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Indian Land Acquisition in the Context of the Transcontinental Railroad

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I. Introduction

The concept of land ownership in the United States can be incredibly complicated, as can the process of acquiring and disposing of title to that land. There are many variables to consider: Who holds title? Do they hold title in fee simple absolute? Are there any encumbrances on that title? Land ownership and acquisition is even more complex in the context of American Indian law, or the law regarding the tribes and tribal members of the various indigenous communities throughout the country. Indian tribes historically held an "Indian" or "aboriginal" title to their lands, a concept which now it not recognized by nearly any court of law, at least not in its original sense. Today, many tribal members have a "vested" title to their lands, or perhaps they live on a reservation. These different types of ownership and their definitions emerged and wavered throughout the eighteenth and nineteenth century as the federal government was in the process of developing its relationship with Indian tribes.

The federal government has used treaties and statutes to create the complex intricacies of Indian land ownership. In many cases, there are limitations on alienation: To whom can you sell your land? Can you sell it at all? In some cases, only the government can take your land, and then they can sell it to a third party. These treaties and statutes have ebbed and flowed over the last two centuries, but a great period of change occurred at the turn of twentieth century, after mass relocation, the Allotment Act, and the expansion of the reservation system.

At the same time, the U.S. was creating and expanding a vast railroad network into the western half of the country, which had previously been limited to routes east of Chicago. This expansion into the American West, filled with indigenous communities and relocated tribes from the East, created the perfect storm for an onslaught of litigation and legislation in the areas of tribal land and railroad construction and operation. For example, in many cases, a railroad

company was granted Indian land through an Act of Congress to build a railroad, but since that grant, the type of Indian land ownership was altered, and now both parties are unsure of who holds title to the parcel, and litigation ensues.

This paper illustrates the vast complexities of Indian land ownership through the lens of railroad construction and operation over the last two centuries. The paper will focus more specifically on policies and case law in the late 1800s and early 1900s, but the required historical context dates years before the first transcontinental railroad and expands far beyond into the present day.

II. Indian Land Acquisition: An Overview

To understand the context of American railroad construction through Indian lands, it is important to explain both the various forms of legal Indian land ownership and the means through which the government and private parties acquire formerly Indian lands.

a. Indian Land Property Interests

The concept of Indian, or aboriginal, title was outlined first by the U.S. Supreme Court in *Johnson v. McIntosh*, where the Court held that the plaintiff's title, which was derived from a previous purchase from Piankeshaw Indians, could not be valid in a court of law.[1] In that case, plaintiff Johnson's lessees brought an ejectment action against William McIntosh, who had obtained a land patent to the same land from the U.S. government.[2] In his opinion, Chief Justice Marshall criticized the "uncivilized" nature in which the land was used before European discovery and wrote that said discovery "gave an exclusive right to extinguish the Indian title of

[1] *Johnson v. M'Intosh*, 21 U.S. 543, 604 (1823).
[2] *Id*. at 543.

occupancy, either by purchase or by conquest."[3] *Johnson* gave the federal government broad authority to either extinguish Indian title unilaterally or purchase title without any competition from private parties.

Although the *Johnson* opinion broke down the theory of Indian title, Marshall explained that Indian inhabitants of the land retained some rights after discovery. For example, they remained the rightful occupants of the land, with a legal claim to retain possession of it and use it as they please.[4] The *Johnson* decision diminished their rights to complete sovereignty, as well as their power to dispose of the land at their will to whomever they pleased.[5] In this strong articulation of the discovery doctrine, the Court held that the United States had an underlying fee title to all Indian lands "within the boundary lines described in the treaty" of Paris, ending the American Revolutionary War.[6]

The *Johnson* decision came early in the Supreme Court's extensive Indian law jurisprudence and was followed by the landmark case of *Worcester v. Georgia*, where Marshall outlined the extent of tribal sovereignty and the relationship between tribes and the U.S. government.[7] The controversy in this case was based on a Georgia law which prohibited "all white persons [from] residing within the limits of the Cherokee nation … without a license or permit" from the governor.[8] Worcester and his allies argued that the acts of the Georgia legislature seized the whole Cherokee country, extended its laws over unceded land and "annihilate[d] its political existence."[9] In a slight turn from his opinion in *Johnson* just nine years

