joel Turrill, Dec. 15, 1848, USDS, Dispatches, vol. 4; Turrill to Buchanan, Dec. 22, 1848, USDS, Dispatches.

[25]Polynesian, July 3, 1847; Kuykendall, Hawaiian Kingdom, 1:296.

[26]Ten Eyck to Sec. of State, Nov. 3, 1847, USDS, Dispatches, vol. 3; Judd, Remarks on Ten Eyck's Draft of a New Treaty with the United States, Feb. 20, 1848, F. O. & Ex.; Buchanan to Ten Eyck, in H. Ex. Doc 48, 53d Cong., 2d sess., pp. 310-11; Kuykendall, Hawaiian Kingdom, 1:297.

[27]Polynesian, Feb. 26, July 8, Sept. 16, 30, Oct. 7, Nov. 25, 1848, Feb. 16, 1850, Oct. 8, 1853, Oct. 30, 1858.

[28]Wyllie, Report on Land, Capital, and Labor, Dec. 1, 1847, F. O. & Ex.; Lee to Wyllie, Dec. 8, 1847, F. O. & Ex.

[29]Privy Council Records, 3:681, 689; law printed in Polynesian, July 13, 1850.

[30]Polynesian, May 3, 1851; Isabella Bird Bishop, The Hawaiian Archipelago: Six Months Among . . . the Sandwich Islands, 1st Am. ed. (London, 1894; Reprint from 5th English ed., New York, 1903), p. 270.

[31]Polynesian, Dec. 14, 1850, March 2, 1861.

[32]See chapter 7, pp. 273-290.

[33]Act 56, Session laws, 1903, Ch. 342, P. L. 1955; U. S. Congress, House, Hearings Before the Subcommittee on Indian Affairs of the Interior and Insular Affairs Committee On Hawaiian Native Claims Settlement Act, 94th Cong., 1st sess., (1975), pp. 200, 226-27; Standing Committee Report No. 57, 1978 Hawaii Constitutional Convention, 1978 Hawaii Constitutional Convention Files, AH; Testimony Before Committee on Hawaiian Affairs, 1978 Hawaii Constitutional Convention; Testimony Before Committee on Hawaiian Affairs, 1978 Hawaii Constitutional Convention, Alu Like.

[34]Testimony Before Committee On Hawaaian Affairs, 1978 Hawaii Constitutional Convention.

[35]Ibid.; Black's Law Dictionary, 4th rev. ed. (St. Paul, Minn., 1968), pp. 73-74.

[36]Testimony Before Committee On Hawaiian Affairs, AH and Alu Like; Honolulu Advertiser, Nov. 11, 1977; Hearings on Hawaiian Native Claims Settlement Act (1975), p. 200.

[37]Honolulu Advertiser, Nov. 11, 1977; Hearings on Hawaiian Native Claims Settlement Act (1975), p. 200.

[38]Testimony by Kali Watson, Testimony Before Committee on Hawaiian Affairs, Alu Like.

[39]Honolulu Advertiser, Nov. 11, 1977; Statement by Agnes Conrad, Archivist at Hawaii State Archives, March 28, 1979, Honolulu, Hawaii; 1978 Hawaii Constitutional Amendments, 1978 Hawaii Constitutional Convention Files, AH.

[40]Theodore Morgan, A Century of Economic Change, 1778-1876 (Cambridge, Mass., 1948), pp. 138-39; U. S. Congress, Senate, Hearings Before the Interior and Insular Affairs Committee on Establishing the Hawaiian Aboriginal Claims Settlement Study Commission, 94th Cong., 2d sess., (1976), pp. 188-89.

[41]Hearings on Hawaiian Native Claims Settlement Act (1975), pp. 161, 172; Hearings on Hawaiian Aboriginal Claims Settlement Study Commission (1976), p. 188; Honolulu Advertiser, Nov. 11, 1977.

[42]Bishop, Hawaiian Archipelago, pp. 90, 406; Charles Nordhoff, Northern California, Oregon, and the Sandwich Islands (New York, 1875), p. 76; Lawrence Fuchs, Hawaii Pono, A Social History (New York, 1961), p. 16; S. B. Dole, "Hawaiian Land Policy," Hawaiian Annual (1898), p. 125; Morgan, Century of Economic Change, p. 139; U. S. Congress, Senate, Sen. Doc. 668, 60th Cong., 2d sess., (1909), p. 11.

[43]Thomas M. Spaulding, The Crown Lands of Hawaii, University of Hawaii Occasional Papers, no. 1 (Honolulu, 1923), pp. 15-16; Hobbs, Hawaii, pp. 73-74.

[44]See fn. 27; Dole, "The Problem of Population and Our Land Policy," in Pacific Commercial Advertiser, Oct. 26, 1872; P. Nahaolelua, "Biennial Report of the Minister of Finance to the Legislative Assembly of 1872,"pp. 7-8, in USDS, Dispatches, Notes From the Hawaiian Legation, vol. 2.

[45]S. B. Dole, "The Problem of Population and our Land Policy," Pacific Commercial Advertiser, Sept. 10, 1863.

[46]Ralph Kuykendall and A. Grove Day, Hawaii: A History, rev. ed. (Englewood, 1961), pp. 205-06; U. S. Congress, House, Territories Committee, Leasing of Land in Hawaii, Hearings on H. 17599, 62d Cong., 2d sess. (1912), p. 36.

[47]30 Stat. 750 (1898); 31 Stat. 141 (1900).

[48]Robert Horwitz and Judith Finn, Public Land Policy in Hawaii: Major Landowners, Legislative Reference Bureau Rept. 3 (Honolulu, 1967), pp. 13-15, 35-43.

[49]Ellis, Narrative of a Tour Through Hawaii, p. 223; Hawaiians had also expressed this fear in 1820, Missionary Herald, 17 (1821): 118, 172.

[50]Brown to Calhoun, Jan. 18, 1845, USDS, Dispatches, vol. 2; Petition, June 12, 1845, F. O. & Ex.; Records of the Legislature, 2:20-22; Polynesian, August 2, 1945; John Young to Residents of Lanai, Aug. 7, 1855, Department of the Interior Letter Book 6.

[51]Morgan, Century of Economic Change, pp. 138-39.

[52]Peirce to Hamilton Fish, Feb. 10, July 5, 1873, USDS, Dispatches From U. S. Ministers in Hawaii, 1843-1900, vol. 15; Charles Bishop to Peirce, Nov. 14, 1873, enclosure with Peirce to Fish, Nov. 18, 1873, USDS, Dispatches From U. S. Ministers in Hawaii, vol. 15; Pacific Commercial Advertiser, Sept. 13, 1873; Hawaiian Gazette, July 9, 1873.

[53]Pacific Commercial Advertiser, Aug. 10, Dec. 7, 1867, Jan. 1, 4, 1868, March 12, July 2, 1870, Feb. 8, July 5, 12, 26, Sept. 27, Nov. 22, 1873; Hawaiian Gazette, Feb. 26, July 3, Nov. 19, 1873; Peirce to Fish, Feb. 25, 1871, USDS, Dispatches From U. S. Ministers, vol. 13; Quote from Peirce to Fish, May 26, 1873, USDS, Dispatches From U. S. Ministers, vol. 15; Peirce to Fish, Feb. 28, July 7, Nov. 24, 1873, USDS, Dispatches From U. S. Ministers, vol. 15.

[54]Resolutions in Pacific Commercial Advertiser, July 5, 1873; Pacific Commercial Advertiser, Jan. 4, Oct. 28, 1868, Aug. 9, 16, Sept. 13, Nov. 22, Dec. 13, 1873; Hawaiian Gazette, March 26, 1873; Bishop to Peirce, Nov. 14, 1873, enclosures with Peirce to Fish, Nov. 18, 1873, USDS, Dispatches From U. S. Ministers, vol. 15; Peirce to Fish, Nov. 24, 1873, USDS, Dispatches From U. S. Ministers, vol. 15.

[55]19 Stat. 625-27 (1875).

[56]25 Stat. 1400 (1887). For detailed study of reciprocity and annexation see Merze Tate, Hawaii: Reciprocity or Annexation (East Lansing, 1968) and Sylvester Stevens, American Expansion in Hawaii, 1842-1898 (Harrisburg, Pa., 1945).

[57]George Merrill to James Blaine, Aug. 1, 6, 1879, in H. Ex. Doc. 48, 53d Cong., 2d sess.; John Stevens to Blaine, Feb. 7, 10, 1890, in H. Ex. Doc. 48; Peirce to Fish, Feb. 5, 1874, USDS, Dispatches From U. S. Ministers, vol. 16; Bishop, Hawaiian Archipelago, p. 421; see generally Ralph Kuykendall, The Hawaiian Kingdom, 1874-1893: The Kalakaua Dynasty, vol. 3 (Honolulu, 1967).

[58]Native opposition to annexation existed throughout the second half of the nineteenth century; for example see Pacific Commercial Advertiser, Mar. 14, 1868; Peirce to Fish, March 17, April 28, Nov. 18, 1873, USDS, Dispatches From U. S. Ministers vol. 15, Nordhoff, Sandwich Islands, p. 96; Bishop, Hawaiian Archipelago, p. 247; Emma to Peter, Jan. 6, 1874, in Alfons Korn,ed., News From Molokai, Letters Between Peter Kaeo and Queen Emma, 1873-76 (Honolulu, 1976), p. 169; Proclamation by Kamehameha III and Keoni Ana, March 10, 1851, in H. Ex. Doc 48, 53d Cong., 2d sess.; Luther Severance to Daniel Webster, March 11, 1851, in H. Ex. Doc 48; Webster to Severance, July 14, 1851, in H. Ex. Doc 48; W. L. Marcy to John Mason, Dec. 16, 1853, in H. Ex. Doc 48; Marcy to Gregg, April 4, 1854 and Jan. 31, 1855, in H. Ex. Doc 48; Gregg to Marcy, July 26, Aug. 7, Sept. 15, Oct. 2, Dec. 29, 1854, in H. Ex. Doc 48.

[59]Pacific Commercial Advertiser, Dec. 28, 1867, Jan. 1, Feb. 8, 22, March 14, Oct. 24, 1868, July 2, Nov. 19, 1870, Feb. 15, 22, March 1, 8, 15, 29, April 5, 12, June 7, 1873; Hawaiian Gazette, March 5, 1873; Peirce to Fish, May 26, 1873, USDS, Dispatches From U. S. Ministers, vol. 15; William Seward to Edward McCook, Sept. 12, 1867, in H. Ex. Doc. 48, 53d Cong., 2d sess.; Seward to Z. S. Spaulding, July 5, 1868, in H. Ex. Doc. 48.

[60]Correspondence concerning the Revolution of 1893 and annexation is found in H. Ex. Doc 48, 53d Cong. 2d sess., pp. 75-246, 422-509.

[61]Ibid.

CHAPTER VII

NATIVE AMERICAN RESTITUTION ATTEMPTS

During the 1970s both native Hawaiians and American Indians have become increasingly vocal and active in asserting claims for land. Native Americans have channeled most of their efforts through legal means but some of their actions have been extralegal. Hawaiians and Indians have focused their activities on four main areas. These include the actual restoration of land, obtaining monetary compensation for lands taken from them, preventing additional alienation, and recovering or affirming historic fishing, hunting, gathering, and water rights. Most of the gains made by Native Americans have resulted less from their assertive actions and more from a favorable judicial and legislative climate of opinion.

MONETARY COMPENSATION FOR EXPROPRIATED LANDS

Hawaiians and Indians have sought monetary compensation. Most Indian claims have sought monetary compensation for lands taken illegally or unfairly. Indians pursued this course of action because they believed it offered the only alternative. Prior to congressional enactment of the Indian Claims Commission Act of 1946, Indians requesting restitution first had to

obtain congressional approval for a suit against the federal government. Federal courts observed sovereign immunity to suit unless the federal government authorized litigation. The protection of property guaranteed by the fifth amendment of the constitution has been construed not to apply to Indian tribes. Congress narrowly conceived the basis for litigation and consequently approved few petitions. On those it sanctioned, the legislative process sometimes lasted for forty years.

After a decade and a half of congressional attempts to formulate a system to adjudicate Indian claims, Congress established the Indian claims Commission in 1946. Essentially a jurisdictional act, the legislation allowed the tribes five years to register claims with the commission. The act required the Commission to adjudicate the claims by 1957. Congress later extended the life of the Commission five times. The Commission finally dissolved on September 30, 1978. Congress passed legislation for the transfer of unsettled claims to the Court of Claims.[1]

The act permitted suits for claims arising in regard to the constitution, treaties, executive orders, claims sounding in tort, or involving fraud, duress, mutual or unilateral mistake, and claims "based on fair and honorable dealings not recognized by any existing rule or equity." Indians based most of their cases on the first argument. The majority of suits involved uncompensated taking of land or

payments of a sum less than the fair market value of the land. Claimants had to prove exclusive occupancy of a definable territory. The Commission recognized claims showing aboriginal title to exclusive use and occupancy even if only seasonal or ritualistic. They refused compensation for claims of areas shared jointly by more than one tribe or band except when the federal government moved several tribes into an area and then removed them.[2]

The litigation involved a lengthy process and the Commission completed its work slowly. Originally tribes presented 370 claims but the Commission separated some into individual dockets comprising a total of 615. The Commission further subdivided the dockets into separate issues covering about 850 claims. By the end of 1967, the Indian Claims Commission had dismissed 132 dockets, approved 100 for awards for about $226 million, and during the next eleven years it approved an additional 242 dockets for awards and denied seventy-two petitions. By September, 1978 the Commission had decided 546 dockets for $818,172,606.64 less attorney's fees. The Indian Claims Commission transferred the remaining dockets to the Court of Claims for settlement.[3]

Before deciding the amount of compensation, the Commission determined the fair market value of the land at time of taking and then deducted offsets that included the original sum paid the tribe plus additional costs of supporting the tribe. The Commission never formulated an exact method of

determining what items comprised offsets. Congress justified the deduction of offsets by claiming that the tribes would not have needed gratuities if they originally had received sufficient compensation for their lands. It failed to consider that the tribes would not have needed gratuities if they had not been forced to cede their lands and also would not have wanted or bought certain things considered as offsets. Without the offset provision, Congress probably would not have passed the Act of 1946 since it believed the total amount of restitution awards would have been too high. Before the Commission settled a claim, it held three hearings. The first decided the validity of the claim. If it was justified, a second hearing determined the fair market value of the land. The third set the total amount of offsets. After the Commission awarded monetary compensation, Congress had to approve the tribe's plan for using the money. In 1973 Congress passed legislation authorizing the Secretary of Interior to approve a method of distribution, contingent on congressional approval. The same act required each tribe to invest a minimum of twenty percent of its award. Both the tribe and federal government could appeal the Commission's finding to the Court of Claims.[4]

Generally Indian tribes opted for a per capita settlement, preferring this method of destination of the award largely out of a fear that unless they received the money immediately, the federal government eventually would cause them to lose both their land and money. The Indians viewed

termination as a possible outcome of investing their award money. As justification for their attitude they have pointed to the fate of the Menominee tribe. In the 1950s Congress selected the Menominee tribe as one of the first to be terminated from federal trust status because of its timber wealth. In 1951 the Menominees received $7,600,000 after a seventeen-year court case. The Menominees decided to award $1500 per tribal member and invest the remaining funds in their thriving lumber operation, their hospital, and other community enterprises. By the time of their final termination in 1961, they had spent most of their money in their attempt to defeat termination. Almost bankrupt, they had to close their hospital and sell a large part of their land before Congress restored their tribal status in 1973. The Indians' previous experience with outsiders managing their money to their detriment explains their reluctance to program their money.[5]

The aboriginal population of Alaska received monetary compensation for former lands as a part of the Alaska Native Claims Settlement Act of 1971. Congress awarded the tribes $462.5 million with two percent royalty on mineral development on state and federal lands in Alaska up to $500,000,000.

