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"We Want Our Land Back": Returning Land to First Peoples in the Land Return Era Using the Native Land Claims Commission to Reverse Centuries of Land Dispossession.

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ARTICLES

"WE WANT OUR LAND BACK"[1]: RETURNING LAND TO FIRST PEOPLES IN THE LAND RETURN ERA USING THE NATIVE LAND CLAIMS COMMISSION TO REVERSE CENTURIES OF LAND DISPOSSESSION

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1. This was the message of Lorena Gorbet, of the Mountain Maidus in California, in her successful effort to regain land for the Mountain Maidus. Jane Braxton Little, *Sierra Stewards Listen to the Trees, and a California Tribe Regains an Ancestral Land*, SACRAMENTO BEE (June 20, 2018, 4:31 AM), https://www.sacbee.com/opinion/california-forum/article213494354.html [https://perma.cc/LX2L-F69F].

INTRODUCTION

"It has always been about the land."[2] The struggle over land has been the defining characteristic between First Peoples[3] and European-American latecomers for over four centuries.[4] The establishment of the United States after the Revolutionary War perpetuated and exacerbated the removal of First Peoples from their land.[5] The United States has 2.27 billion acres of land,[6] with 1.9 billion acres in the 48 contiguous states.[7] But Native Nations and individuals in the contiguous United States own approximately 56.6 million acres of land, a mere moiety consisting of three percent of their original land base, with most held in trust by the federal government.[8] Non-Native actors effectively control the land that Native Peoples originally inhabited.[9] But as one journalist queried, who were the "[W]hite men" to control land that "Indians had roamed over

2. G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—An Essay*, 82 N.D. L. REV. 811, 811 (2006).

3. *See, e.g.*, *First People*, CAMBRIDGE DICTIONARY (2022), https://dictionary.cambridge.org/us/dictionary/english/first-people [https://perma.cc/7VKW-XQRV] (using the terms First Nations, First Peoples, Native Nations, Native Peoples, and Tribes interchangeably).

4. *See generally* Leroy V. Eid, *Review of In a Barren Land: American Indian Dispossession and Survival, by Paula Mitchell Marks*, GREAT PLAINS Q. 159, 159 (2000) (covering America's westward expansion and how the United States government seized the land where Native Americans lived).

5. *See* Lubna S. El-Gendi, *Illusory Borders: The Myth of the Modern Nation-State and Its Impact on the Repatriation of Cultural Artifacts*, 15 J. MARSHALL REV. INTELL. PROP. L. 486, 498 (2016) ("This right, which was universally recognized (at least among the European powers), gave the 'discoverer' of a land absolute rights over that land, empowering the discovering sovereign with the right to possess, grant, sell, and convey these lands."); *see generally* DAVID E. WILKINS, HOLLOW JUSTICE: A HISTORY OF INDIGENOUS CLAIMS IN THE UNITED STATES 39 (2013) ("The losses continued, indeed were exacerbated, once the U.S. was formally established as a nation in the latter part of the eighteenth century.").

6. *See* CAROL HARDY VINCENT & LAURA A. HANSON, CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, 9 (2020) (discussing federal land ownership as of 2018).

7. *See* Dave Merrill & Lauren Leatherby, *Here's How America Uses Its Land*, BLOOMBERG (July 31, 2018), https://www.bloomberg.com/graphics/2018-us-land-use [https://perma.cc/D98N-C2BV] (relating the sheer amount of land owned to the United States' economic production).

8. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1476–77 (1994) (noting nearly all tribal and allotted lands are held in trust by the United States).

9. *See id.* at, 1481–82 ("Of the 56.6 million acres owned by tribes, over fifteen million are leased to non-Indians for grazing, mining, and commercial and residential leases, with some leases extending ninety-nine years.").

. . . for centuries, hunting and living on it? Where did the white men get their legal title to it?"[10] The Supreme Court provided an answer when it stated the United States, in exercising its war and treaty powers, "overcame the Indians and took possession of their lands, sometimes by force . . ."[11]

Land dispossession severely compromised Native cultures because land is foundational to Native life.[12] The continued existence of independent Native Nations rests on (1) *a secure land base*, (2) a functioning economy, (3) self-government, and (4) cultural vitality.[13] A secure land base is the core attribute.[14] With land, a Tribe can establish its jurisdiction, support a population, develop a tribal economy, and provide a place for religious practices and cultural traditions.[15] However, centuries of land depredation by non-Native actors have stripped land from Tribes, and the land that Tribes retain is at risk of further depredation from private companies, state governments, and a federal government that often violates its trustee duties.[16] Native Peoples continue their quest to regain their land, despite generations of land dispossession.[17] This article proposes a Native Land Claims Commission Act to create the Native Land Claims Commission to hear tribal land claims and return federal land to the original inhabitants.

This introduction briefly outlines the problem of non-Native actors misappropriating tribal land.[18] Section II identifies the beginning point of North American history, not with the arrival of Europeans

10. *Creation of Indian Claims Commission: Hearings Before the Committee on Indian Affairs*, H.R. 1198 & H.R. 1341, 79th Cong. 54 (1945).

11. Bd. of Comm'rs of Creek Cty. v. Seber, 318 U.S. 705, 715 (1943).

12. *See* Wood, *supra* note 8, at 1567 (developing the idea that pollution throughout the United States has created serious imperil for the future of Native Nations).

13. *See id.* at 1474 (identifying these four characteristics as important to tribal existence).

14. *See id.* at 1476 (emphasizing the first attribute listed in the article).

15. *See id.* at 1474 (showcasing the importance of tribal land for tribal functions).

16. *See id.* at 1475, 1481 (discussing interests of non-Native actors in obtaining and developing Native lands).

17. *Cf.* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 754 (1992) ("Indian tribes have refused to disappear despite the genocide of the 18th and 19th centuries, the neglect of the first half of the 20th century, and the genocide-at-law that continued well into this century. Indian tribal claims against the Government also continue to be initiated and litigated in spite of the creation of elaborate judicial devices to settle these claims for all time.").

18. *See* Wood, *supra* note 8, at 1475, 1481 (reiterating the misappropriation of lands by non-native actors).

"discoverers," but with the already-present First Peoples who inhabited all parts of the continent on which they used and maintained the land.[19] Section III reveals how the arrival of Europeans to the "New World"—new only to late-arriving Europeans—began the process of tribal land dispossession.[20] Section IV discusses how the advent of the United States continued and accelerated tribal land dispossession.[21] Section V reveals the First Peoples' continuing quest to regain their land while detailing the bases for returning land.[22] Section VI proposes the Native Land Claims Commission Act that establishes the Native Land Claims Commission, providing a forum for the land claims of First Peoples. The Conclusion highlights the need for lawmakers to use the opportunity in the current land-return era to return land to First Peoples after centuries of land injustice.[23]

I. THE FIRST PEOPLES LAND INHABITANCE ERA

During the First Peoples Land Inhabitance era, rich and mature cultures existed throughout the "New World" for thousands of years.[24] The Native Peoples of North America lived on their land for a millennia, accumulating knowledge of the plants, animals, and soil.[25] Their accumulated learning informed their traditional way of living that

19. *See* Adam Rutherford, *A New History of the First Peoples in the Americas* (Oct. 3, 2017), ATL., https://www.theatlantic.com/science/archive/2017/10/a-brief-history-of-everyone-who-ever-lived/537942/ [https://perma.cc/PJ9B-XFW3] (reinforcing the original inhabitants of the Americas).

20. *See* El-Gendi, *supra* note 5, at 498 (citing arrival of Europeans as beginning of Native land disposition).

21. *See generally* M. Jordan Thompson & Chelsea L.M. Colwyn, *Living Sqélix: Defending the Land with Tribal Law*, 51 CONN. L. REV. 889, 891 (2019) (settling the Americas by the Europeans changed the Native Peoples relationships with the land).

22. *See generally* Andrea Guzman, *A Call to Return Land to Tribal Nations Grows Stronger*, MOTHER JONES (Apr. 30, 2021), https://www.motherjones.com/environment/2021/04/land-back-tribal-nations-sovereignty-treaties-white-supremacy/ [https://perma.cc/92VN-EBRN] (highlighting efforts Native Peoples used to regain their lands).

23. *See* Wood, *supra* note 8, at 1474 (referencing the perils of continuing along the current course of action and emphasizing the need to return power back to the Indigenous peoples who inhabited this land before European colonization).

24. *See* Rutherford, *supra* note 19 (emphasizing diversity of Native Peoples and the land during the First Peoples Land Inhabitance era).

25. *See* Thompson & Colwyn, *supra* note 21, at 891 (describing the relationship between the Native Peoples and the land).

sustained them, and the land on which they lived.[26] They were organized societies that effectively managed their land for generations.[27] The North American continent was not a wild, untouched area waiting to be discovered by Europeans.[28] Rather, it was used and shaped by Native Peoples for millennia before European incursion.[29] Native Peoples strategically burned forests on the Eastern Seaboard to increase forage for moose, deer, and woodland caribou.[30] The Miwok in Yosemite Valley ate acorns for food, which came from the tribes cultivation of black oaks.[31] "[L]ong ago, . . . [a]ll the animals were here, many animals. Plenty of everything, and this land was good . . . And the air here was clean," said tribal elder Mitch Smallsalmon of the Salish and Pend d'Oreille.[32]

II. THE EUROPEAN LAND DISPOSSESSION ERA

The European Dispossession era involved European Nations arriving to North America and competing for territory already occupied and used by Native Peoples.[33] It began with Queen Isabella sponsoring Christopher Columbus' 1492 voyage and declaring him to be the Spanish Admiral of any lands he could "discover and acquire."[34] His journey to

26. *See id.* at 891 (showing the mutual relationship benefitting both the Native Peoples and the land).

27. *See* Darla J. Mondou, *Our Land Is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations After NIFRMA*, 21 AM. INDIAN L. REV. 259, 295 (1997) (discussing the Native Peoples of North America ability to govern their land for generations is emphasized by their spirituality).

28. *See* David Treuer, *Return the National Parks to the Tribes*, ATL. (Apr. 12, 2021), https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/ [https://perma.cc/L6DC-62KX] (emphasizing the North American continent has been shaped by the Native Peoples for at least 15,000 years).

29. *See id.* (describing how the land the Native peoples tended was strategically cultivated for the animals to forage).

30. *See id.* (reenforcing this land was not a wild garden).

31. *See id.* (discussing that many of the Miwok who survived were driven from their homes onto reservations).

32. *See* Thompson & Colwyn, *supra* note 21, at 895 (describing Mitch Smallsalmon who lived on the land that is now Montana, Idaho, and Eastern Washington).

33. *See* El-Gendi, *supra* note 5, at 498 (stressing that although the Natives People occupied the land first, the Europeans assumed sovereignty of the soil).

34. *See* ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY 14 (2006) (explaining Queen Isabella sent ambassadors to the Pope to claim Spain's title to the island).

the already-inhabited Caribbean Islands led to Pope Alexander VI stating that Spain had title to the islands because they had been "undiscovered by others," a fiction later termed the Doctrine of Discovery.[35] This journey and others that Columbus took between 1492 and 1502 introduced the Americas to European nations.[36] The major powers—Spain, Portugal, France, and Britain—competed to acquire land beyond their borders.[37] Each claimed "sovereignty of the soil" with absolute rights over the land based on their purported "discovery" of already-inhabited land in the "New World."[38] Their belief in their superiority over the Native inhabitants self-justified their conquests.[39] Their imperial designs and ethnocentric views would lead to continuing abuses against Native Peoples.[40] For example, King George III's Proclamation of 1763 stated that "[F]rauds and abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians."[41] Ultimately, the arrival of Europeans began the process of tribal land dispossession that would continue with the establishment of the United States on the North American continent.[42]

35. *See generally id.* (explaining the doctrine granting Europeans ownership, sovereign, and commercial rights over the land).

36. *See* Kevin Enochs, *The Real Story: Who Discovered America*, VOA (Oct. 10, 2016, 2:16 PM), https://www.voanews.com/a/who-discovered-america/3541542.html#:~:text=Christopher%20Columbus%20is%20credited%20with%20discovering%20the%20Americas%20in%201492 [https://perma.cc/QV3G-MJLV] (noting that the notion that Columbus discovered America is misleading and incorrect).

37. *See* El-Gendi, *supra* note 5, at 498 (calling attention to the fact that although Native Peoples occupied the land, the sovereignty of the land was not identified).

38. *See id.* at 498 (explaining the sovereignty of the soil gives the discoverer the right to possess, grant, sell, and convey the land).

39. *See* Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847, 908 (2011) ("England, Spain, Portugal, and their colonists in the Americas and Oceania presumed that their governments, cultures, and civilizations were superior to those of Indigenous peoples and justified their conquest and domination.").

40. *See id.* at 911–12 (explaining the Native Peoples' culture and civilizations were inferior to others).

41. *The Proclamation of 1763*, DIGIT. HIST., https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=159 [https://perma.cc/4UT8-NZ9F].

42. *See* El-Gendi, *supra* note 5, at 498 ("The European nations which, respectively, established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy.").

III. THE AMERICAN LAND DISPOSSESSION ERA

A. The United States' Continuing Reliance on the Discovery Doctrine

American colonizers embraced the Doctrine of Discovery to justify dispossessing North America's Native inhabitants of their land.[43] White colonists used this doctrine to assert that their "discovery" of "new" lands justified the transfer of political, commercial, and property rights to themselves without the knowledge or consent of the indigenous inhabitants even though they had occupied and used the land for millennia.[44] Justice John Marshall made the Discovery Doctrine part of U.S. law by ruling that European colonists "discovering" the "New World" divested indigenous peoples of rights to their land.[45] According to Justice Marshall, the rights to the land transferred to American colonists when they emerged as the new non-tribal sovereign after the end of the Revolutionary War and the establishment of the United States of America.[46] The fait accompli transfer of tribal land rights reflected America's incipient land avidity.[47]

43. *See* MILLER, *supra* note 34, at 1 (emphasizing that the Doctrine of Discovery granted American colonizers complete property rights over this land).

44. *See* Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 5 (2005) (discussing the application of the Doctrine of Discovery to the American tribes by England by explaining how the Christian nations gained land already occupied by Native Peoples).

45. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 567–68 (1823); *see also* Michael C. Blumm, *Why Aboriginal Title is a Fee Simple Absolute*, 15 LEWIS & CLARK L. REV. 975, 976–78 (2011) (asserting that the *Johnson* opinion, if properly interpreted within the Anglo-American system of property law, would have left the tribes with a title in fee simple absolute).

46. *See* Raymond Cross, *De-Federalizing American Indian Commerce: Toward a New Political Economy for Indian Country*, 16 HARV. J. L. & PUB. POL'Y 445, 492 n.4 (1993) ("[L]and transactions that occurred in 1773 and 1775 between an Indian tribe and a non-Indian purchaser were nonetheless invalid because, under the doctrine of discovery, the United States had the sole and exclusive right to acquire the Indians' title to land that they had occupied since time immemorial. The United States, as the newly emerged sovereign, had assumed the rights of its predecessor states—Britain, France, and Spain—over the various lands that comprised the territory of the newly formed United States.").