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[3] *Id*. at 587.
[4] Matthew L.M. Fletcher, *The Pedagogy of American Indian Law: Article: The Iron Cold of the Marshall Trilogy*, 82 N.D. L. Rev. 627, 632 (2006).
[5] *Id*.
[6] *Johnson*, 21 U.S. at 584-585.
[7] *Worcester v. Georgia*, 31 U.S. 515 (1832).
[8] *Id*. at 542.
[9] *Id*.

earlier, Chief Justice Marshall wrote a majority opinion declaring the law unconstitutional, arguing that the Cherokee nation was a "distinct community occupying its own territory … in which the laws of Georgia can have no force."[10]

In essence, *Worcester* dismantled the discovery doctrine, which was outlined in *Johnson*, holding that discovery itself did not assign fee title to the discoverer.[11] The *Worcester* Court noted that in the Treaty of Paris, the King of Great Britain could cede only what belonged to his crown, which did not include the outlined boundaries of the Cherokee nation and other distinct Indian communities over which title was inappropriately claimed.[12] However, *Worcester* was followed shortly after by the Trail of Tears and by the Supreme Court's decision in *Mitchel v. United States* (1835), which overruled part of *Worcester* and returned to the *Johnson* dicta, holding that preemption granted fee title to the discoverer.[13]

The Court revisited the concept of Indian, or aboriginal, title in *United States v. Santa Fe. Pacific Railroad Co.*, holding that Congress' extinguishment of title is plenary but not presumed without display of clear intent.[14] The case was brought by the federal government on behalf of the Walapai (Hualpai) Indian tribe against the railroad, which claimed that Indian title was extinguished by statute in 1866.[15] However, the Court also held that the creation of an Indian reservation through executive order effectively extinguishes Indian title claims to lands outside of the reservation bounds, regardless of whether the lands were continuously occupied.[16]

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[10] *Id*. at 561.
[11] *Worcester*, 31 U.S. at 560.
[12] *Id*. at 561.
[13] Fletcher, *supra* at 647.
[14] *United States v. Santa Fe P. R. Co.*, 314 U.S. 339 (1941).
[15] *Id*. at 343.
[16] *Id*. at 359.

Later, the Supreme Court continued to chip away at the rights guaranteed to those who held land under the theory of Indian title. In *Tee-Hit-Ton Indians v. United States*, the Court held permissible a taking of certain timber from Alaskan Natives' lands without just compensation, arguing that it is the obligation of Congress to make contributions for Indian lands "rather than subject the Government to an obligation to pay."[17] This case again affirmed the dicta in *Johnson*, which denied the power of an Indian tribe to pass down a right of occupancy, which the Tee-Hit-Ton held here.[18] The Court explicitly dismissed the idea of required compensation for extinguishing Indian title "without specific legislative direction to make payment."[19]

While Indian or aboriginal title is easily extinguished and often without just compensation, recognized, or vested, title is derived from explicit governmental recognition of aboriginal property rights. Vested title is created when Congress, through treaty or statute, confers upon the Indians a right to permanently occupy and use land.[20] However, the Congressional statement must intend to confer legal rights, not merely permissive occupation.[21] Another important distinction between Indian title and vested title is that the latter does not require actual use and occupancy of the lands, so a claim of "tribal abandonment" cannot be successful to defeat vested title.[22]

The distinction between Indian title and vested title is particularly important within the Indian Claims Commission (ICC), which grants compensation to tribes for deprivation of both forms of title.[23] Before the ICC was created in 1946, tribal plaintiffs' access to judicial remedies

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[17] *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290 (1955).
[18] *Id*. at 279-280.
[19] *Id*. at 283, citing *United States v. Tillamooks*, 341 U.S. 48 (1946).
[20] *Tee-Hit-Ton Indians*, 348 U.S. at 277-278.
[21] *Id*. at 279.
[22] *Crow Tribe of Indians v. United States*, 151 Ct. Cl. 281, 284 F.2d 361 (1960).
[23] *Id*. at 283.