Encouraged by congressional passage of the Alaska Claims Settlement Act in 1971, Hawaiian nationalists actively campaigned for comparable legislation for their benefit. ALOHA--Aboriginal Lands of Hawaiian Ancestry--led the movement for reparations for lands taken in the 1890s. Numerous

other native Hawaiian organizations originated in the 1970s and joined with older native organizations to support a claims settlement. Many of the nationalists disagree on the method of restitution. Some extremists have demanded the establishment of an independent Hawaiian Kingdom or a tribal government possessing sovereignty much like the reconstituted Indian tribes and co-existing within certain states.[6]

The movement for restitution has based its claims on the alleged illegal actions of the United States minister to Hawaii, John Stevens, in 1893 when he ordered the United States naval forces to land in Hawaii. Use of the American military supporting the revolutionary white settlers led Queen Liliuokalani to surrender her kingdom to the Committee of Safety in order to avoid bloodshed. The provisional government and later the Republic of Hawaii ruled Hawaii without the consent of the native Hawaiians and designated the crown and government lands as its public lands. When the United States annexed the Republic of Hawaii in 1898, the revolutionary government ceded these public lands to the federal government. According to Hawaiian leaders the federal government assumed illegal ownership through an act of conquest as a result of the activities of American representatives in 1893 and 1898, which form the basis for the native Hawaiian claim for compensation. The natives maintain that they lost both dominion and domain over their nation and land.[7]

In 1974 Representatives Spark Matsunaga and Patsy Mink

from Hawaii introduced the first native Hawaiian claims bill but the House Interior Committee failed to report it out of committee. They reintroduced the measure during the next session; it met the same fate. In February, 1975, the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs held hearings in Hawaii on the native claims bill.[8]

Under the provisions of the bill, the Secretary of the Interior would establish a roll of all living native Hawaiians. The roll would be maintained by adding the names of new-born Hawaiians. To qualify as a native Hawaiian, an individual had to be the descendant of the aboriginal race inhabiting the Hawaiian Islands before 1778. A person lacking sufficient genealogical documentation of his ancestry could still be enrolled if other native Hawaiians considered him a native. The claims bill called for the creation of a Hawaiian Native Corporation to manage the one hundred million dollars to be paid annually by the federal government for a period of ten years; the total settlement amounted to one billion dollars. The members of the corporation would consist of the native Hawaiians listed on the proposed rolls. Another provision gave the Hawaiian Native Corporation first rights to claim any federal land in Hawaii which the government classified as surplus lands.[9]

Undaunted by the apparent lack of congressional support, leaders of ALOHA, congressmen from Hawaii, and other

Hawaiian aboriginal organizations continued their drive for recompense. In 1975 Representative Matsunaga and Senator Daniel Inouye introduced a measure providing for the establishment of a Hawaiian Native Claims Settlement Study Commission to investigate the claims asserted by the natives which they believed stood a better chance of congressional passage. The bill directed the commission to determine the validity of the claim; if justified, then the Commission would decide how to rectify them, and report their recommendations to Congress, Congress would not be bound by the suggestions. ALOHA preferred its newly formulated bill which closely resembled the original bill but contained an additional provision calling for the return of approximately 2.5 million acres of land, the size of the crown and government estate in 1893. ALOHA reluctantly supported the alternative legislation that would establish the Hawaiian Native Claims Settlement Study Commission because the congressmen assured ALOHA leaders that its bill would not pass Congress.[10]

For the next two years Congressmen from Hawaii reintroduced the Study Commission bill, with some modifications. During 1976 and 1977 congressional committees conducted hearings in Hawaii on the measure, causing committee members to alter the original bill to incorporate certain requests expressed by members of the Hawaiian community. The natives desired an increase of native Hawaiian members and more representation from all the main islands in the Hawaiian

Archipelago on the proposed Study Commission. Finally in October 1977 the Senate passed the bill without opposition but in May, 1978, the House failed to approve the measure.[11]

Motivated by a belief in the need for quick enactment, Senator Inouye reintroduced the bill during the same session but Congress did not vote on the proposal again that year.[13] Undoubtedly the Hawaiian congressmen and native Hawaiians will continue to press the issue of native claims in Congress. Although the outcome of such legislation remains uncertain, the outlook appears brighter for eventual establishment of the commission. The growing congressional opposition against Native American claims as seen in the proposed legislation to abrogate Indian treaties could work to the detriment of any settlement for native Hawaiians.

Apparently a large segment of the political and business community in Hawaii supports the establishment of the Hawaiian native claims study commission and federal compensation for the native land claims. This raises the question of the sincerity of their allegedly altruistic motives. Perhaps the elite support the settlement more for the positive economic effect a monetary settlement would have on Hawaii's economy than from an unselfish concern with native welfare and rights. Passage of restitution legislation possibly would affect fifteen percent of the population of Hawaii who claim descent from the aboriginal race of the Hawaiian Islands.[13]

Hawaiian nationalists encouraged the 1978 constitutional

convention to incorporate an amendment to Hawaii's constitution. The voters of the state supported an amendment that provided for the establishment of an Office of Hawaiian Affairs. Along with other responsibilities relating to native Hawaiian concerns, the Office of Hawaiian Affairs would receive and manage any funds or property designated for native Hawaiians. Its promoters advocated the creation of such an office partially in anticipation of receiving a settlement from the federal government. During the 1979 session legislators introduced a bill creating an Office of Hawaiian Affairs.[14]

RESTORATION OF LAND BASE

Both native Hawaiians and American Indians endeavored to rebuild their land base during the twentieth century. Both groups started making such attempts earlier in the century but only achieved limited success. American Indians accomplished more in this sphere than native Hawaiians; the former have made significant progress in the 1970s in regaining former lands.

RESTORATION OF THE INDIAN LAND BASE--In 1934 Congress enacted the Indian Reorganization Act. Under its provisions, tribes could purchase land. The act established a loan fund enabling tribes to purchase land. Congress failed to appropriate sufficient funds to support the program adequately. Tribes acquired four million acres by the 1950s through the Indian

Reorganization Act's provisions or supplemental legislation. The Oklahoma Welfare Act of 1936 authorized the Secretary of the Interior to buy lands for participating Oklahoma tribes but the Secretary has never requested the use of funds for the purchase of non-trust lands.[15]

In 1977, under provisions of the Indian Reorganization Act, the Bureau of Indian Affairs transferred lands to trust status for the Puyallup tribe and Sault Ste. Marie Chippewa Indians. Previously the Puyallup tribe or tribal members had fee simple title to lands within the boundaries of the Puyallup Reservation. The Sault Ste. Marie Chippewa Indians purchased a seventy-six acre tract and requested the Bureau of Indian Affairs to transfer the land to trust status. The cities of Tacoma, Washington and Sault Ste. Marie, Michigan challenged the action. Until the courts resolved the issues, the Secretary of the Interior stayed additional taking of lands for these tribes. In late 1978 the District Court for the District of Columbia determined that the Secretary of the Interior had the authority to place lands in trust for the Puyallup tribe and the Sault Ste. Marie Chippewa Indians.[16]

In 1974 Congress passed legislation allowing the Sisseton and Wahpeton Sioux tribe of the Lake Traverse Reservation in North and South Dakota to consolidate its landholdings. The heirship plight of the Sioux paralleled that of many tribes. Land holdings held in trust became

fractionalized to the extent that efficient utilization of a tract was impossible. The act provided for the tribal purchase of such divided interests.[17]

During the 1970s Congress passed two bills providing for the return of lands to Indian tribes. In 1975 one act authorized the Secretary of the Interior to restore surplus lands to tribal trust status. In 1975 the Submarginal Lands Act conveyed over 370,000 acres of submarginal lands to certain Indian tribes. These lands had been acquired for tribal use during the 1930s.[18]

Occasionally Congress returned small acreages to the holdings of numerous tribes. For instance, the Washoe Indians of California received eighty acres of surplus lands, and the Bridgeport Paiutes, the Sisseton Sioux, and Kootenai tribe also acquired small tracts.[19]

In 1978 Congress approved the return of land to the Zia and Santa Pueblos. The United States government had acquired these lands in 1937 and placed them in the public domain under the supervision of the Bureau of Land Management. The Zia Pueblo received 4850 acres, Santa Ana Pueblo, 16,000 acres. These lands are held in federal trust.[20]

Legislation returning the Taos Blue Lake and its watershed area in 1970 represented one of the most celebrated cases of land restitution. Taos Pueblo leaders continually attempted to regain ownership of these sacred areas since 1906. At that time President Theodore Roosevelt placed Blue

Lake and its environs in Taos National Forest, later Carson National Forest. The Taos Pueblo received no compensation for these lands. Prior to 1906 and until 1918 the United States government "recognized and protected the special and exclusive interests" of the Taos Indians to this area. In 1924 Congress enacted the Pueblo Land Board Act to settle land disputes between the Pueblos and non-Indians. The Board offered $458,520.61 to the Taos Pueblo for lands taken within their reservation by non-Indians. The government paid part of the settlement but the Taos Pueblo requested the return of Blue Lake and its watershed area in exchange for the remaining cash payment. The Indians continued to insist on receiving title to the land and Commissioner of Indian Affairs John Collier agreed to help them attain their goal. In 1933 Congress passed legislation providing for a fifty-year permit with right of renewal for 31,000 acres of the Blue Lake area. Because of difficulties in concluding a satisfactory agreement, the Indians did not sign the permit until 1940. It granted the Taos Pueblo exclusive use to the area for their annual ceremonial period and free use of wood, forage, and water for personal and tribal needs.[21]

The Taos Pueblo continued their efforts to regain title to Blue Lake and the Rio Pueblo de Taos watershed. In 1965 the Indian Claims Commission affirmed the Taos Indians' exclusive aboriginal use and occupancy of 113,000 acres. The Commission awarded a claims settlement but the tribe refused

to accept monetary compensation and held out for the land. The Commission supported the Taos Pueblos efforts for return of the land but it did not possess the authority to return it. Tribal efforts garnered widespread national support from representatives of the Roman Catholic Church, National Organization of Churches, Indian Rights Association, National Organization of American Indians, and former Secretary of the Interior Stewart Udall. A group of prominent Americans formed the National Committee for Restoration of Blue Lake Lands to the Taos Indians. Other individuals such as President Richard Nixon and New Mexico governor David Cargo also joined the large number of supporters.[22]

The Taos Indians maintained that Blue Lake and its watershed area possessed spiritual significance and absolute sanctity. Blue Lake, their principal shrine, had been the site of the Indians' annual pilgrimage for 700 years and individual Indians used the lake for religious worship daily. The Taos Pueblo argued that the existence of their traditional religion and cultural survival depended upon protection of the area. The tribe desired to prohibit all commercial exploitation. The Taos Indians maintained that timber, grazing, and recreational use had desecrated Blue Lake and its watershed.[23]

White supporters argued that the Taos Indians should have the land returned to their possession because of its sacred importance to the Pueblo's religion. They maintained

that the tribe's situation differed from other Indian efforts to regain land because of its spiritual significance and the Taos wanted the land for religious rather than economic reasons. They also cited the Taos Indians' long history of endeavors to regain ownership of Blue Lake and its environs.[24]

A small group of vocal congressmen, lumbermen, sportsmen, and United States Forest Service officials opposed the return of Blue Lake. They claimed that the Taos Indians possessed every right to religious freedom under the supervision of the United States Department of Agriculture as they would with the land held in trust by the Bureau of Indian Affairs. Some opponents argued that conservation practices would best be served with jurisdiction of the land under the Forest Service. Most of the adversaries argued that return of Blue Lake would establish a precedent that would enable other tribes to regain claimed lands in place of traditional monetary compensation.[25]

In December, 1970, Congress restored 48,000 acres to the Taos Indians. The United States government held the land in trust for the tribe. The legislation stipulated that Blue Lake and the surrounding land remain a wilderness area and that the tribe only use it for traditional purposes such as religious ceremonies, hunting and fishing, a water source, forage for domestic livestock, timber, and for personal uses.[26]

The following year Congress enacted the Alaska Native Claims Settlement Act. It awarded title in fee simple to the

largest amount of land ever received by American Indians for the extinguishment of aboriginal title. The Alaskan tribes claimed ownership to most of the 375 million acres contained in the state's land mass. According to the provisions of the settlement act, the natives would receive clear title to forty million acres and $462.5 million, and two percent royalty on mineral development on state and federal lands in Alaska up to $500 million. The act authorized the land distribution among twelve native profit-making district corporations. They would allocate acreages to eligible villages who would receive fee in simple patent to the surface estate while the regional corporation retained subsurface rights. Some Native Alaskans chose to select fee simple ownership of land instead of coming under the provisions of the act.[27]

In 1972 Secretary of the Interior Rogers C. B. Morton reserved ninety-nine million acres from which the Native Alaskans could select their forty million acre allocation. Four years later, the Secretary of the Interior made the first land conveyence to a regional corporation.[28]

Numerous litigation has resulted from passage of the Alaska Native Claims Settlement act. Some of the lawsuits have contested the Secretary of the Interior's rulings that declared certain native villages ineligible for receiving land. Other legal disputes have developed over the pattern of selection by native corporations, the state of Alaska, and the federal government.[29]

The adjudication of native land claims culminated a century of unsettled title to ninety percent of the land in Alaska and several decades of native efforts to obtain title. A number of native organizations originated in the mid-1960s as a result of the land rights issue. In 1966 the Native Alaskans created a statewide association, the Alaska Federation of Natives. The discovery of oil in Alaska promoted the swift settlement of native claims. Desire for immediate exploitation of this valuable resource prompted the oil companies to join forces with the natives to clear land titles. A receptive administration in Washington also contributed to an early settlement. The Nixon administration wanted to settle the land claims issue before it approved the Alaskan pipeline project.[30]

From the time the United States purchased Alaska in 1867 from Russia, Congress had neglected to clarify aboriginal land rights. The purchase agreement, the Organic Act, and the Statehood Act recognized native rights of use and occupancy. The latter two documents left the settlement of such rights to Congress.[31]

Some Native Alaskans withheld approval of the Native Claims Settlement Act. William Willoya, an Eskimo, believed the legislation would be detrimental to the continuation of the aboriginal subsistence lifestyle and entailed a sell-out to the corporations. He maintained that Congress excluded traditional hunting, fishing, wood, and berry gathering areas

used seasonally by nomadic natives from the land allotted to the native corporations. He claimed that more than 20,000 natives will be forced off the land in the next twenty years. Willoya also expressed a concern shared by other Native Alaskans that the legislation will force the aboriginal population to accept a business economy. Congress established the profit-making corporations and thus forced an alien concept on Alaskan tribes. In order to become self-sustaining organizations it is expected that the corporations will join with multi-national corporations to exploit the mineral resources. Several Native American leaders declared that the organizations will be more concerned with profits than with protecting the traditional subsistence methods and culture of Alaskan natives. Willoya also feared that the native corporations would have to sell some of their land in order to pay taxes after 1991. Until that time shareholding natives can not alienate their non-taxable shares in the corporation. After the twenty-year non-alienation period the corporations can sell the land and natives can market their shares although non-natives can not receive voting rights in the operation of the corporations. Opponents of the legislation also lamented the loss of traditional hunting, fishing, gathering, and water rights. The laws of Alaska became applicable to the natives with the passage of the Native Claims Settlement Act. The federal government also terminated all trust responsibilities to the Alaskan aboriginal population. Even some of the native

supporters of the claims settlement voiced displeasure with the act but were convinced that it was the best agreement they would obtain.[32]

Final assessment of the overall benefits of the legislation can not be made for some time. But thirty years from now, the settlement act may be seen in the same light as the General Allotment Act with its resulting loss of native landownership, dislocation, and loss of native culture. Much will depend on the success of the native corporations in retaining title to the land and maintaining traditional lifestyle and culture. The white ideological basis of the Alaska Claims Settlement Act rests with the hope of assimilating the Alaskan Eskimos, Indians, and Aleuts into the Western business economy. Profit-making organizations with a competitive corporate structure comprise a concept alien to most Alaskan natives' cooperative subsistence culture. The impact of mineral exploitation, speculation, and a money economy threaten the native way of life.