47. *See* John H. Dossett, *Tribal Nations and Congress's Power to Define Offences Against the Law of Nations*, 80 MONT. L. REV. 41, 50 (2019) (discussing the history of tribal nations relationship with Anglo-Americans and its relation to how Native Americans have no option but to give up their land).

The Discovery Doctrine remains a part of U.S. legal jurisprudence[48] that continues to undermine tribal property rights.[49] However, this colonization-era relic should be abandoned in the modern era as Tribes regain their land because, first, the Discovery Doctrine is an outmoded concept based on supercilious notions of European and Caucasian superiority.[50] Second, Justice Marshall's ruling that Europeans "discovered" the "New World" is a legal fiction because Native populations lived on the land for generations prior to European latecomers.[51] Finally, the High Court of Australia in *Mabo v. Queensland* returned traditional land rights to the Meriam people by rejecting the Discovery Doctrine and a related concept, *terra nullius*, as "unjust and discriminatory."[52] Europeans used the concept *terra nullius,* meaning empty land, to argue that they "discovered" land that was "vacant" despite Native inhabitants already occupying the land.[53] The High Court stated the "law should neither be nor be seen to be frozen in an age of racial discrimination."[54] It was a fiction to regard the land rights of the indigenous inhabitants as non-existent, and the High Court declared "an unjust and discriminatory doctrine of that kind can no longer be accepted."[55]

B. The United States' History of Unjust Land Confiscations

The United States has consistently stripped land away from Native Peoples using myriad methods including swift action through theft,

48. *See* Nathan Goetting, *The Marshall Trilogy and the Constitutional Dehumanization of American Indians*, 65 GUILD PRAC. 207, 216 (2008) (explaining that Anglo-American law has always seen Native Americans as inferior).

49. *See* MILLER, *supra* note 34, at 1 (referring to the inherent Indigenous subjugation present in the Discovery Doctrine).

50. *See id.* (explaining that Canadian and Australian courts are struggling with similar discovery conflicts).

51. *See generally id.* (explaining that the country who first discovered new lands automatically gained sovereign and property rights over the land).

52. *See* John Borrows, *Ground-Rules: Indigenous Treaties in Canada and New Zealand*, 22 N.Z. UNIV. L. REV. 188, 194, 206 (2006) (rejecting the Discovery Doctrine and the *terra nullius* doctrine to restore the land rights of the Meriam people).

53. *See* Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849, 857 (2009) (defining the doctrine of *terra nullius).*

54. Mabo v. Queensland (No. 2) (1992) 175 CLR 1, 34 (Austl.).

55. *See id.* at 35 (chastising the treatment of land of the Indigenous People).

violence, or gradual divestment through settler incursions.[56] Approximately half the land area of the United States was purchased through inequitable treaties or agreements that paid Tribes on average less than a dollar an acre.[57] The United States confiscated another third of a billion acres, mainly in the West, without compensating the original Native inhabitants.[58] The United States claimed another two-thirds of a billion acres through unilateral action that extinguished Native title to their land.[59] The vast land swathes of Native Peoples were reduced to reservation enclosures.[60] As time passed, the reservation areas were reduced even further.[61] For example, the 1887 Dawes Act gave the President authority to divide reservation land into allotments for individual Native Americans with any remaining land deemed "surplus" that could be sold to non-Native Americans.[62] The result was Native Peoples losing two-thirds of their land as their land was reduced from 138 million to 48 million acres between 1887 and 1934.[63] An example of drastic land loss is seen in the Dakota and Ojibwe who originally occupied all 51 million acres of what would later be called Minnesota, but at the end of the Treaty Period in 1871, their lands were reduced by more than 95 percent to just 2.1 million acres.[64]

56. *See* Manola Secaira, *A Wenatchi Designer's Plan to Buy Back Native Lands*, CROSSCUT (Apr. 25, 2021), https://crosscut.com/focus/2021/04/wenatchi-designers-plan-buy-back-native-lands#:~:text=In%20August%202020%2C%20she%20launched,reaching%20their%20goal%20of%20%2425%2C000 [https://perma.cc/64FA-RSZU] (discussing the various ways the United States seized the Native Americans' land).

57. *See* Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 404 (1998) (commenting on the severely low payouts to the Native Americans for their land).

58. *See id.* (expanding on the confiscation of Native American land by the United States).

59. *See id.* (elaborating on the acts taken by the United States to obtain Native American land).

60. *See* Secaira, *supra* note 56 (explaining the history and consequences from the treaties signed by the Native Peoples and the settlors).

61. *See, e.g., id.* (detailing the history of the Native Americans' loss of land).

62. *See* Charlene Koski, *The Legacy of Solem v. Bartlett: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 84 WASH. L. REV. 723, 730 (2009) (describing the Dawes Act and the impact it had on Native American lands).

63. *See id.* (explaining the drastic loss of land suffered from the Native Americans because of the Acts passed in the United States).

64. *See* Cris Stainbrook, *Preserving Indian Land and Sacred Spaces: Part II of Healing Minnesota Stories Native Voices Series*, HEALING MINN. STORIES (Mar. 9, 2015), https://healingmnstories.files.wordpress.com/2020/12/land-loss-update.pdf

IV. THE FIRST PEOPLES LAND RETURN ERA

The First Peoples remain committed to regaining their land despite the long passage of time.[65] This commitment is seen in the Land Back movement, a current manifestation of the centuries-long quest of indigenous peoples to reclaim their land.[66] "Land Back isn't some distant thought," but a "very real hope," explains Corrine Rice, who is Lakota and Mohawk, and part of the movement to restore land to Native Peoples.[67] This hope becomes increasingly real with increased acknowledgement of tribal land injustice, recognition of multiple bases for land return, and Native Peoples working to recover their land.[68]

A. Acknowledging the Injustice of Land Dispossession

In arguing for compensation for Tribes, Representative James O'Connor stated it was a matter of justice to remediate the wrongs committed by the "White man" against Native Americans.[69] President Nixon averred, "The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. This condition is the heritage of centuries of injustice. From the time of their

[https://perma.cc/UB7D-UHJD] (providing an example of a Native American tribe that lost a substantial part of their land due to the Acts passed in the 1800s); *see also* Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1108 n.68 (1989) (Some view the treaty-making period as one of five periods beginning with "[1] the formative years (1789-1871), marked by extensive treaty-making between the federal government and the conquered tribes, primarily to advance the federal acquisition of Indian lands; [2] the era of allotments and assimilation (1871-1928), typified by the infamous Dawes Act, an allotment program that was aimed at dismantling existing tribes to accommodate the westward expansion of the United States; [3] the brief period of Indian reorganization (1928-1942), marked by a swing in policy away from assimilation-at-any-cost and toward greater respect for Indian culture; [4] the era of termination (1943-1961), characterized by a return to strong assimilationist policies, a termination of the federal government's trust responsibility for Indian tribes, and a transfer of that responsibility to the states; and, finally, [5] the era of self-determination (1961 to the present), marked by a move away from assimilation and toward recognition of the value of tribes and tribalism, and renewed emphasis on the federal government's trust responsibility to Indian tribes.").

65. *See generally* Guzman, *supra* note 22 (elaborating on the continued effort of the Native Americans to retrieve their land).

66. *See id.* (describing the Land Back exchange and the importance of adequate legal representation to starting the process).

67. *See id.* (noting that "Land Back isn't some distant thought for anyone in my family. It's a very real hope.").

68. *See generally id.* (indicating that white supremacy plays a large role in Native injustice).

69. 75 CONG. REC. S1902 (daily ed. June 23, 1937) (statement of Rep. O'Connor).

first contact with European settlers, the American Indians have been . . . deprived of their ancestral lands . . . ."[70] President Obama stated,"[F]ew have been more marginalized and ignored by Washington for as long as Native Americans—our First Americans."[71] President Obama pledged to keep working with Tribes to restore tribal homelands and ensure their sacred lands were protected for future generations.[72] Joe Biden, as a presidential candidate, recognized that tribal homelands were central to tribal sovereignty and self-governance and he vowed to "[r]estore tribal lands"[73] Although "restore" merely meant placing land in *trust status* rather than returning land directly to tribes.[74] After winning the presidency in 2021, President Biden convened the first meeting of the White House Council on Native American Affairs to work with Tribal Nations on various issues including "Tribal homelands."[75] President Biden's Department of the Interior nominee Debra Anne Haaland stated, "I will honor the sovereignty of Tribal nations and recognize their part in America's story."[76] After being confirmed, Interior Secretary Haaland declared, "I strongly affirm the United States' support for the UN

70. 1 RICHARD NIXON, *Special Message on Indian Affairs*, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE U.S. 564, 564 (1970) ("The first Americans—the Indians—are the most deprived and most isolated minority group in our nation . . . This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been . . . deprived of their ancestral lands . . .").

71. U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1 (Dec. 16, 2010), https://2009-2017.state.gov/documents/organization/184099.pdf [https://perma.cc/6AC6-BRKU].

72. *See* Press Release, The White House, Remarks by the President at the Tribal Nations Conf. (Dec. 3, 2014) (on file with author) (highlighting how President Obama vowed to "protect [Native Americans'] natural resources and restore tribal homelands . . . [to] make sure [the] sacred lands are protected for future generations.").

73. *See Biden-Harris Plan for Tribal Nations*, BIDEN HARRIS DEMOCRATS, https://joebiden.com/tribalnations/ [https://perma.cc/KD4X-8R4R] (listing commitments of the Biden/Harris administration including the restoration of tribal lands).

74. *See id.* (establishing the method used by the federal government to rebuild land via placing land in trust).

75. *See* Press Release, Readout of the Biden-Harris Administration's First Meeting of the White House Council on Native Am. Affs. (Apr. 23, 2021) (on file with author) (discussing the focus and attendants of the first meeting on Native American affairs).

76. Statement of Debra Anne Haaland, Nominee for the Position of Secretary of Department of the Interior Before the Comm. on Energy & Nat. Res. 117th Cong. 3 (2021).

Declaration on the Rights of Indigenous Peoples, and our commitment to advancing Indigenous Peoples' rights at home and abroad."[77]

B. Establishing the Bases for Returning Land

1. Adhering to the United Nations (UN) Declaration on the Rights of Indigenous Peoples

The 2007 UN Declaration on the Rights of Indigenous Peoples recognizes the "urgent need to respect and promote the inherent rights of indigenous peoples . . . , *especially their rights to their lands* . . . ."[78] The Declaration states that "[i]ndigenous peoples shall not be forcibly removed from their lands or territories."[79] In 2010, President Obama stated that the United States would be "lending its support" to the Declaration after the United States had initially opposed the Declaration.[80] The State Department affirmed that the United States "supports" the Declaration and that it had moral and political force, but clarified that the Document was neither legally binding nor a statement of current international law.[81] Nonetheless, President Obama stated that "[w]hat matters far more than words—what matters far more than any resolution or declaration—are *actions* to match those words."[82]

The Declaration affirms indigenous peoples have the right to lands they traditionally owned, occupied, or used.[83] States must recognize and protect these lands.[84] The Declaration calls for states to provide effective mechanisms to redress any action that dispossessed indigenous peoples

77. Debra Anne Haaland, Remarks by Secretary of the Interior Deb Haaland at the UN Permanent Forum on Indigenous Issues (Apr. 19, 2021).

78. G.A. Res. 61/295, at 3 (Sept. 13, 2007) (emphasis added).

79. *Id.* at art. 10.

80. Press Release, The White House, Remarks by the President at the White House Tribal Nations Conf. (Dec. 16, 2010) (on file with the author) (transcribing President Obama's speech on the development of the U.S.'s stance on the U.N. Declaration on the Rights of Indigenous Peoples.).

81. *See* U.S. DEP'T OF STATE, *supra* note 71 (clarifying that the Announcement proved to be less hopeful than thought).

82. Press Release, *supra* note 80.

83. *See* G.A. Res. 61/295, at art. 26(1) (Sept. 13, 2007) ("Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.").

84. *See id.* at art. 26(3) ("States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.").

of their lands.[85] It further calls for states to implement a "*fair, independent, impartial, open and transparent process* . . . to recognize and adjudicate the rights of indigenous peoples pertaining to their lands . . . ."[86] Such a process can be achieved through the creation of the Native Land Claims Commission to address the land claims of Tribes in America.[87] This is the type of action that matters far more than words, to paraphrase President Obama's statement above.[88]

2. Fulfilling the Federal Government's Trustee Duties

The federal trust responsibility includes the duty to return land to First Peoples.[89] As trustee, the federal government controls and manages tribal land and resources.[90] But the trust responsibility should extend further to include a fiduciary duty to return land, including land held in trust, to First Peoples as soon as possible.[91]

3. Remedying Injustice

The Preamble to the U.S. Constitution states that a purpose of the Constitution is to "establish Justice."[92] Restoring long-deprived land to Native Nations would help establish justice.[93] Second, the desire to remedy the "denial of justice" to Tribes that helped create the 1946 Indian

85. *See id.* at art. 8(2)(b) ("States shall provide effective mechanisms for prevention of, and redress for . . . Any action which has the aim or effect of dispossessing them of their lands, territories or resources.").

86. *Id.* at art. 27 (emphasis added).

87. *See generally* Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 N. D. L. REV. 359 (1973) (explaining the Native Lands Claims Commission will provide the most just compensation).

88. *See* Press Release, *supra* note 80 ("[W]hat matters far more than words—what matters far more than any resolution or declaration—are *actions* to match those words," said President Obama).

89. *See* Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 555 (1987) (explaining the various obligations the U.S. has undertaken through treaties, including the return of land to the Native people).

90. *See id.* at 555 (indicating the role of the federal government as trustee of these lands).

91. *See id.* (explaining the trust relationship between the United States and the Native Peoples that exists through treaties, statutes, and Supreme Court cases).

92. *See* U.S. CONST. pmbl. (establishing the principle objectives of the Constitution).

93. *See* Press Release, U.S. Congressman Peter DeFazio, DeFazio Bill, W. Or. Tribal Fairness Act, Signed into Law (Jan. 8, 2018) (describing legislation passed to remedy injustices faced by Native Americans by restoring stolen land).

Claims Commission also applies to the proposed Native Land Claims Commission because the separation of Tribes from their land is a continuing "denial of justice."[94] Third, as Representative Peter DeFazio explained, much work is still needed to "correct our nation's injustices" towards Native Peoples including returning their land.[95] Finally, as President Nixon stated, Native Peoples endured "centuries of injustice" because of the misappropriation of their ancestral lands.[96] Returning their land in the twenty-first century would counter prior centuries of land injustice.[97]

4. Following Federal Precedents for Returning Land

There is precedent for the United States returning land with title to quondam owners.[98] The United States agreed to return the Panama Canal to Panama when President Jimmy Carter and General Omar Torrijos signed an agreement that outlined the process of return in 1977.[99] Both countries jointly managed the Panama Canal until 1999 when Panama gained full control.[100]

Also, the United States returned land to Guam through the 1994 Guam Excess Lands Act.[101] This Act directs the General Services Administration to transfer to Guam all U.S. right, title, and interest to any

94. *See* H.R. REP. NO. 79-1466, at 18 (1945) ("The pernicious effects of long delay and the denial of justice are thus an inherent part of the procedure under which Indian claims can be disposed of only through special act of Congress.").