was extremely limited. Beginning in the late 1800s, Congress began passing laws waiving sovereign immunity in specific cases, allowing for damage claims against the United States by tribal members.[24] This tedious process led to the Indian Claims Commission Act of 1946, which created the ICC, a quasi-judicial body responsible for all tribal claims against the U.S., to be reviewed in the Court of Claims.[25] The Act specifically provided for jurisdiction over "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant."[26] In the case of *Otoe and Missouri Tribe of Indians*, the Supreme Court construed the Commission's power to include jurisdiction over governmental takings of aboriginal title.[27]

Vested title is often created through congressional act, by a ratified treaty, federal statute, or other agreement.[28] Intent to create a permanent legal interest must be explicit.[29] The court will carefully examine any statute and relevant legislative history to determine the intent of Congress to grant either a permanent legal interest or simply a right of occupancy.[30] While most Supreme Court cases assume that the creation of vested title requires congressional action, some statutes grant the Court of Claims the authority to hear causes of action arising under executive orders.[31] In either case, a vested property right is substantial compared to Indian title because the former provides constitutional protection against uncompensated takings.[32]

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[24] Russel Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58 N.L. L. Rev. 7, 19 (1982).
[25] Act of Aug. 13, 1946, Ch. 959, 60 Stat. 1049, 25 U.S.C. §§ 70 *et seq.*
[26] 25 U.S.C. §§ 70a.
[27] 350 U.S. 848 (1955).
[28] *Tee-Hit-Ton Indians*, 348 U.S. at 277.
[29] *Id*. at 278 (holding that neither statute offered by the Tee-Hit-Ton Indians indicated any intention by Congress to grant the Indians any permanent rights in the lands of Alaska).
[30] *Id*.
[31] 28 U.S.C.S. § 1505.
[32] *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 323 (1942).

As previously noted, the tribal claimant has the obligation of demonstrating Congressional intent to affirmatively grant or recognize tribal property rights. A treaty creating an Indian reservation that sets aside land for the "use and occupancy" of the tribe has been sufficient to establish a vested property interest for the tribe.[33] For example, in *Menominee Tribe of Indians v. United States*, the Menominee Indian reservation was no longer federally recognized, but the tribe claimed that the 1854 Treaty of Wolf River, which created the reservation, maintained hunting and fishing rights on the property that were not extinguished.[34] In this case, the Court held that the 1854 treaty, in conjunction with Public Law 280 and the Termination Act of 1954, retained immunity with respect to hunting, trapping, and fishing and the control and regulation thereof.[35]

In other cases, however, congressional recognition is not so explicit, and a court must infer recognition from the context surrounding the treaty and the treaty's stated purposes. In *Crow Tribe of Indians v. United States*, the Tribe sought additional compensation for land which it ceded to the United States by treaty in 1868.[36] The Indian Claims Commission held that the U.S. had recognized the Tribe's title in the Treaty of Fort Laramie (1851) but then purchased the lands for less than $0.054 per acre, when the lands had a market value of an average of $0.40 per acre.[37] Although the Commission found this compensation amount unconscionable, the Government contended that the Treaty was not a treaty of recognition because Article 5 of the Treaty speaks of "recognition and acknowledgment by the Indian nations rather than by the United States."[38] The Court of Claims disagreed, finding that the Government's participation in a

[33] *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).
[34] *Id*. at 406.
[35] *Id*. at 410-411.
[36] *Crow Tribe of Indians v. United States*, 151 Ct. Cl. 281, 283 (1960).
[37] *Id*. at 283-284.
[38] *Id*. at 286.

treaty where the various tribes describe and recognize each other's' territories is in effect a recognition of the Indians' title to those specific areas, considering the surrounding circumstances.[39]