Congressional approval of the return of 185,000 acres in the Grand Canyon to the Havasupais in 1975 marked another significant settlement of native land claims. Havasupai attempts to regain some of their ancestoral lands dated to the early twentieth century. For six centuries, the Havasupai migrated from the plateau lands on the rim of the canyon to the canyon floor in the summer. Use of both areas provided subsistence for the tribe. Since 1882 the Havasupai lived

on a 518-acre reservation on the floor of the Grand Canyon. In 1919 Congress established Grand Canyon National Park and also allowed the tribe to continue using the plateau. But National Park Service officials restricted Indian free use of the area compressing the Havasupais on 518 acres of which only 200 acres comprised arable land. The tribe maintained that their survival depended on the return of the plateau lands. In January, 1975, President Gerald Ford signed the legislation designating 185,000 acres as trust lands for the Havasupai.[33]

In addition to regaining land by congressional legislation, Indians have also secured possession of former lands through presidential executive orders. On May 20, 1972, President Richard Nixon issued an executive order directing the return of Mt. Adams and 21,000 acres to the Yakima tribe, culminating over four decades of tribal efforts at recovery. After discovering a map delineating the proper boundaries set by the 1855 Treaty of Walla Walla, the Yakimas presented their claims to the federal government. The map showed that errors made by the surveyors resulted in a reduction of 421,465 acres of their reservation. In 1904 the federal government restored 300,000 acres to the tribe. Finally the Indian Claims Commission in 1968 ruled that the Yakimas were entitled to an additional 121,465 acres. Since 98,000 acres comprised rich farm lands owned by whites, the Commission awarded the tribe fifty cents an acre for them. The remaining

lands were located in the Gifford Pinchot National Forest. The Commission determined that the federal government did not have to return the land and left the ultimate decision to the discretion of the President. This led to Nixon's executive order returning some of the land.[34]

At times agreements between tribal leaders and state officials have resulted in satisfactory land settlements. In 1976 Massachusetts governor Michael S. Dukakis established a reserve for the Wampanoags. The Indians received the right to manage 227 acres with Massachusetts holding veto power. Around 1900 the city of Fall River had annexed the land claimed by the Wampanoags.[35]

Indians also used the judicial system to regain lands. During the 1970s the Pomo Indians on Robinson Rancheria in California obtained the return of their reservation to trust status. The United States Supreme Court in 1970 determined that the Cherokee, Choctaw, and Chickasaw tribes owned the riverbed of the Arkansas River in Oklahoma. In 1920 the Oneida tribe received thirty-two acres as a result of a federal district court decision. An United States Circuit Court of Appeals decision in 1978 declared that the Western Shoshones might possess aboriginal title to twenty-two million acres in Nevada. The appellate court remanded the case to United States district court to determine whether the Western Shoshones have beneficial title to the disputed lands.[36]

The Pit River Indians of northern California have

tried to get their land claims case before the courts throughout the 1970s. They claim title to 3.5 million acres of land taken by the federal government in the 1850s. The Indian Claims Commission acknowledged their aboriginal use and occupancy of the area in question and awarded a cash settlement of $29 million as part of a joint judgment with a loosely named group, the California Indians. The other state tribes readily accepted the restitution. The Pit River Indians rejected the money settlement and requested return of their former lands. The Bureau of Indian Affairs invalidated the results of the Pit River election and conducted a subsequent election through the mails which overturned the earlier tribal decision. Current leaders alleged that the Department of the Interior improperly conducted the election and deemed the later results invalid. The tribe later voted to reject the monetary compensation and demanded the return of their lands. The Pit River Indians appealed to the Indian Claims Commission to review the 1964 judgment but in 1973 and 1974 the Commission refused the petition. Some of the Pit River Indians resorted to the tactic of occupying tracts of claimed land as well as bringing suit against the Hearst corporation, Pacific Gas and Electric, and other giant corporations, and the federal government. In the mid-1970s the Pit River Indians won ownership rights to a fourteen square mile area while another decision declared that the Pit River Indians did not have title to the disputed lands. Some of the Pit

River Indians declared their intention to continue their recovery efforts.[37]

A significant number of Indian land claims remained in abeyance in 1979. Some of these suits are based on state violations of the 1790 Trade and Intercourse Act. This federal statute prohibited states from obtaining Indian lands or treatying with tribes without federal approval. In several of these cases tribal leaders have combined judicial efforts with negotiation and legislative action.

The Narragansett tribe of Rhode Island asserted claims against that state for making transactions in violation of the 1790 law. The Narragansett based their claim for 3500 acres of land in the state on a series of state statutes enacted by the legislature before 1890. Tribal leaders initiated court action against the state of Rhode Island. In 1978 the parties negotiated a settlement. Subsequently the United States Congress approved the agreement that provided for the return of 1900 acres to the Narragansetts. In August, 1979, the Rhode Island legislature approved it.[38]

The settlement authorized the appropriation of $315 million of federal funds to purchase 900 acres from private land owners and 900 acres of state public lands. A state-chartered corporation controlled by eight persons, five Indians and three state officials, will acquire and hold the land in trust for the tribe. Nine-tenths of the land will be restricted to permanent conservation while about 225 acres

can be developed subject to the approval of the corporation. Terms of the settlement included tribal agreement to congressional extinguishment of any claim to land in Rhode Island.[39]

During the 1970s the Penobscot and Passamoquoddy tribes asserted aboriginal ownership of a large part of Maine. Proceeding from the position that transactions between the state of Massachusetts and these tribes beginning 1794, and later actions by the state of Maine, violated the Trade and Intercourse Act of 1790, Penobscot and Passamoquoddy leaders requested that the federal government assist them in bringing suit against these states. The Interior and Justice Departments refused because the tribes lacked federal recognition. Then the Penobscot and Passamoquoddy tribes took their claim case to court and the resulting judicial decrees stated that the tribes possessed tribal status and that the government must act as trustee on their behalf. Following the 1975 decision Justice and Interior officials assisted the Maine tribes in their land claims.[40]

Because of the cloud placed on the validity of land titles in Maine President Jimmy Carter intervened in an attempt to settle the land controversy. In 1977 Carter assigned William Gunter as a special representative to investigate the land claims of the Maine Indians and to recommend a settlement plan. Gunter recommended that the federal government pay the tribes $25 million and that Maine provide 100,000 acres

of its public lands situated in the claims areas to the Penobscot and Passamoquoddy tribes. In return they would agree to relinquishment of all aboriginal claims to land in Maine. Tribal leaders refused to accept the plan. Not only had Gunter recommended a small land return but also recommended that Congress extinguish aboriginal title to the land claimed by the tribes, except state public lands, in the event the tribes refused to consent to the proposed settlement.[41]

At the request of the governor and attorney general of Maine the state congressional delegation introduced legislation during the spring of 1977 that would retroactively ratify the illegal treaties consummated with the Penobscot and Passamoquoddy tribes since 1790.[42]

In February, 1978, leaders of the two tribes and a White House Work Group announced they had reached a "memorandum of understanding." The proposed agreement was not accepted by the disputing parties. In April, 1979, tribal leaders and state officials continued negotiations for settlement of the Penobscot and Passamoquoddy tribes' 12.5 million acre land claim. The Hathaway Plan, favored by the landowners and state officials, does not satisfy the tribes. It would award them $37 million plus options to purchase 100,000 acres of land from several major timber companies. Tribal representatives have been unable to agree on a settlement. In late 1978 the tribes reportedly preferred an agree-

ment providing for options on 250,000 acres, $27 million in cash, $10 million for capital improvements, $10 million for land purchase, and $15 million in guaranteed loans for business enterprises.[43]

Meanwhile the legal proceedings remain in abeyance. In the spring of 1979, Department of Justice lawyers requested a second six-month stay of proceedings in anticipation of a negotiated settlement.[44]

During the 1970s the Oneida tribe of New York has been involved in litigation against that state and Oneida County. The Oneidas claim that the state illegally obtained approximately six million acres of their land between 1785 and 1842, and that the cession treaties violated the provisions of the Articles of Confederation and the Trade and Intercourse Act.[45]

The Catawbas in North Carolina also base their current land claim on state violation of the 1790 act. The tribe seeks to regain 140,000 acres.[46]

Wampanoag Indians in Mashpee, Massachusetts attempted to regain land they claimed was alienated in violation of the Trade and Intercourse Act of 1790. In February, 1979, the United States Court of Appeals for the First Circuit upheld the rulings of lower courts that the Trade and Intercourse Act did not protect the Mashpees since they were not a tribe in 1790 nor in 1976.[47]

Native Americans have attempted to recover former lands throughout the twentieth century. The 1970s have been

an era unequaled in Indian nationalistic efforts to regain land. To obtain their goal tribes have applied judicial and legislative means as well as negotiation.

HAWAIIAN LAND RECOVERY--Hawaiians also have attempted to regain possession of portions of their lands. The first major success occurred in the 1920s and has remained a consistent part of native Hawaiian endeavors until the present time. In 1921 the nationalistic Kuhio Kalanianaole, the part-Hawaiian congressional delegate from the Territory of Hawaii, succeeded in his attempts to have the United States government return some land for the use of native Hawaiians. Congress enacted the Hawaiian Homes Act which created the Hawaiian Homes Commission with control over approximately 194,000 acres set aside for native Hawaiians. Kuhio sincerely believed that the only hope for the continuation of the indigenous Hawaiians as a distinct race was to return them to the land. In 1920 he stated that "The Hawaiian race is passing. And if conditions continue to exist as they do today, this splendid race of people, my people, will pass from the face of the earth." Kuhio pointed out that Hawaiians possessed a metaphysical relationship with the land. He believed that if they could live on the land and return to their ancient relationship with it, the process of decimation and demoralization would come to an end.[48]

The death rate of the indigenous Hawaiians was higher than that of any other American minority. At the time of

Captain James Cook's visit to the Hawaiian Islands, the population was estimated at 300,000. Full-blood Hawaiians numbered only 40,000 at the time of annexation. By 1920 the figure had declined to 23,723. In addition the native birth rate fell below the national level and infant mortality was eight times as high as the national average.[49] Western diseases were primarily responsible for the dramatic decimation rate. Thousands of natives died from measles, cholera, smallpox, and venereal disease introduced by traders, sailors, and missionaries. Hawaiians developed some immunity to these pestilences only in the latter part of the nineteenth century. Demoralization caused by alienation of the Hawaiians from their land and nation and disorientation prompted by the influx of white settlers and their growing influence in the economic, religious, and governmental structure of Hawaiian society also contributed to the decline of aborigines.

The rhetoric of American supporters of the Hawaiian Homes legislation contained a philosophy similar to that espoused by promoters of removal of the Five Civilized Tribes from the South in the 1830s and the General Allotment Act of 1887. Advocates claimed the proposal would save the dying Hawaiian race and rehabilitate it by restoring the natives to the land. No one considered placing the natives on reservations although some Americans regarded Hawaiians as "blanket" Indians. Advocates of the Hawaiian Homes Commission Act hoped to Americanize the native Hawaiians and then assimi-

late them into American society. They wanted to place the natives on the land and to create a class of small independent New England-type farmers. Then, they believed, the race would once again thrive, prosper, and become self-reliant.[50]

Besides saving the Hawaiian race from extinction, supporters of the act also wanted to restore to the natives land which had been taken from them in the nineteenth century. All earlier attempts at land distribution had been ineffective when assessed in terms of benefiting the natives. Supporters of Hawaiian rehabilitation claimed that they had not obtained their equal share of the lands in the Great Mahele of the mid-nineteenth century; that speculators had taken advantage of the natives, stripping them of the tiny parcels assigned to them. In addition, advocates of native rehabilitation maintained that the United States had gained possession of Hawaii's public lands after the revolutionaries seized control of the government with the aid of the United States minister to Hawaii.[51]

Other supporters perhaps were motivated by a twinge of guilt. They believed that native deterioration had resulted from contact with Western civilization. American-European intrusion had thrust the native race into an alien society and left it disoriented. The natives had never recovered; within a short period cultural genocide had occurred. Representative James Strong of New York stated that "we went there with our Christianity and civilization and 'demoralized' a

thriving race."[52] Chairman of the House Committee on Territories Charles Curry compared the rehabilitation proposal to that of the United States policy of rehabilitating Indians. Curry gave the example of the Blackfeet. "They were warriors, hunters and not agriculturalists and now they grow crops for private consumption and grains for cattle. They were a dying race but now are a prosperous and multiplying race."[53]

Sincere concern and compassion for the native Hawaiians were not the only motives directing the passage of the rehabilitation bill. The elite in Hawaii, primarily the "Big Five"--Brewer and Company, Ltd., Theodore H. Davies, Ltd., American Factors, Ltd., Castle and Cooke, Ltd., and Alexander and Baldwin, Ltd.--who dominated Hawaiian economic and political life, supported the legislation. The "Big Five" supported Kalanianaole and the movement for passage of the legislation. They promoted the program largely because of the inclusion of a clause within the bill that exempted sugar-producing lands from homesteading. Leases on 200,000 acres of government lands were to expire between 1919 and 1921, including more than 26,000 acres of cultivated sugar cane. Federal and some local forces advocated opening these lands to homesteading. The American belief that homesteading produced a stabilizing influence on individual and family life and that public lands should be used by small farmers motivated this position. Congress in the Hawaiian Organic Act of 1900 permitted withdrawal of certain public lands for homesteading upon the

petition of twenty-five qualified citizens. The Wilson administration declared that sugar lands would become available for homesteading. With the expiration of the leases on sugar lands, the "Big Five" feared that they would lose prime crop lands to homesteaders. The Hawaiian Homes Commission Act removed this threat. The act excluded the lands in question from homesteading; revenues from the leased lands were to finance the Hawaiian Homes Commission program.[54]

An opponent of the Hawaiian Homes Commission Act testified before the Senate Committee on Territories that: "The only object of this rehabilitation bill--the real reason for this rehabilitation bill--is in order that the present leases of highly cultivated lands may be renewed. . . ." By removing the sugar-producing lands from use as home lands, the bill left only the poorer agricultural and pastoral lands for homesteading. Much of the available land was marginal because of a lack of water or soil unsuited for farming. Most attempts to farm these lands failed. By the late 1920s many homesteaders had signed contracts with the pineapple producing firm of Libby, McNeill, and Libby.[55]

Congressmen studying the bill realized that, without the provision exempting the sugar cane lands, it would be difficult, if not impossible, to win approval of the legislation. They also neglected to analyze the effects this provision would have on the success of restoring land for native use.

Congress approved the rehabilitation scheme on an experimental basis for five years. The program appeared successful at the end of the probationary period. During the experimental stage Congress limited homesteading to designated lands on Molokai and to small tracts on Hawaii. To qualify as a homesteader, a native had to be at least fifty percent Hawaiian. Congress required this degree of blood quantum since these individuals needed the most help. The commission leased the lands to qualified Hawaiians at one dollar a year for ninety-nine years. Natives could lease land, ranging from twenty to eighty acres of agricultural lands, 100 to 500 acres of first class pastoral lands,and 250 to 1,000 acres of second class pastoral lands. The title remained with the United States government.[56]

To prevent alienation of the lands from native Hawaiians congressional leaders excluded from the act a proviso granting the land in fee simple. They could not mortgage, sell, or lease land issued to them. Each tract had to remain within the grantee family. The federal government's paternalistic stance was calculated to protect the aborigines from their "own thriftlessness and against the predatory nature" of individuals wanting to obtain the natives' property. Previous experience in Hawaii revealed the natives' tendency to alienate their lands. A 1919 report revealed that Hawaiians owned only 6.23 percent of the land and approximately one thousand wealthy Hawaiians held title to this property.[57] During the second

half of the nineteenth century natives lost or sold most of their land to enterprising white men. This occurred largely because the natives lacked a clear understanding of the concept of property, the value of land, or the necessary procedures to take to retain possession of their kuleanas. Many natives lost their lands through an inability to finance farming. Some congressmen familiar with the Indians' tendency to alienate land received in fee patent through the implementation of the General Allotment Act realized that the same problems existed among Hawaiians. Undoubtedly they recognized the similarities and wished to avoid the difficulties experienced by Indians in the alienation of their property.

Other provisions of the Hawaiian Homes Commission Act designated that rent from leases on sugar lands and water licenses serve as revenue for the one million-dollar revolving home loan fund. It furnished the capital to construct buildings and make improvements on the tracts, to purchase livestock and equipment, and to aid in developing land. The act also required that the commission membership of five persons consist of three individuals of at least fifty percent Hawaiian.[58]

During the next fifty-five years, the Hawaiian Homes Commission underwent numerous organizational and procedural changes. One of the most significant modifications in the home program came in 1923. This amendment enabled natives to lease one-half acre lots for residential purposes. Sub-

sequently, the commission established residential additions around Hilo, Honolulu, and other cities. By 1977 these small house lots comprised eighty-seven percent of the land leased to native homesteaders. Most native Hawaiians currently request houselots.[59]

The success of the rehabilitation scheme has been small since it has accommodated only a small segment of the Hawaiian population. Prince Kuhio's designs have been circumvented since most of the lessees live on houselots rather than on kuleanas as he had envisioned. After fifty-six years of operation, the Department of Hawaiian Home Lands has granted only 2738 leases for approximately 25,032 acres. Of the remaining home lands the commission set aside over 45,000 acres of marginal lands for conservation purposes.[60]

A combination of factors have obstructed the successful culmination of Kalanianaole's goal of returning his people to the land. Some of these impediments existed from the beginning of the program while others have developed recently.