95. Press Release, *supra* note 93 (expressing that the passage of the Western Oregon Tribal Fairness Act was a move towards progress).

96. NIXON, *supra* note 70, at 564 (explaining American Indians have been oppressed, brutalized, and denied the opportunity to control their own destiny since their first contact with European settlers).

97. *See generally*, Treuer, *supra* note 28 (discussing the impact that returning lands to Native Tribes would have to remedy centuries of harm caused by being kicked off of their ancestral lands).

98. *See id.* (emphasizing that although it does not happen often, the United States has given land back in the past).

99. *See* Treuer, *supra* note 28 ("But in 1977, President Jimmy Carter and General Omar Torrijos of Panama signed an agreement that outlined the transfer of control of the canal to Panama.").

100. *See id.* (undoing Theodore Roosevelt's deal with the Panamanian nationalists, where the U.S. received the canal in exchange for helping the Panamanians to overthrow the Colombian government).

101. *See* Guam Excess Lands Act of 1994, Pub L. No. 103-339, § 2(a), 108 Stat. 3116 (1994) (mandating excess land be returned to Guam).

federal agency land that the agency deems "excess."[102] To facilitate the return of land, a 1999 Guam law established the Guam Ancestral Lands Commission to restore land previously confiscated or condemned.[103] The Commission is composed of seven members who are residents of Guam and descendants or heirs of ancestral landowners.[104] The goal is to restore ancestral lands so that the original landowners, their heirs, and their descendants may exercise their "fundamental civil rights in the property they own."[105]

Further, the federal government returned land with title to the Alaska Native Tribal Health Consortium.[106] The 2013 Alaska Native Tribal Health Consortium Land Transfer Act directed the Secretary of Health and Human Services to convey the federal government's right, title, and interest in designated property to the Tribal Health Consortium.[107] The conveyance would be made by warranty deed, not require consideration from the Consortium, not impose any obligation or condition on the Consortium, and disallow any reversionary interest.[108]

Last, Senator Bill Bradley sponsored a 1987 bill (the Sioux Nation Black Hills Act) directing federal agencies to convey designated federal land directly to the Sioux Nation.[109] The bill stated that the Sioux Nation never voluntarily ceded the Black Hills; rather, there was a "pattern of duress practiced by the Government on the starving Sioux to get them to agree to the sale of the Black Hills."[110] Although Senator Bradley's bill

102. *See id.* (allowing Guam to use the land for public benefit).

103. *See* 21 G.C.A. § 80104(a)(1) (2018) (instating the Original Landowners Registry to be used to confirm an applicant's property claim).

104. 21 G.C.A. § 80103 (1999) (indicating that members shall be appointed by the Legislature).

105. 21 G.C.A. § 80102(c) (1999) (acknowledging that the Native people of Guam were deprived their full use and enjoyment of their private property).

106. *See* Alaska Native Tribal Health Consortium Land Transfer Act, Pub. L. No. 113-68, § 2(c), 127 Stat. 1205, 1205 (2013) ("[T]he [Secretary of Health and Human Services] shall convey to [the Alaska Native Health Consortium] all right, title, and interest of the United States in and to the property for use in connection with health and related programs.").

107. *See id.* (conveying the property by warranty deed instead of quitclaim).

108. *See id.* (laying the condition of the conveyance that would effectuate the transfer of property within the Alaska Native Tribal Health Consortium Act).

109. *See* 133 CONG. REC. S2921-03 (daily ed. Mar. 10, 1987) (statement of Sen. Bill Bradley) (introducing the Sioux Nation Black Hills Act which would "restore to the Sioux Tribe a portion of the lands awarded to them by an 1868 treaty and subsequently illegally taken from them.").

110. *Id.* (statement of Sen. Bill Bradley).

did not become law, it serves as precedent for future legislation that returns land in fee simple to Tribes so that Tribes hold legal title[111] rather than returning land in trust whereby the federal government holds legal title.[112] This article's proposal to form a Native Land Claims Commission that gives Tribes the option of receiving returned land in fee simple follows Senator Bradley's bill calling for the return of federal land to "the Sioux nation in fee simple."[113]

C. Regaining Tribal Land

Tribes seek and regain their land from various actors, including the federal government.[114] For example, in 2020, the federal government returned approximately 11,760 acres of land to the Leech Lake Band of Ojibwe through the passage of the Leech Lake Band of Ojibwe Reservation Restoration Act.[115] The Ojibwe's original reservation encompassed approximately 600,000 acres in northern Minnesota.[116] But the federal government implemented unjust policies in the late 1800s and early 1900s that removed around 530,000 acres without tribal consent.[117] Later, from 1948 to 1959, the Bureau of Indian Affairs (BIA) removed an additional 17,000 acres when it unlawfully sold tribal allotments to the U.S. Forest Service (to add to the Chippewa National

111. *See id.* (statement of Sen. Bill Bradley) (including proceedings regarding the Sioux Nation Black Hills Act, S. 705, 100th Cong. § 5(b)(1) (1987)).

112. 25 U.S.C. § 5108 (1934).

113. *See* 133 CONG. REC. S2921-03 (daily ed. Mar. 10, 1987) (statement of Sen. John Kerry) (introducing a bill to "convey all of such Federal lands, minerals estates, and water rights to the Sioux Nation in fee simple, without warranties of any kind.").

114. *E.g.,* Leech Lake Band of Ojibwe Reservation Restoration Act, Pub. L. No. 116–255, 134 Stat. 1139, 1139 (2020) (effecting the transfer of land to the Tribe in trust by the United States for the benefit of the Tribe and considered to be part of the reservation of the Tribe. The land entered into the trust was originally taken from the Tribe from 1948 through 1959).

115. *Id.* at 1140 (indicating that for purposes of the Act, "Federal land" means the 11,760 acres located in the Chippewa National Forrest that will be given to the Leech Lake Band of Ojibwe).

116. *See* Briana Bierschbach, *'Land is Culture': Measure Could Restore Nearly 12,000 Acres of Leech Lake Land*, STAR TRIB. (Dec. 7, 2020, 4:53 AM) https://www.startribune.com/measure-will-restore-nearly-12-000-acres-of-leech-lake-land/573311681/?refresh=true [https://perma.cc/YP7P-BVJJ] (revealing how the Leech Lake band, who originally owned 600,000 acres, now owns the smallest amount of their original reservation compared to any other tribe in Minnesota).

117. *See id.* (highlighting that the federal laws that took the lands were passed on account of the Government reneging on its original treaties with the band).

Forest) without the consent of the Tribe or individual allottees.[118] The Ojibwe Reservation Restoration Act returned 11,760 acres through a land transfer from the U.S. Department of Agriculture—which includes the Forest Service that manages the Chippewa National Forest—to the Department of the Interior held in trust for the Ojibwe.[119]

The authors of the legislation, Representative Betty McCollum and Senator Tina Smith, recognized the "decades of work" by the Leech Lake Band of Ojibwe to regain their land.[120] In turn, Ojibwe Chair Faron Jackson, Sr. thanked Senator Smith, Representative McCollum, and others who helped make the return of the land a reality.[121] Senator Smith explained that the Restoration Act was needed because the U.S. government had "whittled away" the Band's land over the years.[122] Returning the land was necessary to right a "wrong" by the federal government, stated Representative Betty McCollum.[123] The return of land, albeit in trust status, to the Ojibwe is an important step in remedying tribal land injustice.[124] But the next step is to create a process to systematically return land with the option to return land in fee simple so

118. *See id.* (explaining tribal lands were unlawfully transferred or sold to the Bureau of Indian Affairs and the Department of the Interior to add to the Chippewa National Forest by a misinterpretation of their authority).

119. *See Leech Lake Reservation Restoration Act Passes House, Heads to the White House for Final Approval*, LEECH LAKE NEWS (Dec. 3, 2020), https://www.leechlakenews.com/2020/12/03/leech-lake-reservation-restoration-act-passes-house-heads-to-the-white-house-for-final-approval/?fbclid=IwAR2r6lDwTohDutuDR81wp3L7aixkTkkIX2JQmQVekRmpcxir-0MXFPUap0Y [https://perma.cc/DK4X-3YAN] (illustrating how the Government transferred stolen Ojibwe tribal lands back to tribal trust status through the Leech Lake Reservation Restoration Act).

120. Press Release, U.S. Congresswoman Betty McCollum, Rep. McCollum and Sen. Smith Bill to Restore 11,000 Acres of Land to Leech Lake Band of Ojibwe to be Signed into Law (Dec. 3, 2020), https://mccollum.house.gov/media/press-releases/rep-mccollum-and-sen-smith-bill-restore-11000-acres-land-leech-lake-band-ojibwe [https://perma.cc/7CDW-TSTS].

121. *See id.* (saying "chi-miigwech" which means "thank you" in Ojibwe for the Senator and Representative's work in passing the bill).

122. Bierschbach, *supra* note 116.

123. *Id.*

124. *See Leech Lake Reservation Restoration Act Passes House, Heads to the White House for Final Approval*, *supra* note 119 ("Passage of [the Leech Lake Band of Ojibwe Reservation Restoration Act] helps restore a sense of justice that generations of Leech Lakers have worked to achieve.").

that Native Peoples can directly possess their land; the proposed Native Land Claims Commission can achieve this objective.[125]

V. CREATING A NATIVE LAND CLAIMS COMMISSION TO FACILITATE RETURNING LAND TO FIRST NATIONS

The United States created the 1946 Indian Claims Commission shortly after World War II in part because of the "military valor and sacrifice" of Native citizens during World War II, and because of the contradiction of Americans denouncing the denial of democratic rights to minorities abroad while denying Native Peoples—America's "oldest national minority"—their rights at home.[126] But the 1946 Indian Claims Commission failed to fully resolve the Tribes' claims because the Commission dispensed money rather than returned land.[127] Money, though, is not a panacea.[128] Thus, a Native Land Claims Commission is needed to address the deeper desires of Tribes, which is to regain their lands and, thereby, restore their cultures.[129] Congress should pass, and the president should sign legislation such as this article's proposed Native Land Claims Commission Act, to institute a land-return effort that remedies centuries of land dispossession.[130] As stated by Nakia Williamson-Cloud, cultural resource program director for the Nez Perce

125. *See id.* (noting that transferring the lands requires the Ojibwe to work with the Chippewa National Park to finalize a plan or survey to determine how to fragment the forest land).

126. H.R. REP. NO. 79-1466, at 2 (1945).

127. *See* Ward Churchill, *The Law Stood Squarely on Its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 OR. L. REV. 663, 686 (2002) (seeking to separate itself from garnering similarities to Nazi expansionism, the United States sought to retroact its unlawful taking of tribal lands).

128. Chari Alson Maddren, *AIDS Vaccines: Balancing Human Rights with Public Health*, 17 TEMP. INT'L & COMP. L.J. 277, 293–94 (2003) (acknowledging the lack of access to adequate health care due to a lack of resources and health care infrastructure, which Nations need more than money to fix. Delivery systems are needed as well).

129. *See* Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 423 (2003) (explaining the article's intention of highlighting restoration of land throughout part II. Stating, native people are "physically and emotionally connected to and united with their land.").

130. *See generally* Kirsten Matoy Carlson, *Priceless Property*, 29 GA. ST. U. L. REV. 685, 726 (2013) (suggesting land transfers from the federal government back to Tribes is possible and has been done before. For example, the Havasupai Tribes received 185,000 acres of National Park Service lands from the federal government in 1975.).

Tribe, "Our culture and way of life is tied to the land."[131] Below are central features of the proposed Native Land Claims Commission to effectuate returning land to Native Peoples.[132]

A. Returning Land Rather Than Dispensing Money

The proposed Native Land Claims Commission Act authorizes the Commission to return *land* to tribal claimants.[133] The Act eliminates a major flaw with the 1946 Indian Claims Commission with its limitation on providing only monetary compensation to Tribes.[134] The language of the 1946 Indian Claims Commission Act did not mention returning land and instead addressed the "*payment* of any claim,"[135] the appropriation of "such *sums*" as needed to pay a claim,[136] and the Commission issuing in writing the grounds for relief and the "*amount* thereof."[137] Representative Costello, who opposed the creation of the Indian Claims Commission, argued that the creation of the Commission would

131. *See* Cassandra Profita, *Nez Perce Tribe Reclaims 148 Acres of Ancestral Land in Eastern Oregon*, OR. PUB. BROAD. (Dec. 25, 2020, 3:47 PM), https://www.opb.org/article/2020/12/25/nez-perce-tribe-eastern-oregon-reclaims-ancestral-land/ [https://perma.cc/44JR-2PW9] (explaining that buying back the land "has a much deeper meaning for the tribal community than simply having legal title" because the tribe's connection through "lives, culture . . . and spirituality.").

132. *See generally* Daniel T. Campbell, *The Courts, the Government, and Native Americans: The Politics and Jurisprudence of Systematic Unfairness*, 3 RACE & ETHNIC ANC. L. DIG. 30, 32–36 (1996) (discussing several issues with the American executive and judicial treatment of Native Tribes including: (1) the Supreme Court's attempt at defining who is an "Indian" and which groups are "Indian tribes" under the meaning of specific statutes, (2) how the label of "Indian" often meant being treated as inferior or uncivilized, and (3) the taking of land and other rights in an attempt to limit tribal sovereignty).

133. *Contra* Indian Claims Commission Act, Pub. L. No. 79–726, § 22(a), 60 Stat. 1049 (1946) (allowing the Indian Claims Commission to *only* award monetary judgments that would bar any further claim arising out of the controversy. Creating a system where if a claimant Tribe is awarded a monetary judgment for the taking of their land, the Tribe would forfeit all claims to their land.).

134. *See* Janet C. Neuman & Michelle E. Smith, *Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive Effect of ICC in Litigation Over Off-Reservation Treaty Fishing Rights* (Lewis & Clark L. Sch. Legal Rsch. Paper Series, Working Paper No. 2009-22, (2008)) (stating, "Congress only authorized the [Indian Claims] Commission to grant one remedy – monetary damages.").

135. *See* Indian Claims Commission Act § 22(a) (highlighting that money would be probably used to compensate for the land that was taken from Native Peoples).