The scope or extent of the property rights vested may vary depending upon the language of the recognizing authority. As outlined in *United States v. Shoshone Tribe of Indians*, government recognition does not transfer fee title to the tribe; instead, the federal government holds the "naked fee" in trust for the tribe.[40] The Court described this property right to be "as sacred and as securely safeguarded as is fee simple absolute title," and the tribe enjoys the right to use and enjoy the land in any way, in absence of any expression to the contrary.[41]

Over time, the Supreme Court has articulated the various rights included within the scope of recognized title, even if they are not mentioned explicitly in treaty or statute. For example, in *Winters v. United States*, the Court held that establishment of a reservation and recognition of title carried with it the right to access waters necessary for agricultural and other use.[42] The Court has also held that Indians are the beneficial owners of the timber standing upon their land and the proceeds of its sale, "subject to the plenary power of control by the United States."[43] Furthermore, as previously mentioned, the Court has recognized vested title to include hunting and fishing rights, even without explicit mention in the treaty.[44] There is conflicting jurisprudence on the issue of including navigable waters within the scope of recognized title, but these title holders generally maintain widespread use and control over their lands.[45]

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[39] *Crow Tribe of Indians*, 151 Ct. Cl. at 286.
[40] *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 117 (1938).
[41] *Id*.
[42] *Winters v. United States*, 207 U.S. 564, 577 (1908).
[43] *United States v. Algoma Lumber Co.*, 305 U.S. 415, 420 (1939).
[44] *Menominee Tribe of Indians*, 391 U.S. 410-411.
[45] *Montana v. United States*, 450 U.S. 544 (1981); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

Some Indian reservations are created through Presidential action in the form of an executive order. Reservation lands originating in executive orders are considered "Indian country" for the purposes of federal criminal jurisdiction.[46] Both Congress and the Supreme Court have recognized the President's ability to "withdraw lands from the public domain and create reservation lands by executive order."[47] The Court has required that an act of Congress must be clear and intentional in order to diminish reservation boundaries which were created by executive order or by Congress.[48]

It is important to understand the reduced security that a tribe may have in its property interest if a reservation is created by executive order. In *Sioux Tribe of Indians v. United States*,[49] the Tribe sought compensation for a terminated reservation created by executive order, but the government argued that (1) the President lacked the authority to confer a compensable interest in the public domain, and (2) the President did not purport to do so.[50] The Court found that, while in the past, Congress had abolished executive order reservations and provided a measure of compensation, it did so "as an act of grace rather than a recognition of an obligation."[51] Following this, it concluded that Congress had not delegated the President the power to grant a compensable interest in the reservation, and there was no constitutional authorization for this conveyance, so the orders terminating the reservation did not require compensation.[52] Ultimately, the process of the President withdrawing public lands to create reservations, which led to this dispute, was prohibited by Congress in 1919.[53]

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[46] *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 353-4 (1962).
[47] *Sioux Tribe of Indians*, 316 U.S. at 324-5.
[48] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).
[49] *Sioux Tribe of Indians*, 316 U.S. at 324.
[50] *Id*.
[51] *Id*. at 330-1.
[52] *Id*. at 331.
[53] 43 U.S.C. § 150.

b. Indian Land Transfers

In early agreements between the federal government and Indian tribes, many treaties prohibited the federal government from acquiring Indian lands without the consent of the majority of adult male tribal members.[54] Of course, these consent provisions were created considering the disparate bargaining power between the nineteenth-century federal government and the various Indian tribes, and they were not often enforced to their terms.[55] Treaties made in the nineteenth century were done so under the cloud of "an American manifest destiny to acquire and settle all of the western lands to the Pacific Ocean."[56] As a result, American Indians have had lands taken by the federal and state governments without consent or even compensation for years.[57] The following section will outline examples of federal action involving the government that lead to the dispossession of Indian lands, either for government purposes or to convey to private parties.