Unsuitability of a large portion of the Hawaiian home lands for farming, ranching, or house lots hindered the use of these lands for homesteading. The lands often lacked water, good soil, or easy accessibility. The sugar interests secured the removal of prime agricultural public lands from homesteading as a condition of their support for passage of the Hawaiian Homes Commission Act. This left for the most part only marginal lands for the rehabilitation program.

During the early years of the Hawaiian Homes project, the Commission instituted regulations guiding the development of the home lands that tended to restrict the acreage available for homesteading. Before a qualified native Hawaiian could receive land, the area had to have roads, water, and utilities. The requirement that the homesteaded acreage must have a house and other improvements financed by the Hawaiian Homes Commission also restricted the granting of leases to natives. Often when natives have attempted to fund the development of their land with their own resources, the Department of Hawaiian Home Lands has refused to allow it. During the 1970s the Department of Hawaiian Home Lands also demanded that all fixed improvements must have its prior approval. One Hawaiian claimed that officials of the Department of Hawaiian Home Lands told him that he must return the plot on which he had constructed a barn without approval or the Department would revoke the ninety-nine year lease on his homestead.[61]

In 1970 the Department of Hawaiian Home Lands also placed a $10,000 ceiling on the amount of improvements the native could institute on his acreage. These rules have hampered leasing and development of homestead lands. Many of the homes constructed on the residential tracts consequently took on the appearance of slums.[62]

Because of requirements made by the Department of Hawaiian Home Lands and insufficient funds, widespread leasing has not occurred. Many natives have had to wait long periods

before receiving lands and large numbers of applicants still wait for homestead awards. The average waiting period has been fifteen years while some applicants have waited over thirty years. Currently the waiting list contains the names of over 5000 applicants and it would include many more if the natives believed they could receive a lease. Natives have discovered that Department of Hawaiian Home Lands officials have been careless with their applications, losing or destroying vital papers. A number of natives waited eighteen years for a homestead only to discover that the Department of Hawaiian Home Lands considered them ineligible because it gave priority to those with children. By this time the children of these applicants were grown and had left home.[63]

Both critics and supporters of the Department of Hawaiian Home Lands argue that a lack of money restricted the successful leasing of home lands to natives. From the institution of the program, it has depended on revenue obtained from the leasing of sugar lands and water leases; Congress has not appropriated funds for its operation. The state of Hawaii occasionally has allotted funds for the program but always in insufficient amounts.

The Hawaii legislature in 1965 amended the Hawaiian Homes Commission Act in an apparent attempt to generate funds for the department and undoubtedly to enable non-Hawaiians to lease desired lands. This statute sanctioned the leasing of Hawaiian home lands to non-Hawaiians. The Department of

Hawaiian Home Lands leased large acreages on long-term leases for relatively small sums of money. The co-sponsor of the legislation, Elmer Cravalho, former mayor of Maui and former Speaker of the Hawaiian House of Representatives, leased 15,000 acres at about $1.60 an acre. In 1971 state Representative Diane Hansen tried to obtain a list of industrial and other leases to non-Hawaiians, the lease rental price, and length of lease from the Department of Hawaiian Home Lands but she claimed that employees told her that they did not have such a list and they would not compile one for her information. Hansen argued that this amendment violated the original legislation because it specifically stated that the Hawaiian Homes Commission must lease lands only to qualified natives and for the amendment to be valid it required congressional approval. The Hawaiian Attorney General maintained that the amendment did not require congressional approval. This state legislation led to further alienation of land from the natives. By 1976 non-Hawaiians had leased 112,000 acres of the home lands. Sometimes indigenous Hawaiians unsuccessfully tried to lease lands already leased to non-Hawaiians.[64] These long-term leases effectively removed potential homesteading lands from natives.

Subletting homestead lands to pineapple companies on Molokai also subverted Prince Kuhio's goal of returning the natives to the land. Although the Hawaiian Homes Commission Act specifically prohibited sub-leasing, since the 1920s state

officials have sanctioned sub-leases. On Molokai 153 families had leases for 6000 acres divided in farm plots. Many of the natives originally received their leases based on an oral agreement that they would lease thirty-five of the forty acres to pineapple companies. Dole, Libby-MacNeil, Del Monte, and California Packers refused to allot the homesteaders water for the development of their remaining five-acre plots. Since they could not farm the tract, and since few jobs existed on Molokai, the homesteaders relied on the lease money received from the pineapple companies. This dependence resembles the American Indian's reliance on lease money. Originally the homesteaders received $23 a ton for all pineapples harvested. This netted each native a total of $8,000 to $10,000 a year. When the pineapple companies re-wrote the leases in 1927, they paid only $840 a year and the companies raised the annual sum to $1080 fifty years later in new leases. In 1957 some natives wanted to farm the forty-acre plots but representatives of the pineapple companies harassed them into signing new leases. Seven farmers refused to renew the leases and attempted co-op farming with other agricultural products. The Hawaiian Homes Commission hampered this action by refusing to loan them money and not approving improvements on their homesteads. The commission awarded residential lots to native lessees contingent on receiving farm tracts that they would lease to the pineapple companies. These homesteaders did not even know the location of their farm plots. When one native lessee

tried to obtain the location of his farm plot, he claimed that the company told him that he would not receive his monthly rental check if he continued his inquiries.[65]

Critics of the Department of Hawaiian Home Lands claim that mismanagement by the Department has undermined the stated purposes of the act. The commissioners allegedly awarded lots to friends on a first priority basis and skipped over Hawaiians first in line for lands in preference of more "suitable" natives. Through the use of executive orders the Department of Hawaiian Home Lands and the governor occasionally trade valuable Hawaiian home lands for other acreages. The state then leases these lands to private parties for large sums of money. Critics claim that proper management would entail retaining these lands and leasing them in order to generate needed revenue for increased leasing of homelands to native Hawaiians.[66]

A rule established by the Department of Hawaiian Home Lands in 1970 required that only lessees with residential lots could receive farm and pastoral lands. This regulation effectively hindered the nine percent of natives requesting the latter type of acreages from obtaining lands. The governor of Hawaii appoints the commissioners, often friends, and this makes them politically susceptible to the desires of the governor. Natives frequently complain of the condescending attitude of the administrators toward them. In 1970 a commissioner asked the natives why they wanted land since "all you Hawaiians want to do is sit around and play your ukulele and be tour drivers."[67]

Even though the rehabilitation program accomplished few of its initial publicly stated objectives of returning natives to the land and uplifting their social, economic, and health status, Hawaiians have favored the Department of Hawaiian Home Lands' continued existence. Territorial and congressional officials have correctly assessed this attitude.

Congress inserted a provision requiring the perpetuation of the Hawaiian Homes Commission in every bill providing for statehood. Each measure included a section requiring the inclusion of the Hawaiian Homes Commission Act in the Hawaii state constitution. In addition the bills contained a compact clause between the United States and the people of Hawaii. Congress placed these provisions into section four of the Hawaii Statehood Act of 1959. The Hawaiian Constitutional Convention incorporated into the state constitution a compact clause establishing a trust relationship over the Hawaiian Homes Commission. This unusual feature made the Hawaiian Homes Commission Act a law of the state and could be repealed only with the consent of Congress. The Statehood Act vested administrative and functional control of the commission in the state. In order to insure that Hawaii faithfully fulfills the provisions of the Native Homes Commission Act, the Statehood Act included a clause reserving the right of the United States to sue the state of Hawaii should a breach of the trust occur.[68]

In 1967 two bills introduced into Congress attempted to amend the Enabling Acts of New Mexico, Arizona, and Hawaii in

respect to the enforcement of trust provisions. This proposed act, originating within the Department of Justice, was based on the view that the states were capable of enforcing their own laws. The bills called for repeal of section 5(f) that provided that the "proceeds and income" from the home lands that the United States held in trust

> Shall be managed and disposed of . . . in such manner as the constitution and laws of said state may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

This proposed legislation aroused the concern of the native Hawaiians and many of the homesteaders of the Hawaiian home lands circulated petitions advocating the defeat of the bills. The natives' opposition hinged on their fear that the removal of federal enforcement of the trust provisions would lead to the "assets" of the Department of Hawaiian Home Lands being "subverted to the detriment of the homestead program." Congress relieved their anxiety by not approving the proposed legislation.[69]

During the hearings held in Hawaii on the Native Hawaiian Claims Act, the natives continually revealed a desire for retention of the Department of Hawaiian Home Lands. Even though they realized its shortcomings they indicated a belief that reform of the administration of the home lands program would lead to the successful fulfillment of Kalanianaole's goals. Many indigenous Hawaiians voiced a desire for reform of the commission and Department of Hawaiian Home Lands.

Efforts to initiate reform of the commission started in the 1950s and continue in 1979. In 1957 the Hawaiian congressional delegate, John Burns, introduced a bill that would partially have remedied the difficulties of the commission. In a speech made in the House of Representatives Burns appealed for federal contributions to the home loan fund so that the commission could award additional tracts to natives. The delegate also proposed a mandatory requirement that the Hawaiian Homes Commission lease at least 20,000 acres within a five-year period. This amendment intended to extend the program to include more qualified natives. Congress refused to act; Burns reintroduced the bill during the following session of Congress but the measure again died in the House Territories Committee. In 1971 Hawaiian state representative Diane Hansen prepared an investigative report revealing mismanagement of the Department of Hawaiian Home Lands and requested Congress to sue the state of Hawaii for breach of the trust compact. Her efforts failed to bring an investigation of the program or a federal suit against Hawaii. One United States senator stated during hearings on the Native Hawaiian Study Commission held in Hawaii in 1978 that he would initiate an investigation of the Department of Hawaiian Home Lands upon his return to Washington but this has not occurred. Some Department of Hawaiian Home Lands officials have recommended reforming the department by placing its operation under the supervision of the Hawaiian court system and eventually allot-

ting home lands to natives on a fee simple basis. Natives do not support this proposal. During the 1970s native homesteaders began a drive for reform of the commission on a state level but state and commission officials have failed to respond to the natives' efforts. Native supporters proposed numerous reform proposals for the commission and Department of Hawaiian Home Lands in the 1978 constitutional convention. Several of the more significant ones included: giving preference to Hawaiians in the leasing of home lands; establishing lessee election of the commissioners; permitting lessees to approve any rules adopted, amended, or repealed by the Department of Hawaiian Home Lands; authorizing homesteaders to present petitions which have ten percent of the lessees' approval to the commissioners for review of a department rule; and allowing lessees' children of one-quarter native Hawaiian blood quantum to inherit the homestead. Any amendment altering the qualifications of homesteaders requires congressional consent. The delegates failed to adopt any of these amendments but did make various changes in the administration of the Department of Hawaiian Home Lands.[70]

Although not completely successful in returning natives to the land, the native Hawaiian homes program has provided a beginning for rebuilding the natives' land base. The program established a potential resource for a land base, especially if the management and operation of the department change to a degree that it can lease the remaining home lands

to natives, enable them to freely develop their land, offer guidance upon request for efficient economic development of their property, and extend capital for improvements. The potential land base, though small, exists and very effort should be made to enable Hawaiians to use it in whatever method they choose. Some natives desire land either for houselots, ranches, or farms. Some aspiring farmers want to return to their ancestoral subsistence method of food production while others want to farm using Western techniques.

In addition to native attempts to make additional lands available to Hawaiian homesteaders through the Hawaiian home lands program, indigenous Hawaiians in the 1970s have been attempting to add new lands to their holdings. The first bill formulated by ALOHA calling for reparations for former lands contained a section providing for the return of surplus federal lands to native Hawaiians. In 1976 ALOHA presented a bill to their congressmen. While closely resembling the first native Hawaiian claims bill presented in 1974, ALOHA added a provision calling for the return of approximately 2.5 million acres. This acreage comprised the same amount of crown and government lands acquired by the provisional government in the 1890s. Representative Spark Matsunaga and Senator Daniel Inouye persuaded the organization's officials that the native Hawaiian bill would fail to pass Congress, and urged them to support a measure establishing a commission to study the validity of the land claims.[71]

Although desiring monetary compensation, many native Hawaiians want land more than money. They consistently expressed this sentiment throughout the congressional hearings conducted in Hawaii from 1975-77. While some will settle for monetary restitution others demand both land and financial compensation. Peter Hauano, speaking for the Puna Hui Ohana organization, presented some of the opportunities monetary reparations would open for native Hawaiians. One included funds for defense of native Hawaiians in quieting title to land inherited through the generations. Natives in Puna possess much of their lands through tenancy-in-common or undivided interest. Such uncertainty of title leaves the door open for others to step in and claim the land through adverse possession. Hauano suggested that reparations could provide needed revenue for costly legal procedures required to obtain clear title to the lands.[72]

Some haoles believe that any land reparations should be given in the form of kuleanas held in fee simple. They want to end, rather than perpetuate, the paternalism manifested through holding lands in trust. During the 1977 hearings, a haole married to a half-Hawaiian, expressed this idea and stated

> The Hawaiians are quite capable of paddling their own canoes individually when they are given enough education and some land of their own that is usable and that is the kind that they know how to take care of. [73]

Many native Hawaiians and haoles promote the idea of

continuing to have land held in trust. One of the constitutional amendments adopted by the citizens of Hawaii in 1978 provided for the establishment of an Office of Hawaiian Affairs. This department is to manage any lands received for the sole benefit of native Hawaiians including lands awarded as reparations.[74]

Some native Hawaiians demand the return of the federally-owned island of Kahoolawe to the state of Hawaii. An active group has been pressuring for restoration of Kahoolawe. The United States military has used this island for bombing practice since World War II. The military and some native Hawaiians consider the continuation of the site in its current status as vital for national security and to a lesser extent for the economic welfare of the state of Hawaii. Those seeking restoration of the island to Hawaii cite the religious, cultural, and historic value of Kahoolawe. The issue divides many natives into two opposing camps concerning the destiny of the island. In 1977 a group of Hawaiians occupied Kahoolawe but authorities removed them. Since the mid-1970s, congressment from Hawaii have introduced legislation authorizing the return of Kahoolawe to Hawaii.[75]

Those wanting the protection of Kahoolawe from destruction by the military also extend their efforts to protection of other land in Hawaii. Becoming more vocal and assertive, Hawaiian activists articulate the restoration and protection of their ancient rights and land. Many natives

oppose the construction of additional expressways and condominiums that despoil the land. The following statement of a native Hawaiian made during congressional debate on the Hawaiian Homes Commission Act still represents the attitude of many natives in 1979:

> This is our land. It belongs to us. Strangers have come here from the other side and have fattened on the land. Everybody gets rich through the Hawaiians, and we are thrown out.[76]

In an attempt to prevent additional alienation of land from native Hawaiians, their supporters persuaded the 1978 constitutional convention to accept an amendment to the state constitution. The voters of Hawaii approved the measure that ended adverse possession on property over five acres. Large landholders had used this method for decades to obtain land in Hawaii and much of the property belonged to native Hawaiians. As originally written, the proposal completely ended the practice. The constitutional convention initially passed the unaltered proposal but a few days later the delegates approved an amendment that excluded acreages under five acres. Both the opponents of the movement to end adverse possession such as the sugar interests and those native Hawaiians who wanted to end the practice voted against the revised amendment. Those delegates approving the proposal agreed to the amendment because they believed that it would aid native Hawaiian landowners. The Sugar Planters' Association and others argued that the measure as originally written would hurt native Hawaiians who owned small acreages without a clear title.[77] The kuleanas

originally had comprised about five acres. By including the five-acre provision, native Hawaiians could still quiet title to their land through adverse possession.

NATIVE AMERICAN STRUGGLE FOR CONFIRMATION OF FISHING, HUNTING, GATHERING, AND ACCESS RIGHTS

In the pre-contact period Native Americans possessed user rights in the resources of land. During the twentieth century and especially within the last decade Native Americans have asserted these traditional rights and attempted, with some success, to secure judicial acknowledgment and use of them.

Although controversy over fishing, hunting, water, and gathering rights focused mainly on Indians, Hawaiians also vocalized their demand for recognition of these historic rights. In earlier times the tenant could use the resources of the entire ahupua'a for subsistence or cultural purposes. Hawaiians and their supporters wanted affirmation by the state constitution of access, hunting, fishing, gathering, and water rights that they believe they inherited from their ancestors. The state constitution recognizes fishing rights. The courts have viewed fishing rights as personal property rights that must be compensated for if taken. In the 1950s the Territory of Hawaii purchased many of the konohiki fishing rights and made the waters into public fishing places. The natives claim that they still retain those fishing rights which the state did not condemn and pay compensation.