136. *Id.*

137. *See id.* (alluding to only payment, and not the return of land, to compensate those Native people whose land was taken from).

essentially result in "raids" upon the Treasury with Congress paying out "millions of dollars."[138]

But land, rather than dollars, is what the First Peoples desire, as seen in the example of the West Shoshone.[139] In 1962, the Indian Claims Commission ruled that the United States had acquired or controlled twenty-two million acres of Western Shoshone land without payment.[140] Over a decade later, the U.S. government paid a minimal amount of money compensation—the equivalent of fifteen cents per acre—to the Secretary of the Interior to hold for the Western Shoshone.[141] The Western Shoshone's attorneys accepted their commission payments, but the Western Shoshone refused to accept payment for land they regarded as still belonging to them.[142]

Similarly, the Sioux Nation refused to accept a $17.5 million-plus interest award from the Court of Claims' 1979 decision finding the United States took the Black Hills in 1877 without just compensation.[143] The Supreme Court affirmed the judgment of the Court of Claims and the award amount.[144] Decades later, the award amount surpassed a billion dollars, but the Sioux Nation still refused to accept the compensation

138. 81 CONG. REC. H8107 (daily ed. June 23, 1937) (statement of Rep. John Costello).

139. *See* Akilah Jenga Kinnison, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples*, 53 ARIZ. L. REV. 1301, 1313–15 (2011) (explaining the refusal of the West Shoshone to accept the monetary judgment awarded to them by the ICC was because the only remedy the Tribe was seeking, or would accept, was the return of their ancestral land).

140. *See id.* at 1315 (stating further, "the United States, without payment of compensation, acquired, controlled, or treated these lands as if they were public lands.").

141. *See id.* ("In 1979, the U.S. government paid the equivalent of 15 cents per acre to the Secretary of the Interior to hold for the Western Shoshone as compensation for their lands.").

142. *See id.* (discussing how the United States aimed to extinguish the Western Shoshone's title to millions of acres of land through payment despite the Western Shoshone's refusal to relinquish and sell their title).

143. *See* Carlson, *supra* note 130, at 688 (explaining that the Sioux wanted the return of their sacred lands, not the compensation awarded to them by the Court of Claims for the taking of Black Hills).

144. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 424 (1980) (affirming the Court of Claims judgment holding that the governmental taking of the Sioux Nation's land required just compensation); *see also* Carlson, *supra* note 130, at 688 ("The Supreme Court affirmed the Court of Claims' findings and award of $17.5 million plus five percent interest to the Sioux Nation for a total of $122.5 million.").

award because the Sioux Nation did not want money; rather, they wanted the return of the sacred Black Hills.[145]

Likewise, the Oneida Indian Nation of New York withdrew their claims from the Indian Claims Commission in 1982 because the Commission could only provide monetary compensation but could not return land.[146]

These and other Tribes pursue land rather than money because they seek the return of their homeland and sacred land[147]; they seek to preserve their cultural, religious, and ethnic identity that flows from the land[148]; and they seek their own space that allows them to exist as autonomous nations.[149] The 1946 Indian Claims Commission could not address any of the stated desires.[150] Ultimately, the Indian Claims Commission engendered resentment among Tribes who viewed the Commission as a bureaucratic body-focused only on dispensing meager monetary awards instead of returning their non-fungible land.[151] Thus, what is needed is a *land return* commission, not a *money compensation* commission.[152]

145. *See* Carlson, *supra* note 130, at 689 (noting the only compensation the Sioux seek is the return of the Black Hills. This is illustrated by the Sioux's refusal to accept the compensatory award despite their marginalized living conditions.).

146. *See* Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 549–50 n.59 (1994) (naming the various cases involving Oneida land claims and stating they withdrew the claims with the Indian Claims Commission in 1982 "when it became clear that the Commission was not empowered to return land but only to give monetary judgments, and that such monetary judgments would bar any claims for return of land.").

147. *See* McCoy, *supra* note 129, at 423 (highlighting different tribes' value regarding land, rather than monetary benefit).

148. *See id.* (attributing the sense of "cultural, religious, and ethnic identity and community-wellbeing" of Indian tribes to the relationship and traditions they hold with their land).

149. *See id.* (explaining how land provides Indian tribes with a sense of political and national identity by giving them a space to exist autonomously as a group).

150. *See generally* Campbell, *supra* note 132, at 39 (explaining that the Indian Claims Commission could only award monetary compensation which the Native Americans refused to view as a substitute for the lands taken from them).

151. *See* Carla F. Fredericks & Jesse D. Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, 89 U. COLO. L. REV. 477, 501 (2018) ("During its time, however, the 'bureaucratically oriented' nature of the [Indian Claims] Commission bred deep discontent among Indians, climaxing with its rule of money payments in lieu of land restoration.").

152. *See* Campbell, *supra* note 132, at 39 (explaining Native Americans in general refused monetary awards by the Indian Claims Commission because they viewed land as invaluable); *see also* Kinnison, *supra* note 139, at 1313–15, 1318 (discussing Western Shoshone's refusal to accept

B. Returning Land with Title Directly to Tribes

The Native Land Claims Commission Act will provide Tribes with the option of obtaining fee simple title to their returned land instead of limiting them to only placing returned land in trust status to be managed by the Department of the Interior.[153] A Tribe might choose to place returned land in trust status for various reasons, including avoiding "state taxation, eminent domain[,] and adverse possession."[154] But a Tribe should also have the option of directly possessing returned land without the Department of the Interior holding the land in trust.[155] For some Tribes, gaining title to their reacquired land is more important than gaining federal benefits.[156] For example, the Esselen Tribe of Monterey County in 2020 purchased a 1,199-acre parcel of land along the Little Sur River in California.[157] With a grant from the California Natural

monetary awards for the taking of their land. A Western Shoshone grandmother stated, "I am not taking money for this land . . . In Western Shoshone culture, the earth is our mother. We can not sell it."); *see also* Carlson, *supra* note 130, at 688–89 (showcasing the Sioux's refusal of monetary compensation for the taking of lands. The Sioux refuse to accept a monetary award estimated at $1.3 billion for the taking of their land despite abject poverty. Instead, they seek the return of title of their sacred lands.); *see also* Halbritter & McSloy, *supra* note 146, at 549–50 n.59 (supporting the need for a land commission by showing the Oneida Indian Nation also refused monetary judgments in lieu of the return of their land).

153. *See generally* Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 847–48 (2004) (elaborating on how vital the reestablishment of property is for the recovery of tribal economies).

154. *Id.* at 837.

155. *See id.* at 342 (encouraging tribal governments to reject particular aspects of the American property regime, and instead consider tribal property laws for solutions to contemporary land problems that arise in Indian land); Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CAL. L. REV. 1531, 1540 (2019) ("The goal is to imagine as concretely as possible a new and dramatically more flexible legal space where tribal governments, as governments, can pursue a real process of local property reforms and reclaim the richness of modern Indigenous land tenures over time.").

156. *See* Harmeet Kaur, *Indigenous People Across the US Want Their Land Back—and the Movement is Gaining Momentum*, CNN (Nov. 26, 2020, 6:24 PM), https://www.cnn.com/2020/11/25/us/indigenous-people-reclaiming-their-lands-trnd/index.html [https://perma.cc/76KC-92NB] (recognizing different reasons Indigenous people battle to reclaim their land, including identity and economics. For certain Tribes, the importance is connection to ancestors and tradition, while for others it is about the ability to hunt and access clean water.).

157. *See* Hayley Smith & Kristi Sturgill, *After 250 Years, Esselen Tribe Regains a Piece of its Ancestral Homeland*, L.A. TIMES (July 31, 2020, 7:00 AM), https://www.latimes.com/california/story/2020-07-31/after-250-years-esselen-tribe-regains-a-

Resources Agency and assistance from Western Rivers Conservancy, the Esselen Tribe made the purchase and became direct owners of their former land; an important milestone despite the regained land being a fraction of their original ancestral territory prior to the Spanish dispossessing the Tribe of their land in 1770.[158] The Esselen Tribe strived to avoid having their returned land be trust land.[159] As stated by Tom Little Bear Nason, Chair of the Esselen Tribe, lacking "actual complete ownership . . . was a big problem for us."[160] The Tribe's purchase fulfilled their desire to own the land in the Tribe's name.[161] "It's forever ours," declared Tom Little Bear Nason.[162] Although federal law authorizes the Secretary of the Interior to acquire land for Tribes,[163] title to such land is held in trust by the U.S. Government for the Tribe rather than held directly by the Tribe.[164] Without offering Tribes other options, the federal government placing acquired land in trust status continues the practice of treating Tribes as wards, which perpetuates an anachronistic

piece-of-its-ancestral-homeland [https://perma.cc/Z2MK-C9NF] (reporting on the inspiring reunion of the Esselen people and their sacred land by owning the land in fee so it is legally theirs, but while still following a management plan).

158. *See id.* (referencing the injustice from 1770, and how after hundreds of years, the tribe is able to reconnect with their ancestral homeland).

159. *See More Than 1 Thousand Acres of Esselen Ancestral Land Returned to Tribe*, NPR (Aug. 2, 2020, 8:02 AM), https://www.npr.org/2020/08/02/898274915/more-than-1-thousand-acres-of-esselen-ancestral-land-returned-to-tribe [https://perma.cc/X36M-4SWB] (transcript of an interview by host Lulu Garcia-Navarro) (facilitating a conversation between NPR's Lulu Garcia-Navarro and Tom Little Bear Nason, a member of the Esselen Tribe, regarding their reclamation of over one thousand acres of ancestral land that was stolen).

160. *Id.* (transcript of an interview by host Lulu Garcia-Navarro).

161. *See id.* (transcript of an interview by host Lulu Garcia-Navarro) (describing the significance of getting the land back under the Esselen name to forever preserve it. There are no plans to develop the land, the plan is to help repatriate their ancestors.).

162. *See id.* ("But we would never have actual complete ownership. That was a big problem for us.").

163. *See* 25 U.S.C. § 5108 (1934) (except that Treasury funds to acquire land for tribes will not be used to acquire "[a]dditional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico.").

164. *See id.* (explaining that title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation).

policy based on racist assumptions of tribal inferiority and European superiority.[165]

Accordingly, to help Tribes who choose to regain their land with title, the Native Land Claims Commission Act will exempt their land from state taxes and regulation.[166] Exempting their land avoids placing the tribal claimant in the predicament of choosing between regaining land with fee simple title but subject to state taxes and control or placing the land in trust free from state taxes and control but with the land distant and under federal control.[167] A Tribe may regain land directly with title by having the Native Land Claims Commission Act give Tribes "exclusive" jurisdiction over their returned fee land, which follows current law providing states may not tax federal land over which the federal government has exclusive jurisdiction.[168] To ensure this protection is provided to Tribes, the express language of the Native Land Claims Commission Act should state that a Tribe regaining land in fee simple title "shall be exempt from taxation by the United States or any State or subdivision of a State, and from acquisition for public purposes without the consent of the [Tribe]," which is the language in Senator Bradley's 1987 bill to return land to the Sioux Nation,[169] and which accords with the language in current federal law exempting trust land from state and local taxation.[170] Moreover, the Act can protect the Tribe's returned fee

165. *See* Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 97 (1999) (establishing the concept of Indian tribes being considered wards of the nation, deemed incapable, and subjected to Congressional supervision).

166. *See* Leeds, *supra* note 153, at 836 ("[S]tates impose property taxes on Indian-owned allotments, it precludes the tribes' ability to establish its own tax base, and Indian lands become susceptible to forfeiture."); *see also* 25 U.S.C. § 5108 (1934) (restating the code that specifies such lands or rights shall be exempt from State and local taxation).

167. *See* Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy Over Lands and Natural Resources*, 46 NAT. RES. J. 439, 446–47, 457 (2006) (creating an amendment to the current federal law would prevent from state and local law from extending to the land returned to Tribes).

168. *See* George H. Pretty II & P. Scott Manning, *The Federal Enclave Doctrine–Property Tax Exclusions Based on Constitutional Principles*, 24 J. MULTISTATE TAX'N & INCENTIVES, (Sept. 2014), at 26, 29 (noting how property purchased for certain purposes is subject to federal jurisdiction exclusively, meaning state authority is not authorized); *see also* United States v. Unzeuta, 281 U.S. 138, 142 (1930) (providing that Tribes may regain land while having a property tax exclusion).

169. 133 CONG. REC. S2921-03 (daily ed. Mar. 10, 1987) (proceedings that include the Sioux Nation Black Hills Act).

170. *See* 25 U.S.C. § 5108 (1934) (referring to tax exemption for any land in a United States trust for a Tribe or individual Indian).

land against alienation by giving the Tribe approval authority to lease, encumber, or sell their property interest.[171]

C. Establishing an Independent Commission

Establishing an independent commission to investigate land disputes is not a novel proposal.[172] An 1896 federal law created the three-person Klamath Boundary Commission to independently investigate the disputed boundary lines of the Klamath Indian Reservation in Oregon.[173] Similarly, the proposed Native Land Claims Commission is needed to investigate current land disputes.[174] To be effective, the Native Land Claims Commission must be independent for the reasons stated below.[175]

1. The Tribes' Historical Distrust of the Bureau of Indian Affairs

Tribes distrust the Bureau of Indian Affairs in part because of its war-connected history.[176] The War Department created an Office of Indian Affairs in 1824.[177] In 1834, Congress formally established the Bureau of Indian Affairs (BIA).[178] Its purported purpose was to assist Native Peoples, but it was complicit in deliberately spreading disease among Tribes, decimating bison herds, and killing Native American adults and

171. *See* Leeds, *supra* note 167, at 457 (allowing for an amendment would help Tribes from needing to seek approval from the federal government).

172. *See* Indian Appropriations Act of 1896, ch. 398, 29 Stat. 321, 342 (1896) (providing for the purposes of the Indian Appropriations Act of 1896).

173. *See id.* ("[W]hose duty it shall be to visit and thoroughly investigate and determine as to the correct location of the boundary lines of the Klamath Indian Reservation, in the State of Oregon, the location of said boundary lines to be according to the terms of the treaties heretofore made with said Indians establishing said reservation.").

174. Russel Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58, N.D. L. REV. 7 (1982) (providing the purpose of the Native Land Claims Commission).

175. *See* Cheryl Ellenwood et al., *A Native American May be Taking Control of the Cabinet Department that has Shaped Native American Lives*, WASH. POST (Jan. 25, 2021), https://www.washingtonpost.com/politics/2021/01/25/bidens-breakthrough-cabinet-nomination-rep-haaland-comes-native-americans-get-more-politically-active/ [https://perma.cc/773V-TP79] (pointing to new movements and recent events that will enhance the efficacy of the Native Land Claims Commission).

176. *Id.* (providing that distrust in the Bureau of Indian Affairs is causing citizens to be elected into governmental positions).

177. *See* Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, n.1 (2004) (introducing the creation of The Office of Indian Affairs).