As mentioned, the international "discovery doctrine" governed the dynamic between Indian tribes and the first European settlers in the Western hemisphere, who discovered property owners in the "New World."[58] Under this doctrine, lands could either be purchased or acquired through a "just war," but not simply claimed without knowledge or consent of the tribe. The Court's action in *Johnson* was not exactly an exercise of eminent domain, but rather a taking of a property interest "by simply declaring that the original owner never held absolute title in the first place."[59] The Court's justification that Indians did not use their lands in an effective manner

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[54] Raymond Cross, *Article: Sovereign Bargains, Indian Takings, and the Preservation of Indian County in the Twenty-first Century*, 40 ARIZ. L. REV. 425, 427 (1998).
[55] *Id*. at 434.
[56] *Id*. at 441.
[57] Stacy L. Leeds, *Symposium: Indian Property Rights: By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 52 (2005).
[58] *Johnson*, 21 U.S. at 573.
[59] Leeds, *supra* at 61.

paved the way for the federal government to acquire Indian lands and extinguish "Indian title."[60] For most lands in the U.S., the chain of title begins with extinguishing Indian title and redistributing the property to an individual non-Indian.[61]

Although Indian title was reduced to a mere right of occupancy after *Johnson*, the federal government was still required to provide compensation to tribes for lands taken which were previously guaranteed by treaty.[62] The most famous example of Indian removal follows the Indian Removal Act of 1830,[63] when thousands of Cherokee, Muscogee, Seminole, Chickasaw, and Choctaw peoples were forcibly removed from their lands in the southeastern U.S., known as the Trail of Tears. After the Indian Removal Act's passage, tribes could not retain their homelands: they were forced to sell their land via treaty or be forcibly removed without compensation.[64] The difference between Indian removal and typical cases of eminent domain was that the former offered no judicial remedy to the tribes if they chose to decline the offer to sell.

Upon forced relocation, many tribes once again gained property interests in their lands through treaty.[65] The tribal government was usually recognized as the beneficial owner of the lands, some of which were owned in fee simple absolute.[66] The federal government preferred the tribal government to own the land, as opposed to individual Indian citizens, because it allowed for an easier transaction for future land cessions desired from the Indians.[67] In the coming

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[60] Leeds, *supra* at 62.
[61] *Id*.
[62] See *U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (explaining that the preferred method of compensation is market value plus interest).
[63] 4 Stat. 411, 21 Cong. Ch. 148
[64] Leeds, *supra* at 63.
[65] See *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625 (1970) (holding that lands conveyed in 1830 retained fee title).
[66] *Id*.
[67] Leeds, *supra* at 64.

decades, when further land cession was required to achieve the American goal of manifest destiny and Native assimilation, Congress passed the Dawes Act of 1887, or the General Allotment Act, which abandoned the concept of common ownership in favor of individual property rights.[68] In *Lone Wolf v. Hitchcock*, the Court upheld Congress' authority in allotting Indian land without tribal consent, holding that the federal government has full administrative power of tribal lands.[69] Because of this administrative power, the allotments were not considered takings, and therefore the tribal governments were not owed just compensation for the transaction.

The Allotment Act contributed to a rapid increase of Indian land loss because individual Indian landholders did not maintain any protections from the federal government or the tribal government as the land did when held by the tribes. [70] Individually held lands were more easily alienable and could be acquired by state eminent domain or adverse possession.[71] The lands could also now be seized as a result of debtor-creditor disputes or failure to pay taxes.[72] Because these lands, which before could only be sold to the federal government, were now alienable to any private party, land transactions which followed the Act almost always resulted in the land passing to non-Indians.

With all of these avenues available for the federal government to acquire Indian land, there was little that Indian tribes or individuals could do to defend themselves. Only in hindsight did the government acknowledge that "Indian land claims were difficult to research, [and]

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[68] 24 Stat. 388, 49 Cong. Ch. 119
[69] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
[70] Leeds, *supra* at 66.
[71] 24 Stat. 388, at 5. Individually held Indian lands became freely alienable and therefore subject to the same forms of transfer as any other fee lands within a state.
[72] *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 263 (1992).

Indians historically had lacked adequate legal assistance and administrative resources.[73] The U.S. accepted some responsibility for Indian land loss by enacting the Indian Claims Limitation Act of 1982, which allows an Indian nation to petition the Attorney General to investigate land claims.[74] Unfortunately, so much of the land lost was either sold directly or parceled out to private parties, which creates a huge burden in repairing the effects of Indian removal from the nineteenth century.