Hawaiians also maintain that for decades they used the access paths but in recent times the large landholders including corporations, estates, ranches, and hotels have closed off their usage. They pointed out that the maps had clearly marked the various access paths to the mountains and sea even when they traversed private property.[78]

The 1978 constitutional convention and later the voters of the state of Hawaii approved an amendment that guaranteed native Hawaiians their traditional and customary rights for religious, cultural, and subsistence purposes. Under this provision a resident of an ahupua'a could freely exercise these rights within the boundaries of this land division.[79] The state legislature would have to establish the means of regulation in order to prevent abuse of private property.

Native American fishing and hunting rights have been subjected to much debate throughout the twentieth century. Indians had to wage legal battles to obtain judicial recognition of the retention of these rights. The courts generally reaffirmed the existence of treaty rights although their scope and degree of control by the states have remained open to interpretation. Certain aspects of these rights such as the Indians' freedom to fish and hunt on the reservation without state restriction has not been questioned successfully. Other areas such as off-reservation treaty rights and extent of state conservation regulations at "familiar and accustomed places" existed in an arena of controversy. The latter issues

along with tribal control over non-Indians fishing and hunting on the reservation have been at the heart of the hunting and fishing controversy in the 1960s and 1970s. In these two decades, these questions erupted into a violable issue between Native Americans and their opponents especially in the Pacific Northwest and the Great Lakes region. Indian efforts to exercise historic rights led to numerous confrontations and resistance among non-Indian fishing interests and state governments who deny or disregard special treaty rights.

One of the first significant judicial opinions enunciating the retention of off-reservation fishing and hunting rights occurred in 1905. In United States v. Winans the Supreme Court determined that Yakima Indians could enter private property adjoining the Columbia River to fish in the river.The decision stated that by treaty the Indians possessed the right to fish at "familiar and accustomed places" on former lands owned by the tribe. The opinion declared that the Yakimas retained those rights not explicitly given away in the treaty.[80] Since the Winan case, the courts repeatedly have affirmed Native Americans' reserved fishing and hunting rights although judicial opinions acknowledged that states usually had some degree of control over these rights in the name of conservation. In the 1960s and 1970s the courts have defined more concisely the degree of state regulation and in some cases awarded complete jurisdiction to tribal fish and game regulations.

Much of the judicial opinions involved tribes from the

Pacific Northwest. After 1965 the fishing dispute reached new heights and the controversy created numerous confrontations between Native Americans asserting their fishing rights and state conservation officials enforcing state game laws. The Indians appealed their convictions for various offenses.

The major issue revolved around the Indians' right to fish in off-reservation waters without regard to state conservation laws. Native Americans argued that specific treaties guaranteed them the unrestricted right to fish or hunt on lands ceded to the United States. Aborigines in the Pacific Northwest and Great Lake regions depended upon fishing for subsistence and trade. Many contemporary Indians still follow this lifestyle and fish for food or for their livelihood.

Adversaries to the Indian's position maintained that Indians must obey conservation laws and many argued that Indians possessed only rights of other fishermen. State conservation agencies, the political voice of commercial and sport fishermen, and fishermen opposed the Native American's right to fish without restrictions in off-reservation waters. These game laws often worked in a discriminatory manner against Indians. An expert state witness in one fishing case admitted that state officials employed conservation as a subterfuge; that game regulations promoted the non-Indian fishermen's interest. Another case pointed out that state officials can prevent Indians from harvesting any fish. They regulate the licensing of sport and commercial fishermen. They can allo-

cate enough fish to these non-Indians so that all harvestable fish have been caught before they reach the Indian fishing locations.[81]

The courts usually have upheld Indian rights to fish and hunt on lands ceded to the United States, particularly on those classified as "open and unclaimed lands." In Confederated Tribes of the Umatilla Indian Reservation v. Maison the United States District Court for Oregon determined that this included national forest land.[82] The decree in Kimball v. Callahan extended the exercise of these rights on privately owned land where hunting, fishing, and trapping is permitted.[83]

A number of off-reservation cases have centered on the Pacific Northwest tribes. One of these has included the lengthy litigation of the Puyallup tribe. After state game officers arrested some Puyallup Indians for violating conservation laws, the defendants took the issue to court. The suit finally rested before the United States Supreme Court. In Puyallup Tribe v. Washington Department of Game the court determined that the Medicine Creek Treaty of 1854 provided that the Nisqually and Puyallup tribes retained fishing and hunting rights "at all usual and accustomed places" on the lands they ceded to the United States. The opinion also declared that the state of Washington could regulate the time and means for fishing but that conservation must be necessary and reasonable. The court remanded the case to the state

court to determine whether a total ban on net fishing was justified for purposes of conservation.[84] In Puyallup II, Department of Game v. Puyallup Tribe the United States Supreme Court prohibited the state's action of completely banning net fishing for steelhead trout since this obstructed a treaty right. The court remanded the suit to the state court for determination of the number of catchable fish for Indian net fishing. The Supreme Court declared that regulations for Indian fishery conservation must be derived and supported by data concerning each species of fish in the Puyallup watershed. It further stated that should an Indian challenge a regulation the Department of Game would be responsible for showing the necessity of the regulation for conservation.[85]

After Puyallup II but before the state court had carried out the Supreme Court's mandate, the Ninth Circuit Court of Appeals declared that the Puyallup Reservation still existed. This changed the litigation to an on-reservation case. The court supported the tribe's contention that it could fish free of state regulation on that part of the river within the reservation.[86] This included most of the area covered in Puyallup I and II as well as much of Tacoma. The Superior Court of Washington for Pierce County, and subsequently affirmed by the state supreme court, persisted in its assertion of state authority to regulate fishing by the tribe on and off the reservation. The state courts limited the number of steel-

head trout that tribal members could catch with nets during the year and required the tribe to file a list of members authorized to exercise treaty rights. It also ordered the Puyallup tribe to report the weekly number of steelhead caught to the Washington Department of Game.[87]

The tribe appealed the regulations ordered by the state courts to the United States Supreme Court. In Puyallup III the Supreme Court upheld the forty-five percent allocation of natural run of steelhead to Indians and the prohibition of catching harvestable hatchery breed steelhead. The decision allowed the Puyallup Indians to fish freely up to the limit without any restrictions as to time, place, or method. The decree supported the tribe's contention that the extensive regulations violated its sovereign immunity but maintained that the state could regulate Indian fishing rights. It,however, treated lightly the previous decision by the Ninth Circuit Court of Appeals that the reservation still existed and that the tribe held unrestricted rights within its boundaries. The Supreme Court applied the principles previously applied to off-reservation rights since most of the land had been alienated to non-Indians and the tribe did not have exclusive use of the Puyallup River. The court chose to apply article three of the 1854 Treaty which provided for the retention of rights "in common with all citizens of the territory" rather than article two which gave the tribe exclusive rights on its reservation. Two of the Justices dissented by

pointing out the above interpretation of the Treaty of Medicine Creek. They asserted that the court's majority opinion denigrated the holding of the Ninth Circuit Court. They recommended that the case should be remanded to the state courts for determination of the state's right, if any, to regulate on-reservation fishing for purposes of conservation. They suggested that the court's opinion might have been different if the Puyallup controversy had not been before the court for over ten years.[88]

Soon after the Puyallup I decision, fourteen Yakima Indians brought suit against the Oregon Fish Department contesting regulations that allowed non-Indian fishermen to catch most of the harvestable fish, preventing the Yakimas from fishing at their "usual and accustomed" fishing sites guaranteed by an 1855 treaty. The plaintiffs charged that Washington also had failed to recognize the Indian fishery. On the latter complaint the United States District Court for the District of Oregon ordered the state of Washington to recognize officially the Indian fishery. Sohappy v. Smith also defined the treaty fishing rights of the Yakima, Confederated Tribes of the Umatilla Reservation, and Warm Springs tribe. The decision declared that state fish regulations must accord the Indians a "fair share" of the harvestable fish on the Columbia River. Any regulation that did not allow a sufficient number of fish to pass through the lower river to the upriver Indian fishing sites would violate the Indians' treaty rights.

The Indian fishermen's "fair share" catch must meet their economic needs because fishing at the traditional sites provided the basis of their economic needs. The court determined that the state rules could regulate Indians to the extent required for conservation but they must be reasonable and non-discriminatory against Indians.[89] Generally considered a victory for Indian fishermen, Oregon revised its regulations but did not conform to the court's rulings.

In 1974 the district court altered its 1969 decree due to a controversy over the 1974 run of Spring Chinook Salmon on the Columbia River. The court stipulated that the Indian treaty fishermen were entitled to fifty percent of the fish harvest. The states of Washington and Oregon objected to the allocation and appealed to the Ninth Circuit Court of Appeals. The court in Sohappy v. Smith and U. S. v. Oregon upheld the lower court's ruling. It also stipulated that future allocations could be altered, if the states proved that the fifty percent allocation was "inequitable or impractical" and could present an alternate proposal that would equally protect the Indians' treaty rights. The disputing parties reached an agreement concerning the Columbia River fishery and the district court incorporated it into the final decree in 1977.[90]

In 1974 the United States Ninth Circuit Court of Appeals in Settler v. Lameer ruled that the Yakima Indian tribe possessed the jurisdiction to enforce its tribal fishing codes

at all off-reservation traditional fishing sites. The court cited the Winans opinion that the 1855 treaty "was not a grant of rights to the Indians, but a grant of rights from them--a reservation of those not granted."[91] This opinion differed substantially from earlier case law that allowed state regulation at off-reservation sites.

The decisions made in favor of the Northwest Indians only seemed to intensify the hostility of non-Indian fishing interests. This animosity increased with the landmark court decision rendered in 1974. After years of litigation and numerous confrontations between Native Americans and state conservation officers or vigilante non-Indian fishermen that frequently culminated in violence and destruction of Indian property, federal district judge George Boldt issued a monumental decree concerning the coastal tribes of Washington. Previously the federal courts had moved in the direction of defining the limits of Indian fishing rights, but had not dealt directly with the problem. Judge Boldt based his ruling on eleven treaties concluded in the 1850s between fourteen tribes and Territorial Governor Isaac Stevens who represented the United States. The decision maintained that the tribes' held historic rights to fifty percent of the state's commercial salmon catch exclusive of fish landed on the reservation. The tribes retained fishing rights at all "usual and accustomed" fishing sites on off-reservation waters and held rights to self-regulation thereby being exempt from

state control. The state could exercise conservation measures in emergency situations.[92]

Massive reaction occurred to this judicial decision. Non-Indian fishing interests responded in two ways to the Boldt decree. The state, commercial and sport fishermen, and their organizations took legal and extralegal action. Violence against the Indian fishermen and their property continued to occur.[93] Legally the non-Indian adversaries have taken a two-frontal approach. They appealed the Boldt decision first to the United States Court of Appeals and then to the Supreme Court. In early 1976 the Supreme Court upheld the Boldt decision that applied to fourteen federally recognized tribes on the coastal areas of Washington.[94] The non-Indian fishing interests and the state of Washington then started on a new series of court cases, beginning on the state level and proceeding to the United States Supreme Court where several cases currently rest. The federal courts have upheld the treaty rights and Boldt's decision while the state courts have provided obstacles to enforcement of the district court's ruling on the Indians' fishing rights. In hearing Puget Sound Gillnetters Association v. United States the Ninth Circuit Court of Appeals remarked that Judge Boldt had endured "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century" while trying to enforce the decree in U. S. v. Washington.[95]

Before 1977 the state officials only made stabs at

enforcing the district court's opinion. Indian fishermen charged the state with openly violating the orders by abusing the emergency power provision. The Indians claimed state officials closed waters to Indian fishermen. Neither the state, its courts, nor non-Indian fishermen accepted the validity of treaty rights by a minority with little political power. This attitude made enforcement of the district court's orders almost impossible. After 1977 enforcement broke down completely. The state department of fisheries reluctantly published new regulations that met the court's guidelines. State officials issued citations to a small number of violators but prosecutors refused to bring legal action against most of the offenders.[96]

The Washington supreme court rendered a series of decisions stating that the state department of fisheries lacked jurisdiction under state law to enforce certain regulations devised to meet the district court's decree and that the department only had authority to pass regulations regarding conservation. The court declared that it believed that the decrees of United States v. Washington had been erroneous and that Indians held only the right to have the opportunity to fish in common with non-Indians.[97] After the state supreme court's decisions, the department of fisheries issued new regulations that made no attempt to safeguard Indian fishing rights as enunciated by the federal district court.[98]

The combined efforts of the state government and

courts had at best placed Native Americans' fishing rights on the same level or below non-Indian fishermen. State regulations typically discriminated against Indian fishermen. Opponents argued that Indian exemption from state conservation laws depleted the fish supply, particularly that of salmon. Tribal commercial fishermen, however, catch only a small portion of the total fish crop. The state's obstruction of Indian fishing treaty rights forced the federal district court to manage directly the enforcement of Indian fishing rights.[99]

Various non-Indian fishermen organizations brought suit against the district court. In Puget Sound Gillnetters Association v. United States non-Indian fishermen in a consolidated appeal attempted to have various opinions of federal district courts in Washington and Oregon overruled. The Ninth Circuit Court of Appeals declared that both Washington and Oregon fishermen must abide by the lower court's decree.[100] The plaintiffs appealed this decision to the Supreme Court. This with two other cases on appeal challenge the constitutionality of the district court's decisions regarding allocation and enforcement. These argued suits currently await decision by the United States Supreme Court.[101] The continued obstruction and litigation reflect the present unwillingness of state officials and non-Indian fishermen to accept the validity of the Boldt decision and Indian reserved fishing rights.

In the aftermath of United States v. Washington, con-

gressmen, especially from the Pacific Northwest and the Great Lakes region, have introduced bills that call for the abrogation of Indian treaties or of hunting and fishing rights.[102] Congress has refused to approve such legislation but widespread support for such action comes from all areas of the nation. A backlash against Indian treaty rights occurred not only because of the landmark decision on Northwest Pacific tribes' fishing rights but also from nationwide Native American assertions regarding land claims and tribal sovereignty, land, and resources.

In late 1978 a group of national Indian leaders wrote to Attorney General Griffin Bell expressing their concern about his public opinions regarding Indian treaty rights. The Attorney General had stated that he believed that a conflict of interest existed in the Department of Justice between Indian rights and those of the American public. Bell suggested that the department should no longer defend Indians in cases against the general public. Indian leaders maintained that no such conflict existed.[103]

Indian leaders also expressed deep concern over Bell's response to a letter from Washington congressmen in regard to Indian fishing and hunting treaty rights in the Pacific Northwest. Bell implied that he sympathized with the congressmen and non-Indian fishing interests in their disdain for the Boldt decision. The Indian leaders feared that such a remark would only encourage additional obstructions to the fulfillment

of Indian treaty rights. They added that the Attorney General had not mentioned that non-Indian fishermen violated federal law. Indian leaders remarked that such an attitude held by the nation's supreme law enforcement officer could preview the fate of Indian treaty rights.[104]

Fishing, hunting, and gathering rights also have been a major area of controversy in the Great Lakes region. There, in common with the Pacific Northwest, most of the conflict has centered on off-reservation lands ceded to the United States. Native Americans, particularly Chippewa Indians, have exercised and demanded their rights to unrestricted fishing, hunting, and gathering of wild rice. These aboriginal peoples argued that they retained these rights on the land they ceded to the United States in treaties during the nineteenth century. State courts in Michigan and Wisconsin usually have upheld these reserved rights although certain decisions declared that some restrictions existed.