178. *See id.* at 160 (discussing the creation of the Bureau of Indian Affairs).

children.[179] Furthermore, to undermine Tribes and tribal culture, the BIA took Native American children from their homes to boarding schools to assimilate them into white culture.[180] Corruption and ineffective oversight are part of BIA history.[181] In 1937, Representative Usher Burdick characterized the situation of Native Peoples as "prisoners of war" held in subjection and never released.[182] The BIA's failures have led to Tribes' long-term distrust.[183]

2. The Federal Government's Trustee Failures

The Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA) have failed to uphold their trustee responsibilities.[184] For example, a 2021 report of the inspector general of the DOI found that in the Land Buy-Back Program for Tribal Nations, the BIA's improper delegation of authority to its Acquisition Center could lead to litigation and claims that the DOI breached its trust responsibility.[185] In 2015, the Government Accountability Office (GAO) found that the BIA's shortcomings in managing permits for energy development on tribal lands led to increased

179. *See id.* at 160 n.2 (mentioning the result of the spread of disease that destroyed lives for decades and generations through the creation of the Bureau of Indian Affairs).

180. Jessica Larsen, *Policy Considerations and Implications in United States v. Bryant*, 13 NW. J. L. & SOC. POL'Y 469, 484 (2018) **(**mentioning the negative effects that the Bureau of Indian Affairs had on education and on Tribe children).

181. *See* Charles Rennick, *The National Historic Preservation Act: San Carlos Apache Tribe v. United States and the Administrative Roadblock to Preserving Native American Culture*, 41 N. ENG. L. REV. 67, 91 (2006).

182. 81 CONG. REC. H8111 (daily ed. June 23, 1937) (statement of Rep. Usher Burdick) (advocating against the adverse treatment doled by the American government on Native American people).

183. *See* Rennick, *supra* note 181, at 91 (listing examples of the BIA's failures in protection of various Native American rights).

184. *See* Christopher Barrett Bowman, *Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of Cobell v. Norton*, 53 CATH. U. L. REV. 543, 573–74 (2004) (detailing the duties entrusted to the DOI and BIA that were not performed which lead to the mismanagement and loss of funds belonging to Native Americans); Wood, *supra* note 8, at 1479 (claiming the BIA did not adequately negotiate contracts or collect royalties on resources in their capacity as trustee).

185. *See* MARK LEE GREENBLATT, OFF. OF INSPECTOR GENERAL, THE BUREAU OF INDIAN AFFAIRS JEOPARDIZED LAND BUY-BACK PROGRAM ACCOMPLISHMENTS BY DELEGATING LAND TITLE AUTHORITY, 1 (2021) (summarizing the findings of the investigation conducted by the Office of the Inspector General in determining whether the BIA properly executed its delegation of land title authority).

energy development costs and loss of revenue for Tribes.[186] In 2016, the GAO found that the BIA had high staff vacancies and staff with insufficient skills and knowledge that impaired the BIA's ability to meet tribal needs.[187] In 2020, leaders of the Mandan, Hidatsa, and Arikara Nation (i.e., the Three Affiliated Tribes) in North Dakota sued the federal government after the Department of the Interior sided with North Dakota to hold that the riverbed on their reservation belonged to North Dakota.[188] Tribal Chair Mark Fox stated that the Department of the Interior violated treaty obligations and its fiduciary duty as trustee by siding with the state.[189] The Three Affiliated Tribes also asserted that the Department of the Interior failed to collect millions of dollars in oil and gas revenues.[190]

3. Independent of Electoral Politics and Hostile Administrations

It is necessary to create the Native Land Claims Commission as an independent body in order to insulate it from the vicissitude of electoral politics.[191] Each election cycle brings with it new leaders and lawmakers with their own preferences and policies with no guarantee that they view

186. *See* Anna Maria Ortiz, Director, Natural Resources and Environment, Testimony before the Subcommittee for Indigenous Peoples of the United States, House of Representatives (Nov. 19, 2019) (citing lengthy review times and poor management of permits and approvals as reasons for the negative impacts on energy development for tribal lands).

187. *See id.* (recommending the BIA establish a process to assess its employees so that the BIA's responsibilities and tribal needs are met in order to properly serve tribal communities).

188. *See* James MacPherson, *North Dakota Tribe Sues Over Ruling Giving Minerals to State*, ASSOC. PRESS (July 15, 2020), https://apnews.com/article/3da135b905be2463df3a38891c7b4ca2 [https://perma.cc/6894-2PRV] (summarizing the multimillion dollar lawsuit between the Nations and the federal government in connection to 'illegally' taken land on the Fort Bend Indian reservation).

189. *See id.* (citing the grievance filed by the Three Affiliated Tribes in connection to the mineral rights issues on the Fort Bend reservation).

190. *E.g.*, Patrick Springer, *North Dakota Tribes Sue Feds over Land, Millions of Dollars of Oil and Gas Royalties*, GRAND FORKS HERALD (July 16, 2020, 4:58 PM), https://www.grandforksherald.com/news/crime-and-courts/6578717-North-Dakota-tribes-sue-feds-over-land-millions-of-dollars-of-oil-and-gas-royalties [https://perma.cc/4CXR-5FH7] (emphasizing the financial risk at stake for Native American tribes because of the litigation).

191. *See generally* A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 558 (1995) (describing the utilization of federal government corporations for the purpose of protecting government designated agencies or administrations from the influence of politics).

tribal interests as a priority.[192] Indeed, they might be hostile to tribal interests.[193] For example, President Andrew Jackson was hostile to Tribes during his presidency.[194] He signed into law the Indian Removal Act of 1830,[195] which led directly to the Trail of Tears.[196] During this forced march in the winter of 1838, First Peoples were forced off their land in the warm south through barren landscape to Oklahoma and thousands starved or froze to death along the way.[197] The government's removal policy resulted in one quarter to one half of the Cherokee, Creek, and Seminole population perishing.[198] The Creek called Jackson "Sharp Knife"; the Cherokees called him "Indian Killer."[199]

Days after Donald Trump's presidential election and inauguration, he selected a portrait of Andrew Jackson to hang in the Oval Office.[200] "We

192. *See generally* Michael Kagan, *Chevron's Asylum: Judicial Deference in Refugee Cases*, 58 HOUS. L. REV. 1119, 1165 (2021) (noting that turnover rates in politics creates instability and inconsistency in public policy decisions and priorities).

193. *See* Matthew L.M. Fletcher, *States and Their American Indian Citizens*, 41 AM. INDIAN L. REV. 319, 319 (2017) (characterizing the pendulum like effect government reception—or lack thereof —on tribal interests has on Native American nations).

194. *See* Eli Rosenberg, *Andrew Jackson was Called 'Indian Killer.' Trump Honored Navajos in Front of His Portrait*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/11/28/andrew-jackson-was-called-indian-killer-trump-honored-navajos-in-front-of-his-portrait/ [https://perma.cc/U4JB-2845] (providing an example of President Jackson's cruelty towards Native Americans by citing his enactment of the Indian Removal Act of 1830, which forced the relocation of more than 60,000 Native Americans for the purpose of clearing land for White pioneers).

195. *See* Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 757 (2004) (describing President Jackson's enactment of a federal removal policy as the "Trail of Tears" and a near genocide of Native Americans).

196. *See* Blake A. Watson, *Buying West Florida from the Indians: The Forbes Purchase and Mitchel v. United States (1835)*, 9 FIU L. REV. 361, 374 (2014) ("[T]he Indian Removal Act, which was signed into law by President Jackson on May 28, 1830, led directly to the infamous trail of tears.").

197. *See* Marilyn J. Ward Ford, *Twenty Five Years of the Alaska Native Claims Settlement Act: Self Determination or Destruction of the Heritage, Culture, and Way of Life of Alaska's Native Americans?*, 12 J. ENV'T L. & LITIG. 305, 311–12 (1997) (depicting how Native Americans fought to defend their lands against the forced removal, but ultimately lost and were forced to relocate to unfamiliar lands).

198. *See* Watson, *supra* note 196, at 374 (estimating the number of Native American deaths that were a direct result of the Trail of Tears for three large Native American tribal communities).

199. Rosenberg, *supra* note 194 (confirming that Jackson is most famous for his role in Native American's painful and violent history in the United States).

200. *See id.* (asserting that President Trump's decision raised questions about the White House's message towards Native Americans).

noticed," stated Jacqueline Pata, executive director of the National Congress of American Indians.[201] The Trump Administration ceased holding the annual White House Tribal Nations Conference previously held by President Barack Obama throughout his terms in office.[202] The Trump administration initially opposed providing any COVID-19 relief money to tribal nations but finally agreed to provide $10 billion after opposition from tribal advocacy groups and other supporters.[203] The Trump administration supported the Keystone XL and Dakota Access pipeline projects, which Native Nations opposed because the pipelines cut through tribal lands.[204] "This administration's record is one of repeated failures for Native communities," stated Senator Tom Udall, Vice Chair of the Senate Committee on Indian Affairs.[205]

D. Using a Non-Adversarial Model

The Native Land Claims Commission Act will direct the Commission to use a non-adversarial model that is friendly to tribal claimants.[206] This

201. *Id.* (quoting Jacqueline Pata stating "Andrew Jackson wasn't necessarily a president who was respectful of tribal governments and Native Americans. This is one of those eras that is probably bleaker in terms of the relationship between Native Americans and the federal government.").

202. *See* Anna V. Smith, *Trump's Impact on Indian Country Over Four Years*, HIGH COUNTRY NEWS (Dec. 16, 2020), https://www.hcn.org/articles/indigenous-affairs-trumps-impact-on-indian-country-over-four-years [https://perma.cc/857D-WYBY] (noting Trump's poor track record on Indigenous affairs during the start of administration continued to worsen as leadership positions in the BIA and Interior Department were left empty or filled by individuals who never went through the proper channels of congressional vetting).

203. *See* Jennifer Bendery, *The White House Wanted to Give $0 to Tribes in the $2 Trillion Stimulus Bill*, HUFFINGTON POST (Apr. 1, 2020, 5:32 PM), https://www.huffpost.com/entry/tribes-stimulus-coronavirus-white-house-republicans_n_5e839c10c5b6871702a5dc10 [https://perma.cc/N89Y-URWJ] (emphasizing the nation's 574 tribes would need at least $20 billion in direct federal relief to stem job losses and economic instability caused by the pandemic).

204. Rebecca Tsosie, *Indigenous Sustainability and Resilience to Climate Extremes: Traditional Knowledge and the Systems of Survival*, 51 CONN. L. REV. 1009, 1021 (2019) (noting the pipelines would cut through the lands of at least eighty-four federally recognized tribes).

205. *See* Smith, *supra* note 202 ("The truth is the White House is actively undermining Tribal sovereignty across the country and mishandling a once-in-a-century pandemic that is disproportionately hurting Native communities.") (quoting Tom Udall).

206. Alice Eng, *Through the Greed, Ignorance, and Power Behind the Law, a People Still Remain*, 18 B. C. THIRD WORLD L. J. 293, 305–08 (1998) (stating the purpose of the Act was to allow Tribes, bands, or groups of Native Americans access to the courts to have their claims adjudicated).

would not require government attorneys to be automatic adversaries.[207] Specifically, the Native Land Claims Commission Act should *not* direct the U.S. Attorney General or any government agency to automatically oppose every tribal claim.[208] This was a significant problem with the 1946 Indian Claims Commission Act that stated, "[t]he Attorney General or his assistants shall represent the United States in all claims presented to the Commission . . . ."[209] This provision, along with the Indian Claims Commission's preference for the courtroom milieu, created an unfriendly court that employed an adversarial system with rigid rules rather than a claimant-friendly commission that used informal processes, held hearings, investigated claims, acted with initiative, and permitted any relevant witness to appear.[210] Under the adversarial system, combative litigators from the Department of Justice aggressively contested every Tribe's claim.[211] The Justice Department's obstinate opposition contradicted the federal government's role as trustee for Tribes.[212] Indeed, Justice Department attorneys not only failed to act in the Tribes' interests, they actively worked against the Tribes' interests by vigorously seeking every means to dismiss tribal claims, filing numerous motions to delay the proceedings, appealing judgments it lost, and fighting against tribal claims to the bitter end.[213] The government attorneys weaponized the claims process to deny compensation to Tribes.[214] The adversarial claims process worked against tribal claimants, undermined the

207. *See* Indian Claims Commission Act § 15.

208. *But see* Indian Claims Commission Act §§ 15, 22 (requiring representation by the Attorney General or an assistant for all claims presented against the United States. Claims approved by the Commission are final, discharging all claims against the United States, and foreclosing any future claims.).

209. *Id.* at § 15.

210. *See* WILKINS, *supra* note 5, at 196 (claiming there were adverse impacts when the commission became a court, which went against the intent of Congress); Francis Moul, *William McKinley Holt and the Indian Claims Commission*, 16 GREAT PLAINS Q. 169, 170 (1996) (having "all the rituals of jurisprudence.").

211. *See* MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES 92 (Univ. of Okla. Press 1998) (perceiving Native American tribe claims as any other, and defending their client, the United States, zealously).

212. *See id.* (questioning whether the government's dual role as both defendant and trustee should have prompted defending attorneys to consider their posture towards tribal claims).

213. *See id.* (criticizing the hardline tactics taken by the Department of Justice attorneys).

214. *See id.* at 93 (agreeing to negotiate with only those claimants able to survive the "barrage of procedural motions" and definitively prove the government's liability).

Commission's purpose to compensate Tribes, and aggravated their bitterness towards the Commission throughout its existence.[215]

E. Crafting the Composition of the Commission

1. The Number of Commissioners

The Native Land Claims Commission will consist of at least fifteen commissioners, more than the original three commissioners of the 1946 Indian Claims Commission which was later expanded to five,[216] to create a sizable group able to expeditiously hear potentially hundreds of complex land claims from the more than 574 federally-recognized Tribes[217] and Native Alaskan villages.[218] Fifteen commissioners is identical to the number of judges on the Fourth Circuit, which receives 5,000 new cases and hears 450 oral arguments each year.[219]

The potentially large number of tribal land claims would allow for each initial claim to be heard by a panel of three commissioners rather than the

215. *See id.* at 92–93 ("Like many plaintiffs, the tribes sought not only money damages but also vindication, some form of acknowledgement by the defendant or the court that they had been wronged. For the Indian tribes, whose collective memories of the wrongs done them decades before still burned bright . . ."); *see also* HARVEY D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION 245–47 (1990) ("Indian frustration burst out in a dramatic fashion.").

216. *See generally Indian Claims Commission Granted More Than $36 M During 1968*, U.S. DEP'T OF INTERIOR INDIAN AFFAIRS (Mar. 28, 1969), https://www.indianaffairs.gov/as-ia/opa/online-press-release/indian-claims-commission-granted-more-36-m-during-1968 [https://perma.cc/KZ8T-Z3GD] (noting the number of commissioners appointed to the ICC was increased from three to five in 1967).

217. *About Us*, U.S. DEP'T OF INTERIOR INDIAN AFFAIRS, https://www.bia.gov/about-us [https://perma.cc/2J6T-4UX5].