III. Railroad Construction and Indian Lands

During Indian removal from eastern and southern lands, Native Americans were relocated to a designated area of land west of the Mississippi River, mostly in present-day Eastern Oklahoma and Arkansas.[75] Between 1830 and 1890, over 100,000 Indians were relocated to this "Indian Territory,"[76] with borders set by the Non-Intercourse Act.[77] Some of the removal treaties and subsequent treaties with relocated Indians contained provisions for location of railroads across Indian lands,[78] but Indian property interests still posed a threat to westward railroad expansion, particularly for the transcontinental routes (Union Pacific, Northern Pacific, Southern Pacific, Texas Pacific, and Atlantic & Pacific).

Lands in the west reserved for relocated Indian tribes were held in fee ownership by the federal government in trust for the tribes, but the treaties guaranteed the tribes peaceful possession of the land. This trust relationship prevented the government from granting railroads a fee interest in lands within tribal boundaries.[79] The specific type of property interest held by

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[73] *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 519 (1986)
[74] 28 U.S.C. § 2415.
[75] *See* Felix Cohen, Handbook of Federal Indian Law, (Hein, 1988), 53-63.
[76] *Id*. at 55-56.
[77] Non-Intercourse Act of June 30, 1834, 4 St. 729.
[78] *See* F.W. Semple, Oklahoma Indian Land Titles, Annot. (St. Louis: Thomas, 1952), § 342.
[79] Cohen, *supra* at 55.

these Indians is debated, which affects the type of interest that could be granted to the railroads.[80] The Cherokee lands in particular were referred to as "a fee simple, an estate in fee upon a condition subsequent, and a base, qualified or determinable fee."[81] For this reason, the transcontinental railroad routes specifically avoided present-day Oklahoma because Indian lands were largely exempt from these land grants and from the 1875 General Right-of-Way Act.[82] The Act specifically provided that it did not apply "to any lands within the limits of any … Indian reservation, … unless such right of way shall be provided for by treaty-stipulation or by act of Congress."[83] In line with historical trends, the federal government wanted to avoid any direct land transfers between Indian tribes and private parties, without U.S. intervention.

Later, the Dawes Act, which systematically allotted reserved tribal lands to individual tribal members, created further complications for railroads in tribal lands because of their significant limitations on alienation.[84] For instance, in some cases, a railroad obtained tribal approval to construct a line through its lands, but by the time construction began, the land had been allotted to individuals who had limited ability to alienate or simply did not approve of the railroad's construction.[85] The process of allotment reduced Indian land ownership generally, declining from 138 million acres in 1887 to merely 34 million in 1934.[86] Lands that were not allotted became "unassigned" and re-entered the public domain, making them available for distribution to railroads, despite originally being protected Indian reserve lands.[87]

a. Land Grant and Right-of-Way Legislation

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[80] *Id*., citing *Cherokee Nation v. Southern K. R. Co.*, 135 U.S. 641 (1890).
[81] Cohen, *supra* at 55, citing *Holden v. Joy*, 17 Wall 211 (1872).
[82] General Right-of-Way Act of 1875, 18 Stat. 482.
[83] *Id*. at § 5.
[84] *See* Dawes Act, Act of February 8, 1887, 24 Stat. 388, § 5.
[85] Donovan L. Hofsommer (ed.), Railroads in Oklahoma (Ok. Hist. Soc. 1977), 7-18.
[86] Conference of Western Attorneys General, American Indian Law Deskbook, (1993) 19.
[87] *Id*. at 46-51.

i. Land grants

In the middle of the nineteenth century, theories of "manifest destiny" and potential economic and geographic expansion led to the creation of a national railway network in the United States beyond Chicago and into the American West. During this time, particularly from the 1850s through the 1870s, the federal government operated a land grant system, through which railway companies were given millions of acres along which they could build new routes and sell abutting properties to farmers. The federal government granted roughly 130,000,000 acres to railroads from 1850 through 1871.[88]