The Michigan supreme court in April, 1971, maintained that the treaty of 1855 with the Chippewas entitled the L'Anse and Vieux Desert bands of Chippewa to fish on all unsold lands in certain specified areas of Keewanaw Bay of Lake Superior. State game laws did not extend to these particular Indians in the specified areas.[105] In 1971 a Chippewa from the Bay Mills Indian Community intentionally violated state fishing regulations in order to be arrested. State officials charged him with fishing without a commercial fishing license. He claimed

immunity under the 1836 Treaty of Washington which had ceded the land adjoining Pendills Bay of Lake Superior. After various decisions in the lower courts, the state supreme court rendered an opinion in December, 1976. It declared that the Treaty of 1836 reserved the Indians' fishing rights but that Michigan had limited authority to regulate off-reservation fishing rights of the Chippewa. Regulations promulgated had to meet a number of criteria. The rules must be necessary for the preservation of specified species of fish, application to Indians had to be necessary for the preservation of the protected fish, and could not discriminate against treaty Indians. The state supreme court remanded the case to the district court to determine whether the ban on large gill nets satisfied the above requirements. The higher court declared that the treaty fishermen did not have to obtain a state commercial license to fish in the area covered by the 1836 treaty which included much of Lake Superior and a portion of Lakes Huron and Michigan.[106]

Indian endeavors to secure judicial confirmation of their reserved rights have led to extensive conflict with non-Indian fishing interests, property owners, and the state's department of natural resources commission. Its agents have arrested Indians exercising their rights in violation of state game laws and confiscated their fishing materials. In 1973 U. S. Department of Justice lawyers initiated a suit, United States v. Michigan, on behalf of the Bay Mills Indian

Community and Sault Ste. Marie Chippewas, to determine their fishing rights. As of 1978 the federal courts had not issued an opinion. During January, 1978, the United States House of Representatives held hearings on the Great Lakes fishing controversy and the Michigan disputes received most of the attention of the committee. As late as spring of 1979, Michigan congressmen introduced bills in Congress that would abrogate unilaterally treaty-guaranteed fishing and hunting rights.[107]

Indians in Wisconsin also exercised claimed treaty rights without state interference. Some of the state courts have upheld these reserved fishing, hunting, and gathering rights. In 1975 a county court determined that members of the St. Croix band of Lake Superior Chippewa had unrestricted fishing, hunting, trapping, and gathering rights on ceded lands. The following year the state circuit court overruled the above decision.[108] In 1973 a state court declared that members of the Lac Courte Oreilles band of Lake Superior Chippewas retained rights to gather wild rice on ceded lands off their reservation.[109]

Judicial opinions rendered in Minnesota and Idaho reflect the trend to affirm Indian fishing and hunting rights on ceded lands off the reservation. In State of Idaho v. Wallace Wheeler the court determined that members of the Nez Perce Indian tribe could hunt free of state control on ceded lands owned by the federal government.[110] Two years later a different type of suit appeared before the Idaho supreme court. A member of the Idaho Kootenai tribe had been

arrested for hunting on lands traditionally occupied by the tribe. The court declared that the Idaho Kootenai tribe had its aboriginal rights including those of hunting and fishing in the area extinguished by Senate ratification of a treaty which ceded land to the federal government and reserved to Indians only a right to hunt on open and unclaimed lands. Judge J. Donaldson, dissenting from the majority opinion, argued that since the Kootenais had not signed the Treaty of Hellgate, it did not affect their rights. He disagreed with the court's decision that Senate ratification of the treaty nevertheless took away their rights. Donaldson maintained that the Kootenai tribe's rights had not been extinguished by the Senate or by the Indian Claims Commission which had compensated them for loss of possessory rights but not for those of hunting and fishing.[111]

Another suit involving the claim of Chippewa Indians in Minnesota over lands formerly held by the tribe came before the courts in 1978. Minnesota officials arrested a Chippewa for harvesting wild rice at Ned's Lake. The Indians challenged state jurisdiction. In Minnesota v. Keezer the Minnesota district court determined that a United States treaty with the Wyandot, Chippewa, and other tribes included the gathering of wild rice as a reserved right. Subsequent alienation of the lands in an 1825 treaty with the Sioux and the latter tribe's cession of the land to the United States in an 1837 treaty had not extinguished the reserved treaty

rights. The court stated that Chippewas could harvest wild rice in the area of Ned's Lake but that the state could regulate the Indians' right to the degree necessary for conservation. The opinion declared that Chippewas did not have to purchase a state license for gathering purposes.[112]

Other Native Americans asserted their reserved fishing and hunting rights on former reservation lands removed from tribal ownership through termination legislation. In 1968 the United States Supreme Court determined that the Menominees retained the right to control hunting and fishing on the former reservation without state regulation even though the Wolf River Treaty of 1854 had not specifically mentioned these rights. The court based that interpretation on the reserved rights doctrine enunciated in the Winans' decree in 1905. Indians retained those rights unless Congress clearly extinguished them by treaty or agreement. Since the termination legislation of 1953 and 1954 specifically excluded fishing and hunting rights, the treaty survived the termination acts and the Menominee termination of 1954. The court therefore declared that the Menominees had reserved treaty rights on the terminated reservation and the right of self-regulation.[113]

The Klamaths have also been involved in litigation concerning their hunting and trapping rights. The Klamath Termination Act reserved their fishing rights but did not mention their hunting and trapping rights. In 1956 the Klamath tribe brought suit against the state of Oregon concerning

these rights. The federal court decision declared that the act had not extinguished the Klamaths' historic right to hunt and trap. After the Klamath termination became effective in 1961, tribal members again had to go to court to gain affirmation. The court's decision ruled that the Klamath termination act abrogated their hunting and trapping rights.[114] In Kimball v. Callahan (Kimball I) the Ninth Circuit Court of Appeals in 1974 determined that termination legislation had not abrogated the withdrawn Klamath Indians' treaty rights to fish, trap, and hunt without state regulation on former reservation lands consisting of national forest lands and privately owned lands open to hunting, fishing, and trapping. The court held that prior to termination the tribe had those rights within the reservation and individual members had user rights. Termination had not affected those rights and that a withdrawn member under termination had not changed his relationship to the tribe in those matters unaffected by the act; that is fishing, hunting, and trapping rights.[115] On remand from the higher court, the district court stated that these rights extended to the descendants of Indians listed on the 1954 final roll and that the court had no jurisdiction to permit state regulation of treaty rights. After an appeal to the Ninth Circuit Court of Appeals, the court in Kimball v. Callahan upheld the district court's opinion and that of Kimball I. The court in Kimball II stated that tribal members did not contest the right of state regulation for pur-

poses of conservation nor did they claim exclusive rights since most of the former reservation had been transferred to other parties but they did question the degree of state control. The Klamaths wanted joint regulation by the tribe and state. The court ruled that the state of Oregon could limit the Klamaths' rights under appropriate regulations necessary for conservation. The opinion declared that the tribe and state officials should reach an agreement on appropriate standards. If they could not, then the district court should determine the extent of Oregon's authority, and base its decision on the guidelines provided in Puyallup I, II, III, Antoine v. Washington, United States v. Washington, Sohappy v. Smith, and Settler v. Lameer.[116]

Several judicial opinions delivered in the 1970s involved the question of the continued existence of a reservation and the Indians' reserved rights on lands within its boundaries. In 1969 the Leech Lake Band of Chippewa Indians brought suit in federal court for affirmation of exclusive treaty rights on its reservation free of state control. The United States District Court of Minnesota in Leech Lake Band of Chippewa Indians v. Herbst declared that the Leech Lake band retained their reserved rights. The Nelson Act of 1889 which approved allotment and sale of surplus lands did not abrogate the Treaty of 1855 even though the statute contained a provision extinguishing "all our right, title, and interest" in the reservation lands. The reservation remained legally

a distinct entity. The court determined that the Leech Lake Chippewas retained their historic fishing, hunting, and ricing rights on all ceded public lands on the reservation. The opinion refused to decide if the band possessed exclusive rights of regulation and reserved the ultimate interpretation to the federal courts.[117] The disputants appealed and cross-appealed the band's alleged exclusive right to regulate fishing without state control on the reservation. Non-Indian fishermen and property owners in Leech Lake area tried to enjoin the case. While the suit pended before the Eighth Circuit Court of Appeals, the parties reached an agreement and the court remanded the case to district court. The agreement provided that members of the band would be excluded from state regulation of fishing, hunting, trapping, and ricing on the reservation. The band agreed to prohibit commercial fishing and hunting, to conserve the resources for the tourist industry, and to regulate members with a tribal conservation code. The state assented to collect a supplementary licensing fee for the benefit of the Leech Lake Chippewas from non-Indians fishing, hunting, or trapping on the reservation. The district court incorporated this agreement into its final decree of 1973.[118]

A similar issue involved the former Cheyenne and Arapaho reservation in Oklahoma. In this case the federal district court for western Oklahoma rendered an opposite opinion. The court determined that the 1891 act approving the allotment

and sale of surplus lands to the federal government abrogated the treaties of 1854 and 1867 along with the 1869 executive order establishing the Cheyenne and Arapaho reservation. The opinion declared that since the 1891 act extinguished the reservation without reserving any fishing and hunting rights, state regulation extended over all fishing and hunting activities on the former reservation.[119] Cheyenne and Arapaho Indians held no rights beyond those of other state citizens.

As earlier indicated, the Ninth Circuit Court of Appeals in 1974 determined that the Puyallup Indian Reservation still existed even though the lands had been allotted and sold to non-Indians. In Puyallup III, the majority opinion of the Supreme Court applied those principles usually applicable to off-reservation rights; that is, that treaty Indians did not hold exclusive rights and that state regulations for purposes of conservation extended to include the Puyallups.

Case law concerning on-reservation fishing and hunting rights for tribal members normally has included recognition of exclusive rights of tribal sovereignty over regulation of these rights unless Congress specifically abrogated them. The Eighth Circuit Court of Appeals rendered that opinion in Sac and Fox Tribe of the Mississippi in Iowa v. Kicklider. Sac and Fox tribal members residing on a reservation in Iowa objected to the extension of state game and fish laws on the reservation. In an attempt to stop state actions the Indians brought suit in federal court. It determined that the Sac

and Fox had extinguished their reserved rights in the Treaty of 1842 and the federal government had recognized state jurisdiction over the "defacto" reservation. The state of Iowa therefore could regulate fishing and hunting by tribesmen on the reservation. The tribe appealed the decision to the United States Supreme Court but it rejected the appeal.[120] In the spring of 1979, Department of Justice lawyers brought suit in the federal district court of Minnesota to restore fishing, hunting, trapping, and ricing rights within Red Lake Reservation.[121]

Another principle of case law concerning on-reservation fishing and hunting rights of Indians involves the extent of state jurisdiction given to some states by Public Law 280 over reservations within their boundaries. Termination legislation did not give the state the authority to regulate its game laws on the reservation. In 1976 the District Court for the Eastern District of Washington stated that Public Law 280 which specifically extended Washington jurisdiction over the Colville reservation had not included the Colville's reserved fishing and hunting rights. The Confederated Colville tribes had complete jurisdiction over fishing and hunting on their reservation. A later opinion overturned the lower court's ruling that the tribes had control over non-Indians fishing and hunting practices.[122] A similar decree resulted in Arnett v. Gill Nets. The California state court determined that Public Law 280 did not extend state jurisdiction over the

exercise of fishing rights by Indians on the Klamath Indian Reservation. The state had no authority under its police powers to restrict Indian subsistence fishing on the reservation by prohibiting the use of gill nets for purposes of conservation.[123]

In some instances the federal government has assumed authority to control Indian fishing on a reservation. In 1979 the Department of the Interior promulgated regulations for the Hoopa Valley Indian Reservation in California. The Yurok and Hoopa tribes claim they should be allowed to regulate tribal fishing on the Klamath River. Interior officials contend that the tribes have not completed the necessary organization for effective regulation and conservation. The codes prohibited commercial fishing and only approved Indian subsistence and ceremonial fishing. While tribal members are divided on the issue of commercial versus subsistence fishing, they agree that a danger exists to salmon from extensive commercial fishing by non-Indian fishermen and construction of dams that depleted the fish supply.[124]

Another major area in which Native Americans asserted tribal jurisdiction over hunting and fishing rights included tribal control over non-Indians on Indian reservations. Judicial opinions have varied in their interpretations largely due to different approaches in judicial thinking and differing circumstances on each reservation. One suit involved the Quechan tribe of California. Prior to 1975 California

licensed non-Indians fishing and hunting on Fort Yuma Indian Reservation and game wardens entered the reservation to enforce state game laws against them. In 1975, the Quechan tribe issued its own code and denied the state the right to license and regulate non-Indians on the reservation. In Quechan Tribe of Indians v. Rowe the Ninth Circuit Court of Appeals declared that the tribe had jurisdiction over certain non-members hunting on the reservation. The opinion stated that the tribe held the authority to control hunting and fishing by non-members by its power to exclude them from the reservation but could not punish offenders of tribal regulations.[125] Following this decision, California tried to establish judicially its right to regulate non-Indians on the reservation. In California v. Quechan Tribe of Indians the federal district court for southern California declared that the state could regulate non-Indian fishing on Fort Yuma Indian Reservation but could not enter its boundaries to enforce the code without the tribe's permission. The court stated that California had a right to issue "prohibitory" regulations; that is, it could restrict or proscribe activities sanctioned by the tribe but could not authorize non-Indian activity where the tribe had prohibited it.[126]

In 1977 the Minnesota supreme court in two similar cases upheld the state's right to require non-Indians to purchase fishing licenses on Leech Lake Reservation since the regulation resulted from the 1973 agreement between the band

of Chippewas and the state of Minnesota. One of the defendants appealed to the United States Supreme Court but it dismissed the appeal.[127]

Five recently delivered judicial opinions considered state jurisdiction to regulate fishing and hunting on reservations that have enacted comprehensive tribal codes regulating these rights. The federal courts in North Carolina and New Mexico upheld the Indians' right to control non-Indians while courts in Arizona and Montana rendered opposite judgments.

Two judicial decisions involved the right of Crow Indians in Montana to regulate non-Indians on their reservation. In United States v. Sanford the Ninth Circuit Court of Appeals declared that Montana's laws controlling hunting and fishing applied to non-Indians on the reservation.[128] The United States District Court of Montana in United States v. Montana determined that the Crow tribe did not have jurisdiction over non-Indians fishing and hunting on the reservation. It further declared that the state possessed exclusive jurisdiction to regulate non-Indian fishing and hunting on fee lands and the Big Horn riverbed and banks while it had concurrent jurisdiction with the United States on trust lands within the boundaries of the reservation. The court based its opinion on state ownership of the Big Horn riverbed and banks and the absence of a comprehensive tribal game code. Upon appeal to the United States Court of Appeals for

the Ninth Circuit, the latter court in 1978 upheld the ruling.[129]

A recent Ninth Circuit Court of Appeals decision determined that the state of Washington held the authority to regulate non-Indian fishing on the Confederated Tribes of the Colville Indian Reservation. It declared that the comprehensive codes enacted and enforced by the Colville Tribes did not show either congressional or tribal intent to preempt state regulations. One of the judges dissented from the majority opinion by stating that a number of tribal ordinances and licenses used by the court in reaching its decision were enacted prior to the promulgation of the current codes and that others could be interpreted to show tribal intent. He agreed with the 1976 decision of the district court that the tribe may control non-Indians fishing on the reservation with its comprehensive regulations.[130]

In 1978 the White Mountain Apache tribe brought suit against Arizona in an attempt to gain complete jurisdiction over the regulation of non-Indian hunting and fishing on the reservation. In 1976 the tribe had enacted a comprehensive tribal code regulating hunting and fishing for both Indians and non-Indians. This code required a tribal license but no state license. Although the state of Arizona did not enter the reservation to enforce its regulations, it did enforce them when non-Indians left the reservation. Making no distinction between different types of federally owned land, the

court claimed that state police powers extended to the reservation unless Congress specifically preempted this state law. Not finding any such congressional action, the court determined that Arizona game and fishing regulations covered non-Indians on the Fort Apache Reservation.[131]

Considering the attempt by the Mescalero Apache to regulate non-Indian fishing and hunting on their reservation, the United States District Court of New Mexico arrived at a different conclusion. New Mexico district judge Edward Mecham held that Indian country differed from other federal lands. Examining the United States constitution, the Treaty of 1852, and case law, Judge Mecham determined that jurisdiction over reservations remained with the United States unless Congress specifically granted jurisdiction to the states. The judge also cited the New Mexico Enabling Act that acknowledged complete jurisdiction and control by Congress over Indians. According to the district court, the federal government and the Mescalero Apache tribe had exclusive jurisdiction over fishing and hunting on the reservation. The opinion declared that since the tribe had comprehensive game and fish laws and the United States government supported these regulations the state of New Mexico could not enforce state fish and game codes on the reservation against Indians or non-Indians.[132]

In late 1978 the Fourth Circuit Court of Appeals in Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission affirmed an earlier opinion delivered by the district court that the Eastern Cherokees had complete

jurisdiction to enforce their comprehensive tribal fishing and hunting laws against non-Indians and Indians on the reservation.[133]

Case law concerning the exercise of reserved fishing and hunting rights continually changes. Opinions, especially in the federal courts, are affirming these rights and are moving in the direction of confirming increased tribal jurisdiction over non-Indians on the reservation and tribal members on off-reservation waters.

END NOTES

[1]60 Stat. 1049 (1946); 90 Stat. 1990 (1976).

[2]60 Stat. 1049 (1946); Nancy Lurie, "The Indian Claims Commission," The Annals of the American Academy of Political and Social Science 436 (March 1978): 99.