218. *See* 43 U.S.C. § 1601 (1971) ("[T]here is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska."); *see generally* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 291 (2005) (noting "Indians have directed land claims at every branch of the federal government" trying to recapture land or seek compensation for land improperly taken); Maude Blair, *Issuing New Stock in ANCSA Corporations*, 33 ALASKA L. REV. 273, 273–74 (2016) (recognizing that policy changes, appropriately applied, can benefit the Native Tribes).

219. *Judges of the Court*, U.S. CT. OF APPEALS FOR THE FOURTH CIR., https://www.ca4.uscourts.gov/judges/ [https://perma.cc/SG54-MGNT]; *FAQ-Statistics*, U.S. CT. OF APPEALS FOR THE FOURTH CIR., https://www.ca4.uscourts.gov/faqs/faqs—-statistics [https://perma.cc/CXF7-EZDG].

full commission.[220] After the three-member panel issues their decision, a party disagreeing with the decision may appeal to the full commission.[221] This mirrors federal circuit court procedures where an appeal is first heard by a three-judge panel and their decision may be reviewed later in an en banc proceeding consisting of all judges of the court.[222]

2. The Makeup of the Commission

The Native Land Claims Commission Act will expressly require a majority of the commissioners to be Native Peoples.[223] The express language serves to explicitly reveal Congress' response to claims made by Native Americans by creating a commission that is inclusive of Indigenous individuals.[224] This accords with the House Report for the 1946 Indian Claims Commission Bill discussing the hope that "at least one member of the Commission will be an Indian" to "instill confidence on the part of Indian litigants in the impartial character of the Commission."[225] However, the first three commissioners on the 1946 Indian Claims Commission, as well as subsequent commissioners, were non-Native members who did not have experience with tribal issues.[226] Only near the end of the Commission's existence was a tribal member appointed—Brantley Blue, a Lumbee tribal member and former judge.[227]

220. *See* Daniel J. Meador, *Afterword*, 15 J. L. & POL. 567, 568 (1999) (proposing that the Native Land Claims Commission mirror the federal court of appeals by randomly assigning three members to a panel to decide appeals).

221. *See id.* (describing division and distribution among panels).

222. *Id.*

223. *See* H.R. REP. NO. 79-1466, at 10 (1945) (establishing in the original report at least one member of the Commission will be a Native American. The reasoning behind this appointment it "to instill confidence on the part of Indian litigants in the impartial character of the Commission.").

224. *See id.* at 2, 10 (creating a commission to include Native Americans, especially because Native Americans were never given the opportunity to a "full, free, and fair hearing on [their] claims against the government.").

225. *Id.* at 10.

226. *See* Moul, *supra* note 210, at 171 ("[T]he commission had little to do with Indians themselves. None of the original commissions had prior experience with Indian . . ." The source does confirm that at one point one Native American member was appointed to the commission, Brantley Blue, a Lumbee Indian and former judge.).

227. *See id.* (highlighting only one Native American appointment at the end of the Commissions reign, which was Brantley Blue); *see also* Glenn Ellen Starr Stilling, *Brantley Blue*,

Thus, Native Peoples should receive preference when filling positions on the Native Land Claims Commission.[228] This "Indian preference" is constitutional.[229] In *Morton v. Mancari*, the Supreme Court ruled federal law[230] granting employment preference to "qualified Indians" within the Bureau of Indian Affairs was constitutionally permissible.[231] Congress, relying on federal law and plenary power, may single out Tribes for "special treatment" based on their unique legal status.[232] The "Indian preference" is neither racial discrimination nor racial preference, explained the Court, but merely an employment criterion "to make the BIA more responsive to the needs of its constituen[cy]."[233] Further, this employment criterion is reasonably related to Congress' goal of enhancing tribal self-government.[234] Similarly, the Native Land Claims Commission's preference for a Native Peoples majority is constitutional.[235] This "Indian preference" will also make the Native Land Claims Commission more responsive to Tribes who appear before the Commission, furthering Congress' goal of enhancing tribal self-governance by reconnecting Tribes with their land.[236]

Law, LUMBEE INDIANS (Oct. 3, 2016) https://lumbee.library.appstate.edu/notable/brantley-blue-law [https://perma.cc/8DKN-RC2N] (noting Brantley Blue was not only the first, but also the only American Indian appointed to the Commission).

228. *See* H.R. REP. NO. 79-1466, at 10 (1945) (recognizing the importance of Native Peoples' participation as a commissioner to ensure fair treatment).

229. *See* Morton v. Mancari, 417 U.S. 535, 548, 554–55 (1974) (holding that on "numerous occasions [the] Court specifically upheld legislation that singles out Indians for particular special treatment. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed.").

230. *Id.* at 554–55; *see generally* 25 U.S.C. § 5116 (1934) ("Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.").

231. Morton at 417 U.S. 555.

232. *See id.* at 551–52 (drawing from both implicit and explicit constitutional authority to address problems particular to Native Peoples).

233. *Id.* at 553–54.

234. *See id.* at 555 (finding the Indian Preference provision was not racially discriminatory but rather furthered Native American representation needed for self-governance).

235. *See generally id.* (asserting Native Americans have a distinct need for self-governance that has been historically recognized by the courts and the legislature).

236. *See* Geoffrey Robert Schiveley, *Negotiation and Native Title: Why Common Law Courts Are Not Proper Fora for Determining Native Land Title Issues*, 33 VAND. J. TRANSNAT'L L. 427, 430 (2000) (discussing the significant connection between land rights and self-governance).

F. Providing Government-Funded Attorneys for Tribal Claimants

The Native Land Claims Commission Act will provide government-funded attorneys to tribal claimants requesting attorney assistance to aid Tribes with inadequate or no funds.[237] This will merely further current federal law providing "where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity."[238] Government-funded attorneys can be drawn from a qualified-attorneys list created by the Native Land Claims Commission in consultation with other organizations experienced in Native land claims such as the Indian Land Tenure Foundation whose goals include reacquiring federal lands to place under Native ownership and control.[239]

Government-funded legal assistance remedies inherently unequal representation in the 1946 Indian Claims Commission Act, which states a Tribe "may" retain an attorney whereas the Attorney General "shall" represent the United States in claims heard by the 1946 Commission.[240] Further, the 1946 Indian Claims Commission Act permitted Tribes to retain attorneys only on a contingent-fee basis and capped attorney's fees to no more than ten percent of the amount recovered if the Tribe prevailed.[241] The capped contingent-fee model was detrimental to Tribes because it (1) reduced the pool of available attorneys due to the limited payment, especially if a case spanned over a decade before resolution (2) reduced the ability of Tribes to find competent representation, and (3) incentivized attorneys representing Tribes to (a) quickly resolve

237. *See* Nancy O. Lurie, *The Indian Claims Commission*, 436 AM. INDIANS TODAY 97 (1978) (outlining several funding features and limitations included in the Act).

238. *See* 25 U.S.C. § 175 (1948); *see also* United States v. Gila River Pima-Maricopa Indian Cmty., 391 F.2d 53 (9th Cir. 1968) (ruling the statute was not mandatory and that government attorneys could not represent both the government and "Indians" in a dispute between the two parties).

239. *See* Thomas Le Duc, *The Work of the Indian Claims Commission Under the Act of 1946*, 26 PAC. HIS. REV. 1, 4 (1957) (illustrating the challenges attorneys and claimants face if unfamiliar with Native American affairs).

240. *See* Indian Claims Commission Act § 15 (outlining the rights and responsibilities as set forth in the Indian Claims Commission Act for both parties involved in legal suits).

241. *See id.* (detailing the limitations on attorney's fees for attorney's retained during Native land legal matters).

claims,[242] (b) to pressure them into not claiming land ownership and (c) to extinguish the land title upon which claim payments were made.[243]

An example of government-provided counsel includes the Indian Child Welfare Act, which provides paid attorneys to indigent Native parents in removal, placement, or termination proceedings.[244] Government-appointed counsel is also provided to indigent juveniles in delinquency proceedings where they could potentially suffer a loss of liberty through incarceration.[245] Land and liberty are intertwined.[246] Thus, the actual loss of one's *land*, along with the loss of one's prior existence and way of life, justifies providing government-funded legal representation to Tribes appearing before the Native Land Claims Commission; including juvenile and adult defendants.[247]

Civil counsel advocates persuasively argue that there is a right to counsel in civil proceedings based on democratic principles of Due Process, Equal Protection, and the right to a fair hearing.[248] Similarly, the American Bar Association's House of Delegates adopted a 2006 resolution supporting government-funded attorneys in adversarial proceedings involving basic human needs such as those involving "shelter, sustenance, safety, [or] health," and suggested that providing counsel in non-adversarial proceedings could also be beneficial.[249]

242. *See generally* John Gamino, *Indian Claims Commission: Discretion and Limitation in the Allowance of Attorneys' Fees*, 3 AM. INDIAN L. REV. 115, 115–16, 121 (1975) (listing examples of how and why the capped contingency fee turned out to be detrimental to Native Americans in their quest for justice).

243. *See* Neuman & Smith, *supra* note 134.

244. *See* 25 U.S.C. § 1912(b) (2021) (*invalidated by* Brackeen v. Haaland 994 F.3d 249 (2021)) (showing an example of government provided counsel that is statutorily authorized).

245. *See In re* Gault, 387 U.S. 1, 36 (1967) (emphasizing the importance of adequate legal counsel in proceedings where liberty is at stake).

246. *See* Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENV'T L. REV. 75 (2010) (explaining the complex relationship between private land ownership and freedom).

247. *See In re* Gault, 387 U.S. at 36 (expounding on how the potential loss of one's *liberty* justifies providing government-funded legal representation to juveniles and adult defendants).

248. *See* Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 730 (2006) (identifying successful legal theories advocates have utilized when arguing right to counsel cases).

249. *See generally* AM. BAR ASS'N, ABA TOOLKIT FOR A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_toolkit_for_crtc.pdf [https://perma.cc/2V8V-RU96] (outlining adopted civil proceeding policies).

Certainly, the improper requisition of tribal lands and the Tribes' efforts to regain their lands involve basic human issues of shelter, sustenance, safety, and health.[250] Affirming the fundamental right to shelter and housing, a New York City law provides free legal representation to tenants in eviction proceedings.[251] Similarly, the federal government should provide government-funded attorneys to Tribes who have been "evicted" from their land and homes, and who now seek the return of their land and homes.[252]

G. Including an Investigative Division

The Native Land Claims Commission Act will provide an investigative division (i.e., a Research Division[253]) to research relevant information and gather pertinent facts to aid commissioners and Tribes.[254] This remedies a severe shortcoming of the 1946 Indian Claims Commission—lacking a functioning investigative division.[255] The 1946 Indian Claims Commission Act allowed the Commission to establish an investigative division to discover the facts by searching for "all evidence" using all government documents and records for each claim.[256] The evidence would be made available to tribal claimants and any interested federal agency.[257] However, instead of creating a functioning investigative division, the 1946 Commission relied on the opposing parties to develop the facts.[258] No staff was assigned to the investigative division; it merely

250. *See* Elisabeth Wickeri, *"Land Is Life, Land Is Power": Landlessness, Exclusion, and Deprivation in Nepal*, 34 FORDHAM INT'L L.J. 930, 998 (2011) (describing the importance of land ownership in relation to basic and legal rights).

251. *See* N.Y.C. ADMIN. CODE § 26-1302 (2017) (describing program provisions).

252. *See generally id.* (providing New York code as example of government-funded legal services program).

253. *See* JANE DICKINSON, BY LAW OR IN JUSTICE: THE INDIAN SPECIFIC CLAIMS COMMISSION AND THE STRUGGLES FOR INDIGENOUS JUSTICE 76 (Deborah Kerr ed. 2018) (discussing the official entity charged with preparing a claim assessment report).

254. *See* Thomas Le Duc, *The Work of the Indian Claims Commission Under the Act of 1946*, 26 PAC. HIST. REV. 1, 3–5 (Feb. 1957), https://www.jstor.org/stable/3637239?seq=3#metadata_info_tab_contents (illustrating the need for independent research and approval from the Office of Indian Affairs).

255. *See id.* (asserting that without the Research Division there would be continued inadequacy in the claim process).

256. *See* Indian Claims Commission Act § 13(b) (clarifying statute application).

257. *See id.* (expanding on statute applicability).

258. *See* Le Duc, *supra* note 254, at 3–5 (arguing the Act of 1946 failed to resolve the complexity of the research, evidence gathering, and claims process).

consisted of a single division chief who did not investigate and instead mailed inquiries to Tribes.[259] Lack of staffing brought on by a government hiring freeze and lack of funding at the time, caused the investigative division's chief to run into problems conducting investigations.[260] The Commission's failure to create a functioning investigative division was criticized by Tribes, the Court of Claims which heard appeals, and even some commissioners.[261]

Further, if a Tribe requests research assistance, the Investigative Division will appoint a specific researcher to work directly with the Tribe.[262] During a land claim hearing, the Tribe-specific researcher can offer expert testimony to the Commission.[263] This allows the researcher who worked directly with the Tribe to provide relevant information to the Commission.[264] This avoids existing problems in the veterans' disability benefits system wherein the Department of Veterans Affairs (VA) relies on medical testimony of a compensation and pension (C&P) examiner rather than the veteran's own primary care provider to determine if the veteran has military service-connected injuries.[265] By relying on C&P examiners, the VA fails to gather relevant information from those most informed about the veteran's medical situation—the veteran's own

259. *See* Francis Moul, *William McKinley Holt and the Indian Claims Commission*, 16 GREAT PLAINS Q., 169, 170 (1996), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2102&context=greatplainsquarterly [https://perma.cc/D8NJ-WL2L] (citing the failures of how the Native Land Claims Commission Act ran their Investigative Division).

260. *See id.* (discussing the reasoning and problems that led to the overturning of the ICC).

261. *See* Moul, *supra* note 259, at 170 (emphasizing the failures and general disdain felt by the public after the many failures of the ICC investigations).

262. *See generally* Le Duc, *supra* note 254, at 3 (generalizing the purpose behind establishing the bureau of investigation within the Claims Commission).

263. *See* Danforth, *supra* note 87, at 377 (acknowledging the difficulties in the court format for settling Indian claims such as issues brought on by expert testimony).

264. *See id.* (idealizing some of the realities that should have come forward under the ICC, which would allow "scholars to freely present relevant information of a social and cultural nature" when disputing claims).