The granting of land accelerated during the Civil War with the passage of the Pacific Railway Act of 1862, chartering the Union Pacific and Central Pacific Railroads and granting lands to construct a railway from Nebraska to San Francisco, California.[89] The Pacific Railway Act and similar statutes included "rights-of-way" across public lands to construct the railway itself.[90] These were simply rights to use the land owned by another (in this case, the federal government) and were treated separately from grants of land. Under the Pacific Railway Act of 1862, railroads initially received sections of land within 10 miles of the railway, amounting to a grant of 6,400 acres per mile of railway constructed.[91] Two years later, Congress passed new legislation doubling the size of the railroad land subsidies, which allowed for further land sales and increased capital for the railroad companies to complete construction.[92] Congress signaled

[88] Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, DC: Island Press, 1992) 18, 122.
[89] Pacific Railway Act of 1862, 37th Cong., Ch. 120, 12 Stat. 489 (1862).
[90] *Id*.
[91] *Id*.
[92] Pacific Railway Act of 1864, 38th Cong., Ch. 216, 13 Stat. 356 (July 2, 1864).

the end of the "land grant era" in 1870, passing a resolution that stated "the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued."[93]

Many of the land grant statutes passed during this era contained provisions that fee title would be granted subject to Indian right of occupancy, which would remain until extinguished by the federal government. Others, like the Act which incorporated the Northern Pacific Railroad, stated that the U.S. should extinguish, "as rapidly as might be consistent with public policy and the welfare of Indians," their title to lands falling within the operation of the Act.[94] In the case of *Buttz v. Northern P. Railroad*, the Supreme Court held that an individual non-Indian could not obtain title through a right of preemption on lands granted to the railroad company when Indian title to those lands had not yet been extinguished.[95] The Secretary of the Interior and Congress were coming to an agreement with the Dakota and Sioux Indians to be compensated in exchange for their "retirement" from the lands, but the agreement had not yet been ratified by Congress at the time, so their right of occupancy remained.[96] The land grant system created a complicated system wherein the railroad could hold fee title, but the fee was subject to an Indian right of occupancy which could only be extinguished by the federal government, who no longer held title.[97]

As mentioned in an earlier section describing Indian title, the theory of Indian or aboriginal title, from the perspective of the U.S. government, was contingent upon continuous occupation. In *United States v. Santa Fe P. R. Co.*,[98] the Supreme Court held that if an Indian

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[93] Paul Wallace Gates, *History of Public Land Law Development* (Washington, DC: Government Printing Office, 1968), 380.
[94] *Buttz v. Northern Pacific Railroad*, 119 U.S. 55, 68 (1886).
[95] *Id*.
[96] *Id*. at 70-71.
[97] *Id*. at 73.
[98] *United States v. Santa Fe P. R. Co.*, 314 U.S. 339 (1941).

right of occupancy was not extinguished before the railroad's definite location was chosen, then the railroad company was granted a fee subject to the encumbrance of Indian title.[99] Notably, the disputed land in this case was partially located inside and partially outside of the Walapai Indian Reservation.[100] The Court here also ruled that the creation of the Reservation, at the request of the Walapai Indians, amounted to a relinquishment of any tribal claims outside the lands.[101] Ultimately, the Court ruled in favor of the railroad with respect to the lands outside of the reservation, but remanded and requested an accounting to prove that the Walapai have continuously occupied the disputed lands within the reservation since the land was granted.[102] This case provides another example of the ways in which Indian title, while recognized in some forms by the government, is legally quite weak and can easily be extinguished.