[3]Lurie, "Indian Claims Commission," p. 100; United States Indian Claims Commission Final Report, Aug. 13, 1946-Sept. 30, 1978 (Washington, 1978).

[4]Lurie, "Indian Claims Commission," pp. 99-100, 103; Federal Register, 39, no. 10, Jan. 15, 1974, pp. 1835-36; Monroe Price, Law and the American Indian, pp. 497-98.

[5]Lurie, "Indian Claims Commission," pp. 104-05; William Brophy and Sophie D. Aberle, comps., The Indian: America's Unfinished Business (Norman, 1966), pp. 199-206.

[6]Hearings on Hawaiian Native Claims Settlement Act (1975), pp. 66, 109, 133, 156, 164, 168-71, 174, 226, 261, 279, 280, 311; Hearings on Hawaiian Aboriginal Claims Study Commission (1976), pp. 83, 108, 133, 135, 154-55, 184, 192, 214, 258-59, 266-68; U. S. Congress, Joint Hearings Before the Subcommittee on Public Lands and Resources of the Committee on Energy and Natural Resources, Senate, and the Subcommittee on Indian Affairs and Public Lands of the Committee on Interior and Insular Affairs, House, on S. J. Res. 5 and H. J. Res. 526, Establishing the Hawaiian Native Claims Settlement Study Commission, 95th Cong., 1st sess., (1977), pp. 137, 172-73, 177, 180-82, 221, 224, 253, 257; Gray, Francine Du Plessix, Hawaii: The Sugar-Coated Fortress (N. Y. 1972), p. 15.

[7]Hearings on Hawaiian Native Claims Settlement Act (1975), pp. 46-51; Hearings on Hawaiian Aboriginal Claims Study Commission (1976), pp. 40-41, 80-82, 90-93, 112, 189; Joint Hearings on Hawaiian Native Claims Settlement Study Commission (1977), pp. 83, 136, 165, 220, 257; May 23, 1978, 124 Cong. Rec. H4416, H4422.

[8]Hearings on Hawaiian Native Claims Settlement Act (1975); 120 Cong. Rec. 21705-08 (1974); 121 Cong. Rec. 1192-94.

[9]Ibid.

[10]S. J. Res. 155, 94th Cong., 2d sess. (1976); Hearings on Hawaiian Aboriginal Claims Settlement Study Commission (1976), pp. 62-75, 83, 95, 100-01, 156, 189, 266; Joint Hearings on the Hawaiian Native Claims Settlement Study Commission (1977), pp. 67-70, 220; 121 Cong. Rec. 41541 (1975).

[11]S. J. Res. 4, 95th Cong. 1st sess. (1977); May 23, 1978, 124 Cong. Rec. H4420-21; Hearings on Hawaiian Aboriginal Claims Settlement Study Commission (1976), pp. 108, 124-25, 180, 229, 246, 254, 332, 410; Joint Hearings on the Hawaiian Native Claims Settlement Study Commission (1977), pp. 75, 80, 163-67, 188, 212, 218, 225, 266-72, 335-36.

[12]S. J. Res. 139, 95th Cong. 2d sess. (1978).

[13]Hearings on Hawaiian Native Claims Settlement Act (1975), p. 51; Hearings on the Hawaiian Aboriginal Claims Settlement Study Commission (1976), p. 182; Joint Hearings on the Native Claims Settlement Study Commission (1977), pp. 33-35, 64, 83, 119-26, 174-76, 248; 121 Cong. Rec. 41543 (1975); May 1, 1978, 124 Cong. Rec. S6624; May 5, 1978, 124 Cong. Rec. S7044; 124 Cong. Rec. S8703.

[14]See 1978 Hawaii Constitutional Convention File, AH; 1978 Amendments to the Hawaii Constitution, AH; H. B. 890, A Bill for An Act Relating to an Office on Hawaiian Affairs, Hawaii, House, 10th Legislature, 1979, AH.

[15]Theodore H. Haas, "The Indian Reorganization Act in Historical Perspective," in William Kelley, Indian Affairs and the Indian Reorganization Act: The Twenty Year Record (Tucson, 1954), p. 22.

[16]City of Sault Ste. Marie, Michigan v. Andrus, 458 F. Supp. 465 (D. C. C., 1978); City of Tacoma v. Cecil D. Andrus (D. D. C. January 20, 1978); City of Tacoma, Washington v. Andrus, 457 F. Supp. 342 (D. C. C., 1978).

[17]88 Stat. 1468 (1974); for study of status of land consolidation programs in the Southwest, see William Gilbert and John Taylor, "Indian Land Questions," 8 Arizona Law Review (1966), pp. 102-33.

[18]88 Stat. 1954 (1975); 89 Stat 577 (1975).

[19]Akwesasne Notes 2 (Nov-Dec. 1970): 43; 88 Stat. 1368 (1974); 88 Stat. 1383 (1974); 88 Stat. 1465 (1974).

[20]92 Stat. 1672 (1978); 92 Stat. 1679 (1978).

[21]Walter J. Hickel to Sen. Henry M. Jackson, July 8, 1970 in S. Rept. 1345 on H. R. 471, 91st Cong., 1st sess. (1970); Akwesasne Notes 2 (Sept. 1970): 9; 43 Stat. 636-37 (1924); 48 Stat. 108 (1933).

[22]Hickel to Jackson, July 8, 1970; Akwesasne Notes 2 (July-Aug. 1970): 18; Akwesasne Notes 2 (Sept. 1970): 9.

[23]S. Rept. 1345 (1970); Akwesasne Notes 2 (July-Aug. 1970): 18; Akwesasne Notes 2 (Sept. 1970): 8, 9; Hickel to Jackson, July 8, 1970.

[24]S. Rept. 1345 (1970); Hickel to Jackson, July 8, 1970; Akwesasne Notes 2 (July-Aug. 1970): 18; Akwesasne Notes 2 (Sept. 1970): 9.

[25]Akwesasne Notes 2 (Sept. 1970); 8, 9; Akwesasne Notes 2 (July-Aug. 1970): 18; S. Rept. 1345 (1970); Hickel to Jackson, July 8, 1970.

[26]84 Stat. 1437 (1970).

[27]85 Stat. 688 (1971); Aleut Corp. v. Arctic Slope Regional Corporation, 417 F. Supp. 900 (D. Alaska 1976); On Jan. 1, 1976 Native Alaskans residing in Oregon organized a thirteenth regional corporation. The courts and Congress upheld this action. Alaska Native Association of Oregon v. Morton, Alaska Federation of Natives International v. Morton, 459 F. Supp. 459 (D. C. C. 1974); 89 Stat. 1145, 1149.

[28]Tulsa World, Aug. 7, 1976.

[29]For example see, Koniag v. Kleppe, 405 F. Supp. 1360 (D. C. C. 1975); Koniag v. Andrus, (D. C. C. April 28, 1978); Aleut Corporation v.Arctic Slope Regional Corporation, 417 F. Supp. 900 (D. Alaska 1976).

[30]Akwesasne Notes 2 (April 1970): 12; Akwesasne Notes 9 (Early Spring 1977): 10-11; Akwesasne Notes 10 (Autumn 1978): 21; see generally Berry, The Alaska Pipeline: The Politics of Oil and Native Land Claims.

[31]15 Stat. 539 (1867); 23 Stat. 26 (1884); 31 Stat. 321, 330 (1900); 72 Stat. 339 (1959).

[32]Akwesasne Notes 3 (Late Autumn 1971); 6; Akwesasne Notes 3 (Early Winter 1971); 4; Akwesasne Notes 9 (Early Spring 1977); 10-11; Akwesasne Notes 10 (Autumn 1978); 21; Monroe Price in Law and the American Indian, p. 523, noted that Congress did not place any restriction on alienation of land.

[33]88 Stat. 2091 (1975); Akwesasne Notes 3 (June 1971): 20; Akwesasne Notes 5 (Late Summer 1973): 15; Akwesasne Notes 6 (Early Summer, 1974): 38-39; Akwesasne Notes 7 (Early Spring 1975): 36.

[34]Exec Order 11670, May 20, 1972, Weekly Compilation of Presidential Documents, vol. 8, no. 21, May 22, 1972, pp. 880-81; Akwesasne Notes 2 (Nov.-Dec. 1970): 9; Akwesasne Notes 3 (Jan.-Feb. 1971): 15; Akwesasne Notes 3 (Late Spring 1971): 43; Akwesasne Notes 4 (Late Spring 1972): 8.

[35]Wassaja 4 (Aug. 1976): 13.

[36]Ibid., 5 (May 1977): 17; Choctaw Nation, et al v. Oklahoma, et al, 397 U. S. 620 (1970), cert. den., 398 U. S. 945 (1970); Akwesasne Notes 8 (Early Autumn 1976): 18; Akwesasne Notes 10 (Late Spring 1978): 15; U. S. v. Dann, 572 F. 2d 222 (9th Cir. 1978).

[37]419 U. S. 831 (1974); Akwesasne Notes 2 (July-Aug. 1970): 1, 2, 4; Akwesasne Notes 2 (Sept. 1970): 28, 31-32; Akwesasne Notes 2 (Nov.-Dec. 1970): 12, 13, 16, 17; Akwesasne Notes 3 (Mar. 1971): 44; Akwesasne Notes 3 (Early Summer 1971): 12; Akwesasne Notes 3 (Late Summer 1971): 21; Akwesasne Notes 4 (Early Spring 1972): 8; Akwesasne Notes 4 (Late Spring 1972): 12; Akwesasne Notes 4 (Late Autumn 1972): 13; Akwesasne Notes 6 (Late Spring, 1974): 38; Wassaja 5 (Feb. 1977): 20; U. S. v. Gemmill, 535 F. 2d 1145 (9th Cir. 1976).

[38]Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp. 418 F. Supp. 798 (D. R. I. 1976); Narragansett Tribe of Indians v. Murphy, 426 F. Supp. 132 (D. R. I. 1976); 92 Stat. 813 (1978); Wassaja 7 (April 1979): 13; Akwesasne Notes 10 (Autumn 1978): 11; Norman Transcript, Aug. 19, 1979.

[39]Akwesasne Notes 10 (Autumn 1978): 11; Norman Transcript, Aug. 19, 1979.

[40]Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975), aff. 528 F. 2d 370, 376-77, 380 (1st Cir. 1975); Wassaja 4 (Jan. 1976): 3; Wassaja 4 (June 1976): 15.

[41]"Recommendation to President Carter From William B. Gunter," in American Indian Law Review 5 (Feb. 1977): 427-30; Telegram, Passamaquoddy and Penobscot Tribes to Carter, July 26, 1977; American Indian Law Review 5 (Feb. 1977): 430; Akwesasne Notes 9 (Autumn 1977): 18-19.

[42]S. 842 and H. R. 4169, 95th Cong., 1st sess. (1977); March 1, 1977, 123 Cong. Rec. S3205; Wassaja 5 (April 1977): 1, 3.

[43]Akwesasne Notes 10 (Early Spring 1978): 22; Wassaja 7 (March 1979): 8.

[44]Wassaja 7 (April 1979): 11.

[45]Oneida Indian Nation v. County of Oneida, 414 U. S. 661 (1974); Oneida Indian Nation of New York State v. Oneida County, N. Y., 434 F. Supp. 527 (1977); Oneida Nation of N.Y. v.N.Y.State Thruway Authority, filed Mar. 3, 1978 (D. D. N. Y.), 5 Indian Law Reporter L-2 (1978).

[46]Wassaja 5 (March 1977): 15; Akwesasne Notes 9 (Autumn 1977): 18.

[47]Mashpee Tribe v. New Seabury Corp., 592 F. 2d 575 (1st Cir. 1979).

[48]59 Cong. Rec. 7453 (1920); Hawaiian Homes Commission Act, 42 Stat. 108 (1921).

[49]United States Department of Commerce, Bureau of the Census, Fourteenth Census of the United States, 1920: Population, 3: 1172-73; Carey McWilliams, Brothers Under the Skin (Boston, 1948), p. 182.

[50]U. S. Congress, House, Rehabilitation of Native Hawaiians, H. R. 839 to Accompany H. R. 13500, 66th Cong., 2d sess. (1920), p. 6; Gavan Daws, Shoal of Time (New York, 1968), p. 297.

[51]As in this case, many commentators refer to the entire process of land division occuring between 1848-55 as the Great Mahele. Actually the Mahele consisted of the division between the chiefs and king. The kuleana grant allowed commoners to receive title in fee simple.

[52]U. S. Congress, Senate, Committee on the Territories, Proposed Amendments to the Organic Act of the Territory of Hawaii, Rehabilitation and Colonization of Hawaiians . . . Hearings, Before the Committee on the Territories, H. R. 7257, 67th Cong., 1st sess. (1921), p. 118.

[53]Ibid., p. 141.

[54]42 Stat. 108 (1921); Theon Wright, The Disenchanted Isles (New York, 1972), pp. 32-35; Ralph Kuykendall and Lorin Gill, Hawaii in the World War (Honolulu, 1928), p. 403.

[55]U. S. Congress, Senate, Committee on Territories, Hawaiian Homes Commission Act, Hearings on H. R. 13500, 66th Cong., 3d sess. (1920), p. 38.

[56]U. S. Congress, House, Committee on the Territories, To Amend An Act to Provide Government for Hawaii, as Amended, to Establish Hawaiian Homes Commission, and for Other Purposes, on H. R. 13500, 66th Cong. 2d sess, (1920), pp. 121-22, 127-28.

[57]Ibid.; H. R. Rept. 839, 66th Cong., 2d sess. (1920), p. 6; 42 Stat. 108 (1921).

[58]42 Stat. 108 (1921).

[59]42 Stat. 1221 (1923); Annual Report of the Department of Hawaiian Home Lands, 1976-77, p. 13.

[60]Ibid., pp. 13, 26-27. After statehood, the Hawaiian Homes Commission became known as the Department of Hawaiian Home Lands.

[61]Diane Hansen, The Homestead Papers: A Critical Analysis of the Management of the Department of Hawaiian Home Lands (Honolulu, 1971), pp. 5, 13.

[62]Ibid., p. 37.

[63]Ibid., pp. 3-4; Hearings on the Hawaiian Aboriginal Claims Settlement Study Commission (1976), p. 21; Joint Hearings on the Hawaiian Native Claims Settlement Commission (1977), p. 278; Annual Report of the Department of Hawaiian Home Lands, 1976-77, p. 14.

[64]Hansen, The Homestead Papers, pp. 4-7; Hearings on the Hawaiian Aboriginal Claims Settlement Study Commission (1976), pp. 23, 149. During the 1976 hearings Chairman of Department of Hawaiian Home Lands Billie Beamer noted that the 112,000 acres leased to business had a total rental price of $730,000.

[65]Hansen, The Homestead Papers, pp. 11-18; Hearings on the Hawaiian Aboriginal Claims Settlement Study Commission (1976), p. 281; Herman S. Doi, Legal Aspects of the Hawaiian Homes Program, Legislative Reference Bureau Rept. No. 1A (Honolulu, 1964), pp. 14-16, discussed the question of contracts to pineapple companies. He quoted Hawaii Attorney Generals' opinions that such arrangements were not considered subleases. In 1960 a state court decision upheld such contracts but would not allow a Hawaiian homesteader to divide her tract and sublease part of it to her daughter.

[66]Hearings on the Hawaiian Aboriginal Claims Settlement Study Commission (1976), p. 258; Hansen, The Homestead Papers, pp. 4, 7-10, 38, 54; Donald Clegg and Richard Bird, Program Study and Evaluation of the Department of Hawaiian Home Lands, State of Hawaii (Honolulu, 1971), pp. 51-52; Testimony of Ginger Wurdeman, delegate, to the Committee on Hawaiian Affairs, Aug. 9, 1978, 1978 Hawaii Constitutional Convention File, AH; Ibid., Testimony of Kaipo Prejean. The Annual Report of the Department of Hawaiian Home Lands 1976-1977, listed thirty-one executive orders by the Governor for almost 17,000 acres.

[67]Hansen, Homestead Papers, pp. 10, 36-37, 51.

[68]For example see, Hawaii constitution in U. S. Congress, Senate, Statehood for Hawaii, S. R. 1928, part. 2, to Accompany H. R. 49, 81st Cong., 2d sess. (1950); 73 Stat. 6 (1959).

[69]113 Cong. Rec. 13465 (1967); 114 Cong. Rec. 7120 (1968).