265. *See* Hugh McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 S.M.U. L. REV. 277, 292–93 (2019) (illustrating the flawed system in which the VA relies exclusively on C&P examiners to establish a case for the veterans' injuries).

doctor.[266] The Native Land Claims Commission should hear from the researcher who has worked directly with the Tribe.[267]

H. Applying Tribe-Friendly Processes, Standards, Presumptions, and Rules

The Native Land Claims Commission Act can create a Tribe-friendly process by foregoing rigid rules of evidence that hinders a Tribe's ability to present its land claim.[268] This mirrors a 1934 Indian Claims Commission bill allowing Tribes to present their claims "unaffected by rules of evidence" because Congress's goal was to promptly settle tribal claims against the United States.[269] Eschewing rigid rules of evidence to allow for a greater variety of evidence would benefit the Commission and tribal claimants, for example, by allowing tribal members to proffer oral histories to commissioners.[270] Oral histories can be regarded as admissible evidence rather than inadmissible hearsay.[271] Indeed, oral histories are potentially more accurate than written accounts if the written accounts are shaped by biases or ignorance of the indigenous culture.[272] Other evidence including historical, anthropological, and ethnographic

266. *See id.* at 292–93 (distinguishing how the VA system operates on the findings of the C&P and not their actual provider, while the ICC aims to allow an investigator to remain on the case from the beginning to end on behalf of the claim made).

267. *See generally*, DICKINSON, *supra* note 253 (remarking on the proposed function of the "research unit" who should send the commissioner assessments and recommendation regarding the initial request made).

268. *See* S. 3444, 73d Cong. § 7, at 3445 (1934) (indicating the rules of evidence which typically limits cases before the commission).

269. S. 3444, 73d Cong. § 7, at 3445 (1934) ("In any such proceeding, the examiner of the Board shall not be bound by the rules of evidence prevailing in courts of law or equity.").

270. *See* Peter R.A. Gray, *Do the Walls Have Ears? Indigenous Title and Courts in Australia*, 28 INT'L J. LEGAL INFO. 185, 203–04 (2000) (emphasizing the importance of oral records and preserving their accounts).

271. *See* Max Virupaksha Katner, *Native American Oral Evidence: Finding a New Hearsay Exception*, 20 TRIBAL L.J. 20, 38 (2001) (discussing how Canadian courts admit oral history if it is both "probative and reasonably reliable in the discretion of the trial judge," which is also the same discretion that American judges follow under FRE 403).

272. *See* Gray, *supra* note 270, at 203–04 (indicating implicit biases may impact the historical accounts of Indigenous culture).

evidence[273] may be provided along with oral histories to allow the Commission to make fully informed decisions.[274]

Second, the amount of evidence needed to bring a claim before the Commission, or to support any particular argument made to the Commission, is "any evidence."[275] This low-threshold standard has been used by courts in various settings.[276] For example, the *Adams* court stated, "In order to properly raise the issue of self-defense, the defendant need only produce 'any evidence' tending to prove that the homicide was done in self-defense."[277]

Third, a "presumption of validity" will be applied to tribal land claims.[278] A Tribe's filing of a land claim will be prima facie evidence of the validity and accuracy of the land claim.[279] This mirrors the bankruptcy rule which states a creditor's written statement setting forth the creditor's claim constitutes "prima facie evidence of the validity and amount of the claim."[280] A debtor's mere objection to the claim does not invalidate the claim.[281] The objector has the burden of proof to produce evidence sufficient to rebut the presumption of the claim's validity.[282] Likewise, a Tribe's filing of a land claim is presumed valid and accurate.[283] An objecting party has the burden of proof to produce

273. *See* A. Dan Tarlock, *Tribal Justice and Property Rights: The Evolution of Winters v. United States*, 50 NAT. RES. J. 471, note 23 at 477 (2010) (suggesting the addition of scientific evidence may enhance necessary background for an oral history).

274. *See* Gray, *supra* note 270, at 203–04 (allowing the support of other anthropological evidence to support histories potentially tainted by bias).

275. *See* State v. Adams, 641 P.2d 1207, 1209 (Wash. Ct. App. 1982) (creating the "any evidence" standard as the evidentiary criteria for supporting your assertions before an agency's commission).

276. *See id.* (suggesting the "any evidence" standard is widely used across various court proceedings).

277. *Id.* (quoting the majority opinion which explains the evidentiary standard behind a self-defense claim).

278. *See* FED. R. BANKR. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").

279. *See id.* (indicating that a claim itself is proof of validity).

280. *Id.*

281. *See In re* Clark, No. 1:14-CV-00502-EJL, 2015 WL 5595501, at *2 (D. Idaho Sept. 22, 2015) (holding objections do not by itself invalidate a claim when the claim is prima facie evidence of validity).

282. *See id.* (indicating that since a claim itself is evidence of validity, those challenging the claim must produce evidence to the contrary in order to substantiate an objection).

283. *See* FED. R. BANKR. P. 3001(f) (comparing the validity of a tribal claim, to the validity of a creditors written statement as set out in the Federal Rules of Bankruptcy Procedure).

evidence sufficient to rebut the presumed validity and accuracy of the Tribe's claim.[284] Further, placing the burden of proof on the non-tribal claimant is similar to current federal law that places the burden of proof "upon the white person"[285] in any trial involving property rights when the other party is a Native person[286] or Tribe.[287]

Fourth, tribal claimants appearing before the Commission will be afforded a strong presumption of acting in "good faith."[288] This mirrors the "strong presumption that government officials act in good faith."[289]

Fifth, the evidence provided by a tribal claimant to support the land claim will be accorded a "presumption of accuracy."[290] The 1946 Indian Claims Commission accorded this presumption to government officials submitting accounting reports to the Commission.[291] Similarly, this presumption of accuracy should apply to all types of tribal-proffered evidence—including tribal oral histories, anthropological studies, and any other evidence provided by the Tribe.[292]

Sixth, the Native Land Claims Commission Act will include the 1946 Act's provision requiring the 1946 Commission to hear "claims based upon *fair and honorable dealings* that are not recognized by any existing law or equity."[293] This Tribe-friendly provision includes "moral"

284. *See In re* Clark, 2015 WL 5595501, at *2 (comparing the burden of proof in a tribe's claim as prima facie evidence, to the burden of proof as explicated in this case).

285. *See* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 658 (1979) (defining the term "white person" as "any 'non-Indian' individual or entity.").

286. 25 U.S.C. § 194 (2009); *see also* Wilson, 442 U.S. at 658 (expounding on federal law which states the burden of proof is on the white person "whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.").

287. *See* 25 U.S.C. § 194.

288. *See* White Mountain Apache Tribe of Ariz. v. United States, 26 Cl. Ct. 446, 449 (1992), *opinion corrected* (July 17, 1992), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993) (explaining the presumption of accuracy and "good faith" in acts was adopted by the Indian Claims Commission).

289. *Id.*

290. *See id.* (stating it is the plaintiff's burden to raise any exceptions to these "presumptively correct" or "presumptively accurate" reports).

291. *See id.* (reiterating the government's initial burden of establishing the propriety of disbursements to the Native American claims).

292. *See generally* Gray, *supra* note 270, at 203–04 (applying the importance of the presumption of accuracy to all tribal evidence presented in court because courts automatically prefer written records over oral records due to the Anglo-Australian legal system inclination for the accuracy of written works).

293. Indian Claims Commission Act, § 22(a).

considerations.[294] The 1946 Commission failed to make use of this provision's full potential.[295] However**,** the proposed Native Land Claims Commission should make use of the provision because a Tribe's "moral" claim can hold the United States liable for actions they're engaged in—even those within its constitutional or legal authority—if those actions are "less than fair or honorable" to the Tribe.[296] The "fair and honorable dealings" provision arguably cannot supersede the constitutional powers of the United States unless the United States expressly waives its sovereign powers.[297] But as stated by Judge Nichols, the United States, through the "fair and honorable dealings" provision, "has honorably waived its sovereign immunity, waived the statute of limitations, and exposed itself to suits not even founded on law or equity."[298] Further, under the "fair and honorable" provision, an opposing party such as the government, may not use legal defenses that include statutes of limitation or laches, to stifle a Tribe's claim.[299] Unfortunately, the 1946 Commission diminished the "fair and honorable dealings" provision by holding it could not be used if a Tribe's claim could be tried under law or

294. *See* Confederated Tribes of Colville Rsrv. v. United States, 964 F.2d 1102, 1110 (Fed. Cir. 1992) ("[T]he Act commands the Commission to examine all of the facts presented to determine whether, in the broad moral sense, the conduct of the Government in its dealings with the Indians was fair and honorable.").

295. *See generally* Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359, 361-62 (1973) (noting Congress had a strong interest in changing the process system for Indian Claims because of the widespread dissatisfaction).

296. *See* Confederated Tribes of Colville Rsrv., 964 F.2d at 1113 (requiring courts to perform "a judicial inquiry into the facts and circumstances" of certain cases considering the moral cause of action. "That inquiry must of necessity include evaluation of whether or not the Government undertook a special relationship to the Tribes.").

297. *See id.* at 1110 ("[I]t is obvious that Congress did not surrender any right to assert its sovereign powers under the Commerce Clause, much less the power to exercise the navigational servitude over Indian lands, in either explicit or implicit terms when it enacted the fair and honorable dealings clause of the ICCA.").

298. United States v. Oneida Nation of N.Y., 576 F.2d 870, 887 (Ct. Cl. 1978) (Nichols, J., concurring and dissenting).

299. *See* S. REP. NO. 79-1715, at 5307–09 (1946) (opining the provision that "no claim shall be excluded from consideration on the ground that it has become barred by law or any rule of law or equity or that it is barred by any statute of limitations or by laches" might be regarded as authorizing the reopening of all Native claims and suits already adjudicated by the courts or otherwise disposed of).

equity.[300] The "fair and honorable dealings" provision became a secondary provision that was infrequently used,[301] thus undermining Congress's intent for Tribes "to have the full panoply of remedies—legal, equitable and moral—laid out in . . . the [1946] Indian Claims Commission Act."[302] To avoid this outcome, the Native Land Claims Commission Act will explicitly state that all remedies—whether legal, equitable, moral, or otherwise—are equally available to all tribal claimants, individually or in some combination, when a Tribe brings forth a claim.[303] Thus, the full panoply of remedies, including the "moral" remedy, will be included in the Native Land Claims Commission Act.[304] Seventh, all conflicts in fact, legal principles, expert opinions, or other "doubtful expressions" will be resolved in favor of the tribal claimant.[305] This is analogous to any conflict between the Southwest Intertribal Court of Appeals' Rules of Appellate Procedure and tribal rules of procedure being resolved in favor of tribal rules.[306] This resolve-in-favor-of-Tribes provision is also analogous to the rule for interpreting certain statutes.[307] As the Court stated in *Alaska Fisheries v. United States*, "[t]he general

300. *See* Danforth, *supra* note 87, at 400 (explaining the "fair and honorable dealings" clause was broader than the other provisions because claims that were too weak to be won on the basis of the more stringent clauses could be successfully argued as involving an absence of "fair and honorable dealings").

301. *See id.* at 401 (explaining how clause five was used as a last resort. Because of the small number of cases tried under this provision, little can be said about the guidelines).

302. *See* Cherokee Nation of Okla. v. United States, 937 F.2d 1539, 1547 (10th Cir. 1991) (defining "panoply" as a complete or impressive collection of things).

303. *See* Danforth, *supra* note 295, at 366 ("Congress intended the policy it would create would eliminate a moral wrong by hearing all outstanding claims, not only those with bases in law or equity but those of a moral nature. 'In order to settle finally any and all legal, equitable and moral obligations that the United States might owe to the Indians, Congress passed the Indian Claims Commission Act . . .'").

304. *See generally* Cherokee Nation of Okla., 937 F.2d at 1547 (agreeing that Congress intended for the Indian Claims Commission Act to include those moral remedies; however, this does not mean that recovery for the First Nation is automatically intended).

305. *See* Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918) (recognizing what Indigenous tribes have done and continue to strive for; therefore, Congress is intending to conform its actions to the Native tribes' situation and needs).

306. *See* Christine Zuni, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309, 310 (1994) (explaining the Southwest Intertribal Court of Appeals is an impartial forum for the review of tribal court decisions and is open to Tribes in New Mexico, Arizona, Southern Colorado and Western Texas).

307. *See generally* Alaska Pac. Fisheries, 248 U.S. at 89 (requiring a liberal construction of any statute to be utilized for the benefit of Indian tribes in accordance with Choate v. Trapp).

rule [is] that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, *doubtful expressions being resolved in favor of the Indians*."[308] This resolve-in-favor-of-Tribes provision and others above will help create a Tribe-friendly process that ensures land justice is provided to Native Peoples.[309]

I. Allowing Non-Federally Recognized Native Groups to File Land Claims

The Native Land Claims Commission, like the 1946 Indian Claims Commission, will hear the claims of "any Indian tribe, band, *or other identifiable group* of American Indians residing within the territorial limits of the United States or Alaska."[310] The inclusion of those of "other identifiable group[s]" will permit Native groups that are not federally recognized to file claims with the Native Land Claims Commission.[311] As the Supreme Court stated in *McGhee v. Creek Nation*, "[t]he . . . fact that the United States has never recognized by treaty or otherwise the recently formed tribal organization of Eastern Creeks, *does not, we think, defeat their right to present a claim to the [1946] Indian Claims Commission as an identifiable group* "[312]

Accordingly, when the Native Land Claims Commission notifies Native communities of the opportunity to file a land claim, the Commission will notify not only federally recognized Tribes, but also non-federally recognized Tribes, bands, or other identifiable groups of Native Americans.[313] This remedies a prior problem under the 1946 Indian Claims Commission wherein the Bureau of Indian Affairs, tasked

308. *See id.* (emphasis added).

309. *See generally* Indian Claims Commission Act, § 2 (providing the ability for Indian tribes to file a claim arising from the taking of land by the United States without the proper compensation).

310. *See id.* (emphasis added).

311. *See id.* at § 19 (providing all Native groups, including those not recognized by the federal government, express authorization to bring claims arising under the laws of the United States and equity).

312. *See* McGhee v. Creek Nation, 122 Ct. Cl. 380, 392–93 (1952) (asserting that the Eastern Creeks have a right to present claims to the Indian Claims Commission) (emphasis added).

313. *See* WILKINS, *supra* note 5, at 97 (discussing the policy errors made in connection with the Indian Claims Commission in its early years including a failure to provide notice to Native groups other than those federally recognized of the existence of the Commission or the procedures to follow to initiate a case thereunder).

with notifying Tribes of their right to bring claims, notified only federally recognized Tribes.[314]

J. Requiring Objectors to Negotiate with Tribal Claimants

The Native Land Claims Commission Act will also promote negotiations by requiring any party objecting to a Tribe's land claim to attempt to reach a settlement with the Tribe, which aligns with the preferences of the U.S. Court of Federal Claims.[315] This alleviates a problem presented by the 1946 Indian Claims Commission Act by permitting alternate avenues for relief of Native claims, rather than allowing only the Attorney General to compromise any claims.[316] As the only method for dispute resolution, the Department of Justice enjoyed decades of discretion to bottleneck negotiations with Native Tribes.[317] Ralph Barney headed the Justice Department's Indian Claims Section from the 1940s into the 1970s and instituted "hard-ball litigation" tactics that resulted in an unwritten no-settlement policy.[318] He disfavored staff who discussed settling with Tribes and repeatedly bragged about the long years it took for Tribes to recover under the 1946 Indian Claims Commission Act.[319] The Justice Department would not negotiate with Tribes, but it simultaneously adopted a rapid settlement policy in its antitrust division—accommodating big business in a way it refused to work with Native groups.[320] Representative Stewart Udall criticized the

314. *See* Lurie, *supra* note 237, at 98 (noting the Bureau of Indian Affairs contacted only federally recognized groups and thereby overlooked many other Native groups on the eastern seaboard).