[70]103 Cong. Rec. 4706 (1957); 105 Cong. Rec. 55 (1959); Testimony by Kaipo Prejean, Winona Freitas, Keoni Agard, Merwyn Jones, Before Committee On Hawaiian Affairs, 1978 Hawaii Constitutional Convention File, AH.

[71]See chapter 7, pp. 253-54.

[72]See chapter 7,p.252; Hearings on Native Claims Settlement Act (1975), pp. 274-75.

[73]State of Dorothea Whittle, Joint Hearings on Hawaiian Native Claims Settlement Study Commission (1977), p. 282.

[74]1978 Hawaii Constitutional Amendments, article 12, sec. 5.

[75]Joint Hearings on the Hawaiian Native Claims Settlement Study Commission (1977), pp. 29, 242; Hearings on the Hawaiian Aboriginal Claims Settlement Study Commission (1976), pp. 104, 149, 259; Testimony by Nina Bowman, Anne N. Kauaihilo, Benson K. Lee, Alfred Wong, Aug. 9, 1978, Before Committee on Hawaiian Affairs, 1978 Hawaii Constitutional Convention File, AH.

[76]Honolulu Star-Bulletin, July 4, 1919. This attitude reflected throughout the hearings held in Hawaii and in statements made to Committee of Hawaiian Affairs at 1978 Constitutional Convention; for example see Joint Hearings . . . (1977),

pp.242-43. Hearings on Hawaiian Aboriginal Claims Settlement Study Commission (1976), pp. 148-49; Testimony of Joyce Kainoa, Before Committee on Hawaiian Affairs, 1978 Hawaii Constitutional Convention File, AH; Akwesasne Notes 7 (Late Summer, 1975): 39.

[77]See generally Testimony on Adverse Possession Before Committee on Hawaiian Affairs, 1978 Hawaiian Constitutional Convention File, at AH and Alu Like; Honolulu Advertiser, September 8, 1978.

[78]See generally Richard Kosaki, Konohiki Fishing Rights, Legislative Reference Bureau Rept. No. 1 (Honolulu, 1954); Standing Committee Rept. No. 57, pp. 5-8, 1978 Hawaii Constitution Convention, 1978 Hawaii Constitutional Convention file, AH; Committee of Whole Rept, Sept. 5, 1978, p. 2, 1978 Hawaii Constitutional Convention File; Testimony Before Committee on Hawaiian Affairs, 1978 Hawaii Constitutional Convention File.

[79]1978 Hawaii Constitutional Amendments, Art. 12, sec. 8.

[80]198 U. S. 371, 381 (1905).

[81]Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F. 2d 169, 173 (9th Cir.), cert. denied, 375 U. S. 829 (1963); U. S. v. Oregon, 302 F. Supp. 899 (D. Ore. 1969).

[82]262 F. Supp. 871, 873 (D. Ore. 1966).

[83]493 F. 2d 564 (9th Cir. 1974).

[84]391 U. S. 392, 398 (1968).

[85]414 U. S. 44, 48 (1973).

[86]U. S. v. Washington, 496 F. 2d 620, 621 (9th Cir. 1974), cert. denied, 419 U. S. 1032 (1976).

[87]548 P. 2d 1058 (Wash. 1976).

[88]Puyallup Tribe v. Department of Game, 433 U. S. 165 (1977).

[89]302 F. Supp. 899, 907 (D. Ore. 1969).

[90]U. S. v. Oregon and Sohappy v. Smith, 529 F. 2d 570 (9th Cir. 1976); Order of Feb. 28, 1977, U. S. v. Oregon.

[91]507 F. 2d 321, 328 (9th Cir. 1974).

[92]For study of the Northwest fishing controversy prior to 1970, see American Friends Service Committee, UnCommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians (Seattle, 1970). U. S. v. Washington, 384 F. Supp. 312, 340-43 (W. D. Wash. 1974); Akwesasne Notes 2 (Sept. 1970): 37; Akwesasne Notes 2 (Oct. 1970): 1; Akwesasne Notes 2 (Nov-Dec. 1970): 6; Akwesasne Notes 3 (March 1971): 4-6; Akwesasne Notes 3 (Early Spring 1971): 13, 15; Askwesasne Notes 4(Late Winter,1972):15;Akwesasne Notes4 (Summer 1972): 13; Akwesasne Notes 6 (Early Spring, 1974): 26.

[93]Akwesasne Notes, 7 (Early Summer 1975): 20; Akwesasne Notes 8 (Early Summer 1976): 28; Akwesasne Notes (Early Autumn 1976): 17; Wassaja 4 (July 1976): 7; Wassaja 4 (Aug. 1976): 6.

[94]U. S. v. Washington, 520 F. 2d 676 (9th Cir. 1975), cert. denied, 423 U. S. 1086 (1976).

[95]573 F. 2d 1123, 1126 (9th Cir. 1978).

[96]Ibid., p. 1128; Wassaja 4 (July 1976): 7.

[97]Washington State Passenger Fishing Vessel Association v. Tollefson, 571 P. 2d 1373 (Wash. 1977); Department of Game v. Puyallup Tribe, Inc., 548 P. 2d 1058 (Wash. 1976); Puget Sound Gillnetters Association v. Moos, 565 P. 2d 1151 (Wash. 1977); Purse Seine Vessel Owners Association v. Moos, 567 P. 2d 205 (Wash. 1977).

[98]573 F. 2d 1123 (9th Cir. 1978).

[99]Judge Boldt remarked that the state had failed to produce "any credible evidence showing any instance" of Indian destruction or depletion of the fish supply, U. S. v. Washington, 384 F. Supp. 312, 338-39, fn 26, 420 (W. D. Wash. 1974); Akwesasne Notes 8 (Early Autumn 1976): 17; R. Johnson, "The States Versus Indian Off Reservation Fishing: A United States Supreme Court Error," 47 Washington Law Review, pp. 207-236 (1972), discussed the detrimental effects of state conservation laws on Indian fishermen. Puget Sound Gillnetters Association v. U. S. District Court, 573 F. 2d 1123, 1126, 1129 (9th Cir. 1978).

[100]573 F. 2d 1123 (9th Cir. 1978).

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CHAPTER VIII

CONCLUSION

The impact of imperialistic nations, especially the United States, upon Indians and Hawaiians caused fundamental modifications in the aboriginal land tenure systems and use of resources. Contact between the United States with a superior technology and the nativistic cultures ultimately destroyed the latter's absolute sovereignty which had guarded aboriginal access to these lands and resources.

The time and degree in which Native Americans lost sovereignty and their present form of land tenure differed substantially. The time span in which it occurred for Hawaiians was shorter than for Indians. The relatively small land mass of the islands, especially those lands suitable for agricultural or pastoral purposes, intensified the contest for property. On the surface it appears that the land tenure system of each group completely changed. An argument can be made for this point of view but some aspects of the old systems have survived to provide the foundation for a hybrid form of land tenure. This applies especially to the Indians. For the most part, aborigines held land in common with actual

"ownership" resting with the tribe. Tribes still hold land in common with a degree of sovereignty over the use of the land and its resources although the exact status has changed. The United States government holds these lands in trust for the tribes. Many of the reservations have a checkerboard character with both non-Indians and Indians owning land in fee simple along with tribally-held land.

Essentially the contact between Westerners and Hawaiians led to a rather rapid destruction of the aboriginal land tenure system. A few traces remain and the altered tenure shares some common elements with that of the Indian. Some huis, a transitional form between the old system and Western individual ownership, survive. The members of the hui own the land in common and communally share part of the land while having individual plots for personal use. Unlike Indians, Hawaiians have no reservations. The government holds the Hawaiian home lands in a form of trust for Hawaiians as a racial group. Furthermore the home lands have been slowly divided into acreages for use by individual families, although they remain a part of the home lands. Native homesteaders can not own this land but rather lease it for ninety-nine years. Hawaiian lessees possess the status of tenants; like their ancestors who had to pay tribute to use the soil, they pay a small annual lease fee.

Many Indians who received homesteads through allotment still have restrictions on the alienation of their property.

Both Hawaiians and Indians were forced for a time to accept individual ownership of land. Both groups still view land in a metaphysical sense.

One remnant found among Hawaiians and Indians derives from their traditional rights to the use of land for hunting, fishing, and gathering. Indians still have historic water rights and the Hawaiians hold access rights. Native Americans possess rights distinct from those of other American citizens. These rights derive from the aboriginal land system. Judicial opinions, particularly recent federal court decisions, have upheld these rights for Indians. Hawaiians usually exercised their historic rights until recent times when large landholders have blocked access to gathering grounds. The 1978 Hawaiian constitutional convention and electorate adopted an amendment affirming these traditional rights.

Native Americans' economy and subsistence methods have changed. The least altered, Alaskan natives have survived contact with Western patterns of civilization. Many follow traditional lifestyles. Few Indian tribes have a self-sufficient economy but many retain elements of their pre-contact systems. Some Indians continue to gather and fish according to the mode of their ancestors, although they apply more sophisticated techniques and equipment. Some have adopted Western business methods. Tribal economies frequently have a commercial overtone but with profits used for the benefit of the tribe. Many Indian tribes increasingly have moved in

this direction. For the most part, the economy of Hawaiians exists as an indistinguishable part of the larger economy in the islands. A few traditional fishing and farming villages survive as well as the native community on Niihau.

Hawaiians and Indians suffered the common experience of loss of their lands to imperial nations, begun in the fifteenth century by Spain, continued in the sixteenth, seventeenth centuries by France, England, Holland, and Russia, and continued in the nineteenth and twentieth centuries by the United States. At the time of first contact with Westerners, the land tenure systems of these two Native American groups were similar in several aspects. Neither followed the Western practice of individual ownership of land. Title in fee simple constituted an alien concept to both. Most Indians held their lands in common with title vested in the group. Property rights varied with each tribe or kinship group as well as with the particular use of the land. On the other hand, Hawaiians maintained a quasi-feudal land system. Numerous chiefs, each claiming title to all land under his dominion, ruled the Hawaiian Islands. They subdivided their territories among lessor chiefs who controlled native Hawaiian commoners and the use of the land. After unifying the Hawaiian Islands in 1795, Kamehameha I, as supreme monarch, claimed sole ownership of all land in the Hawaiian archipelago. Both Indians and Hawaiians based their land tenure systems upon use rather than on consumerism; the Western practice of selling and buying land was alien to them.

Hawaiians and Indians first met foreigners with friendliness and allowed them free use of their lands which eventually led to conflict because of differing concepts of land tenure. Europeans and Anglos thought in terms of private property with title in fee simple, and exclusive use. The initial confrontation of Hawaiians and Indians with Westerners over conflicts in land tenure differed although the end result was the same. Both native peoples lost most of their lands to intruders. Although Native Americans attempted to retain their systems of land tenure, Europeans and later Americans forced the Western concept of ownership and marketability of land upon them. During the early period of white contact with Hawaiians, the Polynesian concept of land tenure and use prevailed.

Americans applied similar methods to dispossess the Hawaiians and Indians. Both lost their lands largely through peremptory appropriation by settlers. Pioneers constantly encroached on Indian lands forcing the federal government periodically to legalize this occupation through token purchase from the Indian nations. The United States government also used military force to gain tribal land for its citizens. Indian tribes retained control over their diminished territories but continuing settler pressure for more land threatened tribal sovereignty. In the Hawaiian Islands the frequent objections of foreign nations to the native land system reinforced the inward forces working to destroy it. Dis-

placement of the natives resulted from internal subversion. The Hawaiian government allowed haoles to use land, then to lease land, and finally to own it. Although the king allowed haoles property rights, he still retained sovereignty over the land in their possession. Haoles serving the king in his government and trusted missionary friends influenced Kamehameha III to change the land tenure system.

The rationale of the haoles for changing the Hawaiian land tenure system resembled that used by whites for expropriating Indian land. Western morality provided the rhetoric for dispossessing the native. Most missionaries and haoles believed that owning land in fee simple would save the Hawaiian race; and that land should be used to its utmost potential. The "indolent" native did not fully utilize the land. The foreigners, mainly New Englanders, believed that native Hawaiians must accept the Western concept of private property and become cultivators of the soil in order to become civilized. A majority of the haoles, excluding most of the missionaries, wanted land for agricultural, commercial, or private use. Similar attitudes existed in the United States toward the Indian. American pioneers hungered for Indian land; it seemed that their appetite for territory could not be satiated. Americans believed that Indians should not possess all of the land under the tribes' dominion because, it was claimed, they used only a portion of it. Missionaries, reformers, and national leaders including Thomas

Jefferson thought that Indians should become farmers and live on small plots of land. These humanitarians viewed private property as a sign of civilization. The Western morality they used to justify dispossessing Indians of their land included allotment in severalty of tribal land which, it was claimed, would bring civilization to Indians and assure subsequent assimilation into American society.

Motives similar to those fostering the General Allotment Act prompted congressional passage of the Native Hawaiian Homes Commission Act in 1921. This legislation instituted a program to increase the land held by Hawaiians. Advocates of the Hawaiian Homes Commission Act hoped to civilize the native Hawaiians and assimilate them into American society. The proponents wanted to place the natives on the land and mold them into a class of self-sufficient farmers. The sugar interests supported the legislation because it set aside prime Hawaiian agricultural lands for their use. The federal government intended to prevent alienation of lands from Hawaiians. In common with its paternalistic attitude toward Indians, the federal government believed it had to protect Hawaiians from their "own thriftlessness and against the predatory nature" of individuals who wanted to obtain the native's property. Since the 1920s American pineapple corporations sub-leased some Hawaiian home lands.

Native American attempts to rebuild their land base have increased in magnitude in the last decade. Some tribes pur-

chase land or endeavor to enlarge their holdings by recovering former tribal lands. During the twentieth century, the American nation has attempted to compensate Native Americans for the deprivation of their lands and to restore some of their lands. With the enactment of the Indian Reorganization Act of 1934, the United States government reversed its policy of allotment and began to enlarge the tribal land base by purchasing land and restoring it to tribes. At the same time, federal agencies have appropriated Indian lands. Government expropriation has assumed a more subtle form than previously. The federal policy of termination also diminished the size of tribal holdings. Throughout the twentieth century Indians have sought monetary compensation for former lands and they often have been successful, especially since Congress established the Indian Claims Commission in 1946. In 1921 native Hawaiian leaders and their supporters persuaded Congress to set aside about 190,000 acres for the exclusive use of native Hawaiians. During the mid-1970s native Hawaiians tried to obtain federal compensation for former lands, the right to claim any federal land in Hawaii which the government would classify as surplus, and the restoration of 2.5 million acres.

Neither Hawaiians nor Indians accepted the alienation of their lands without resistance. Their opposition assumed different forms. Until the end of the nineteenth century, Indians often resisted with military force. Another method tribal leaders used in an effort to retain their land and

sovereignty consisted of encouraging their people to adopt some aspects of Western civilization. Submitting to removal represented yet another way by which some Indians endeavored to retain land and their way of life. In both the nineteenth and twentieth centuries Indians also resorted to legal proceedings to protect their rights.

Although Hawaiians more pliantly accepted the loss of their lands they did show signs of resistance. Withstanding great foreign pressure, Kamehameha II and Kamehameha III retained the essentials of the land system until the late 1840s. In 1845 the natives held mass meetings to object to the number of naturalized aliens and to granting of land to foreigners. The threat of annexation to the United States and the leasing of Pearl Harbor to the American nation raised extensive objections from natives in the 1870s and 1880s. During the early part of the twentieth century, Hawaiian activists led by Kuhio Kalanianaole tried to revise the land laws to enable Hawaiians to homestead more government land. In the 1970s Hawaiians endeavored to stop alienation of land through legislative means. They successfully promoted the adoption of an amendment to the Hawaiian constitution abolishing adverse possession except for plots under five acres. In recent times, both Hawaiians and Indians have used legal means to try and prevent alienation of their lands.

Native Americans in recent decades, particularly in the last ten years, have shown a resurgence of nationalistic

sentiment and demand for their traditional rights in the exploitation of land and its resources. Hawaiians and Indians increasingly have sought to restore and affirm historic fishing, hunting, and gathering rights. The Indians' struggle included water rights while Hawaiians sought recovery of access privileges. Judicially and legislatively Native Americans have been moderately successful. Actual implementation of these rights awaits Hawaiians while legal victory for Indians encounters increasingly strong opposition from special interest groups. The threat of water and fishing rights have assumed a similar position to that of the diminishing land for Indians in the nineteenth century. As land and its resources become more valuable Native Americans will place even more emphasis on the restoration and affirmation of those rights while their opponents correspondingly will increase their objections to special rights for these minorities.

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