315. *See generally* R. U.S. Ct. Fed. Claims, Appx. H, 165–68 (Aug. 2, 2021) (encouraging alternative dispute resolution and widening the availability of such procedures).

316. *Compare id.* (allowing Native groups to settle their claims through alternative dispute resolution); *with* Indian Claims Commission Act, Pub. L. No. 79–726, § 15, 60 Stat. 1049, 1053 (1946) (illustrating the rigid and one-sided procedures under which compromises were previously submitted to the Indian Claims Commission as part of a report that would later be considered).

317. *See* LIEDER & PAGE, *supra* note 211 at 93–94 (explaining the lengths the Justice Department would go to stall claims, appeal every adverse judgement, and avoid reaching settlements "with any consistency").

318. *See id.* (describing Ralph Barney's philosophy resolving—or avoiding the resolve of—Native claims, "believed [to be] driven by anti-Indian feelings").

319. *See id.* at 94 (detailing how the Department head's opposition to settling Indian claims became the overall stance of the Department's handling of claims under the Indian Claims Commission Act).

320. *See id.* (contrasting how the Justice Department dragged out the resolution of Indian claims with the "relatively rapid resolution of disputes involving big businesses").

Justice Department's no-settlement policy as "harsh" and reflecting poorly on the federal government.[321]

K. Returning Mineral and Water Resources

Land encompasses both mineral and water resources.[322] Self-governance and self-sufficiency entail control of the land and its resources.[323] Thus, the Native Land Claims Commission Act will authorize including mineral and water rights when returning land to tribal claimants.[324] This aligns with Senator Bradley's 1987 bill (the Sioux Nation Black Hills Act) that directed the federal government to convey designated "Federal lands, *mineral estates*, and *water rights* to the Sioux Nation in fee simple, without warranties of any kind."[325] A long-term injustice could be corrected by returning the Black Hills and its resources to the Sioux Nation.[326] Returning land and resources to other First Nations would correct other long-term injustices.[327]

321. *See id.* at 93 (acknowledging that congressional representatives criticized the Justice Department's no-settlement policy towards Native claims).

322. *See* June Prill-Brett, *Indigenous Land Rights and Legal Pluralism Among Philippine Highlanders*, 28 L. & SOC'Y REV. 687, 695 (1994) (defining ancestral domains to include "titled properties, forests, pasture lands, fields, hunting grounds, worshipping areas, burial grounds, bodies of water, mineral resources, and air spaces.").

323. *See* Jennifer McIver, *Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?*, 10 GEO. INT'L ENV'T L. REV. 147, 165 (1997) (asserting self-governance includes access and control of land and its resources).

324. *See* 133 CONG. REC. S2921-03 (daily ed. Mar. 10, 1987) (proceedings concerning the Sioux Nation Black Hills Act, S. 705, 100th Cong. § 5(b)(1) (1987)).

325. 133 CONG. REC. S2921-24, (daily ed. Mar. 10, 1987) (statement by Senator Kerry on submission of Senate Bill S.691, "A Bill to Limit the Testing of Antisatellite Weapons").

326. *See id.* (acknowledging the acquisition of the Black Hills land and resources was taken from the Sioux Nation illegally. Thus, it's time for the American government to fix this 119-year injustice right by returning the land to its rightful owners.).

327. *See id.* (describing why Congress wants to transfer ownership back to First Nations); *see also* David Helvarg, *Island of Resilience: The Wiyot Reclaim Their Land and Culture from a Dark Past*, 21 AM. INDIAN MAG. 16, 17 (2020) [https://perma.cc/GU96-KV5K] (summarizing the massacre that the Wiyot Tribe experienced when white vigilantes attacked them for believing that Natives had stolen cattle from them); *see also* Springer, *supra* note 190 (suggesting the rightful owners should be compensated for the royalties they have lost due to the illegal acquisition of the Natives' land, the appreciation of the land, and the discovery of other resources in the land).

L. Addressing the Limits of Justice

The long passage of time since the taking of land from First Peoples imposes limits on the land return efforts.[328] A representative on the Lake Leech Tribal Council observed, "[i]n a perfect world, we would ask the federal government for every inch of Leech Lake reservation to go back to its rightful owners, but now with so many different land exchanges and ownership changes that's probably unrealistic."[329] Accordingly, the Native Land Claims Commission's return of land will include a pledge from the Tribe to respect existing encumbrances such as utility easements, rights-of-way for roads, and water flowage and reservoir rights.[330] This accords with a 2020 federal law that restored federal reservation land in trust to the Leech Lake Band of Ojibwe, but included a congressional finding that "the Tribe . . . has pledged to respect . . . easements . . . and other rights."[331]

Further, the Native Land Claims Commission will return land without affecting private title to land.[332] This negates Justice Stevens' fear that "ancient claims" leading to the return of tribal land would cause "disruption" among private property owners.[333] The Wiyot Tribe

328. *See generally* Maya Rao, *Congress Weighs Returning 12,000 Acres to Leech Lake Band of Ojibwe*, STAR TRIB. (Dec. 19, 2018, 10:18 PM), https://www.startribune.com/congress-weighs-returning-12-000-acres-to-leech-lake-band-of-ojibwe/503141662/?refresh=true [https://perma.cc/K56B-D4N9] (recognizing the acquisition and transfers of land rightfully owned by the Ojibwe Tribe were illegal. However, despite the Secretary of the Interior acknowledging this injustice in the 1950s, the Supreme Court of the United States, in the 1980s, limited the ability of tribal members to win their land back.).

329. *Id.*

330. *See* Leech Lake Band of Ojibwe Reservation Restoration Act of 2020, Pub. L. No. 116-255, 134 Stat. 1139, 1140 (2020) (explaining the agreement between the government and the tribes to respect certain rights once these tribes acquire their lands back).

331. *See id.* ("[O]n reacquisition by the Tribe of the Federal land, the Tribe has pledged to respect the easements, rights-of way, and other rights . . .").

332. *See generally* Sarah Holder, *This Land is Your Land: A City Returns a Stolen Island to a Native Tribe*, BLOOMBERG CITYLAB (Nov. 4, 2019, 11:29 AM), https://www.bloomberg.com/news/articles/2019-11-05/a-native-tribe-s-quest-to-reclaim-duluwat-island [https://perma.cc/9UBS-GSD4] (reporting the rare story of a Native tribe in California that was able to reclaim their land back from the government. Unfortunately, the Wiyot people experienced a massacre that resulted in the erasure of their culture and imprisonment of their people. After this, the government seized control of Duluwat Island, which the Wiyot Tribe fought to reclaim, without strings attached, from the government.).

333. *See* Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 273 (1985) (Stevens, J., dissenting) (claiming that the return of land to the Oneida Indian Tribe will cause issues to private

respected private property rights when part of their land on Tuluwat Island in California was returned.[334] The Tribe's land was taken in 1860 when white settlers attacked the Wiyot Tribe during its renewal ceremony.[335] The attackers used various weapons including hatchets, clubs, and knives to murder approximately 200 tribal members including children.[336] Over a century later in 2000, the Wiyot Tribe purchased 1.5 acres of land on the eastern edge of Tuluwat Island.[337] Tribal members and volunteers had to clean up tons of toxic materials and debris.[338] In 2004, the City of Eureka returned forty acres of Tuluwat Island to the Wiyot people, partly, due to their cleanup.[339] In 2019, the Eureka City Council voted unanimously to return Dulwat Island to the Wiyot tribe with "no strings attached."[340] Shortly after the vote, the Eureka mayor and the Wiyot tribal chair signed a deed of trust to formally transfer

property owners. Justice Stevens makes the argument that the Framers expected nobody in the future to be punished for their injustices against Indian Tribes. Therefore, letting the Oneida Tribe reclaim their land is an injustice to the people who personally own part of that land under their name. Punishing these people for the injustices of the Framers is unfair and should not have been allowed by the Supreme Court. Due to this, Congress will now have to step in to make another injustice right, but this time for property owners).

334. *See* Holder, *supra* note 332 ('"We know what it feels to be marched here and marched there. We know what it's like to lose our land,' said [the National Congress of American Indians Spokesperson] 'We will not do that to somebody else . . .'").

335. *See* Helvarg, *supra* note 327, at 16 (summarizing the agonizing history of how the Wiyot Tribe lost Tuluwat Island to white settlers).

336. *See id.* (illustrating the massacre that the Wiyot Tribe experienced by white vigilantes).

337. *See* Julia Wick, *Newsletter: Eureka Returns an Island to a Tribe Nearly 160 Years After a Massacre*, L.A. TIMES (Oct. 22, 2019, 3:30 AM), https://www.latimes.com/california/story/2019-10-22/eureka-wiyot-indian-island [https://perma.cc/EA82-2QS5] (discussing the first victory of the Wiyot Tribe in reclaiming their stolen land).

338. *See* Helvarg, *supra* note 327, at 20 (requiring cleaning efforts over a period of years to remove engines, containers of paint, "more than 60 tons of iron and steel," and decayed buildings and water tower).

339. *See id.* (acknowledging the hard effort the Wiyot tribe put into restoring and preserving their land. The Wiyot tribe not only removed debris from the island, but they also focused on rescuing and replenishing the island's native plants and wildlife. Through multiple efforts, in conjunction with religious institutions and environmental groups, the Wiyot tribe was able to restore their land back to its original form. This effort did not go unnoticed by the City of Eureka which is why they returned 40 acres of the land back to the Wiyot tribe.).

340. *See id.* (testifying to the easily and unanimously made ten-minute decision by Eureka City Council to renounce their deed on the remaining 202 acres of the island and return it to the Wiyot tribe).

ownership of the Island to the Wiyot Tribe.[341] However, a few locals still own private land constituting ten percent of the island.[342] Although the Tribe welcomes opportunities to buy or receive parcels of privately owned land if it becomes available, the Tribe will not pressure the locals to leave or feel unwelcome.[343] The Tribe intends to be a good neighbor because they "know what it's like to not be wanted, and to have [their] land taken away."[344]

The Sioux also respect private property, which is evident by their refusal to seek privately owned land in their pursuit of reclaiming the Back Hills.[345] "We have to coexist," averred Lionel Bordeaux, president of Sinte Gleska University on the nearby Rosebud Reservation.[346]

341. *See* Thadeus Greenson, *Duluwat Island is Returned to the Wiyot Tribe in Historic Ceremony*, N. COAST J. (Oct. 21, 2019, 2:40 PM), https://www.northcoastjournal.com/NewsBlog/archives/2019/10/21/duluwat-island-is-returned-to-the-wiyot-tribe-in-historic-ceremony [https://perma.cc/M9AL-7G8X] (capturing the unprecedented moment where the City of Eureka returned the 200 acres that were illegally stolen from the Wiyot tribe back to them).

342. *See* Holder, *supra* note 332 (recognizing that a portion of the island is privately owned by people outside of the Wiyot tribe. Despite this, the tribe has decided to respect these people's ownership of the land as they "know what it's like to lose [their] land." Due to this experience, the tribe has concluded cohabiting with these private landowners.).

343. *See* U.S. Env't Prot. Agency, *Environmental Stewardship and Cultural Preservation on California's Coast: The Tuluwat Village Site on Indian Island in Humboldt County, California*, 6 (Mar. 2018), https://semspub.epa.gov/work/HQ/100001200.pdf [https://perma.cc/L646-A4VE] (quoting welcoming statements made by the Wiyot Tribal Chairwoman Cheryl Seidner. Seidner mentioned they are open to buying any available private land but would never want to make their neighbors feel unwelcome on their land. The tribe is aware that the island is now a home to many people, and they would never rob these private landowners of that. The Wiyot tribe is not about robbing people from their land as they are a "friendly and welcoming tribe.").

344. *See id.* (reporting the testimony of the Wiyot Tribal Chairwoman, Cheryl Seidners, who stated that "the tribe does not want to make their neighbors feel unwelcome." It is the goal of the tribe to cohabit with their neighbors and avoid stealing these private owners' land from them the same way the island was first stolen from the tribe.).

345. *See Why the Sioux Are Refusing $1.3 Billion*, PBS NEWSHOUR (Aug. 24, 2011, 3:57 PM), https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23 [https://perma.cc/X52H-5WEZ] (quoting general counsel for the Oglala Sioux Tribe, who believes that the Sioux people "understand that times have changed, they cannot remove non-member of the tribe from [the Black Hills]").

346. *See id.* (expanding on the position the Sioux tribe has maintained since 1877. The tribe decided that they would never illegally confiscate their land back from either the government or private owners as it goes against their principles and morale. They want their land to be properly returned to them which is why they have agreed to manage a way to live together with their neighbors on their land.).

CONCLUSION

The Indian Claims Commission was debated during a period where President Franklin D. Roosevelt called for a "New Deal" for the American people and lawmakers, such as Representative James O'Connor, called for a "fair deal" for Native Peoples.[347] The Indian Claims Commission was eventually established in 1946 after the end of World War II when the country shifted its focus from external wars to internal endeavors.[348] President Joe Biden has more recently called for a more modern, but analogous, mandate—to extend internet access to tribal lands.[349] Just as the conclusion of World War II accommodated the establishment of the 1946 Indian Claims Commission, the end of the wars in Iraq and Afghanistan has created another post-war period where internal endeavors can include the creation of a new commission—the Native Land Claims Commission—so that First Peoples are included to ensure that new bargains correct old injustices.[350]

347. *See* 81 CONG. REC. H8108 (daily ed. June 23, 1937) (statement of Rep. James F. O'Connor on Indian Claims Commission) (arguing members of Indian tribes should have as much of a chance to not only have their own commission, but also sit in on the Committee. Representative O'Connor goes on to explain that this commission is a way to give Native Americans a voice on matters that concern them. After all the injustices they have had to endure, he believes it is time for the United States government to step up and fulfill their duty owed to Native Americans.).

348. *See* Danforth, *supra* note 87, at 361 (describing the processes created by the Indian Claims Commission, inspired by Congress' interest in amending the dissatisfying procedures in place, to provide Indian tribes with recourses, and to right moral wrongs).

349. *See* Press Release from the Briefing Room of the White House, Biden-Harris Administration Mobilizes Resources to Connect Tribal Nations to Reliable, High- Speed Internet (Dec. 22, 2021) (on file with the official White House website) (setting a goal of ensuring that all Americans—including Native Americans—have access to reliable, affordable, and high-speed internet to learn, work, and participate in the 21st century economy.").

350. *See generally* Danforth, *supra* note 87, at 359 (reflecting on the societal changes that took place before 1946 to accommodate the overdue "rectify[ing of] historical wrongs.").