It is worth noting that Indians living on reservation lands received slightly better protection from the railroad land grant system's implementation. In *Leavenworth v. United States*, the Supreme Court held that a portion of a railroad land grant, which fell within the Osage reservation, was not actually granted because the grant was imprecise as made and meant to become fixed when the line of the railroad became fixed.[103] Through the land grant system, the State of Kansas was granted the authority to cede lands to the appellant railroad, and title would pass to the railroad "if [the U.S.] were embraced by the grant in aid of the construction."[104] The parties' contention was based in their interpretation of an 1863 Act of Congress and later 1867 treaty with the "Great and Little Osage Indians".[105] In the time between the 1863 Act creating

[99] *Id*. at 341.
[100] *Santa Fe P. R. Co.*, 314 U.S. at 344.
[101] *Id*. at 359.
[102] *Id*. at 360.
[103] *Leavenworth v. United States*, 92 U.S. 733 (1875).
[104] *Id*. at 739.
[105] *Id*.

and the railroad and the fixing of the railroad line, the 1867 treaty altered the Osage reservation bounds to extinguish title to the portion of lands in dispute.[106]

While the U.S. maintained that it did not dispose of the Osage lands, the appellant railroad insisted that the extinction of Osage title created public lands in the title's absence.[107] The title of the land at issue was held by the U.S. for the benefit of the Indians, and there was no indication that the government intended to extinguish their title for the benefit of the railroad.[108] The Court here emphasized the fact that lands should not be taken "from the Osages without either their consent or that of Congress."[109] A treaty between the federal government and an Indian tribe to establish a reservation can offer a far greater form of protection than the tribe would have under the theory of Indian title.

ii. Right-of-way

Before 1882, any railroad seeking to build through Indian country had to receive authorization through treaty or express consent of the tribe. However, in 1882, Congress authorized the St. Louis-San Francisco Railway to enter and construct its railroad through Choctaw land without tribal approval.[110] Following this turning point, throughout the next few decades, Congress authorized several railroads to build lines through reserved Indian lands through eminent domain powers, without tribal approval. Notably, this legislation usually did not

[106] *Id*. at 740.
[107] *Leavenworth*, 92 U.S. at 740.
[108] *Id*. at 753.
[109] *Id*. at 752.
[110] The Act also gave the railroads eminent domain authority to acquire the land they need from individuals. *See* Hofsommer, *supra* at 17.

include railroad access to easements along the acquired right-of-way, mostly because of the trust status of the lands.[111]

Later, in the midst of the allotment process, Congress passed the 1899 Indian Lands Right-of-Way Act, which granted railroads rights-of-way across Indian lands, departing from an exception that Indians were granted in the original 1875 Right-of-Way Act.[112] Shortly after, in 1902, Congress amended the 1899 Act, granting railroads the power of eminent domain but not the power to make land grants of Indian lands.[113] The late nineteenth and early twentieth centuries were a period of inconsistency and confusion in regards to the property rights of Indian lands and the ability for railroads to acquire right-of-way across them. The situation complicated further in 1907 when Oklahoma became a state, and its newly adopted constitution allowed for railroads to acquire only an easement through eminent domain, nothing greater – offering increased protection for tribes.[114]

Around the same time, in 1906, Congress passed a bill intending to dissolve the administrative affairs of the "Five Civilized Tribes" (Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole), providing that railroads would have a 2.5 year period to "acquire title" to their lands.[115] The Act further provided that, after the period expired, railroads which did not purchase the title to rights-of-way they held would automatically forfeit title, which would then vest in the owners of the legal subdivisions or in the municipalities through which the right-of-way ran.[116]

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[111] *See* Chicago, Milwaukee & St. Paul, 25 Stat. 888, § 16 (Mar. 2, 1889); Dakota Ctr. RR. Co., 27 Stat. 492 (Feb. 27, 1893); Choctaw Coal & Rw. Co., 25 Stat. 39 (Feb. 18 1888); Ft. Smith & W. Coal Rw. Co., 29 Stat. 40 (Mar. 2 1896).
[112] Act of March 2, 1899, 30 Stat. 990.
[113] The 1902 Act only amended the 1899 Act for those lands in Indian Territory (Eastern Oklahoma). *See* Enid & Andarko Act, Feb. 28, 1902, Ch. 124, 32 Stat. 43.
[114] *See* Art. 2, § 24.
[115] Act of April 26, 1906, 34 Stat. 137 § 14.
[116] *Id*.

Many railroads failed to take advantage of this opportunity, leaving title to forfeit and be acquired by private parties. For example, in the case of *Kansas City S. R. Co. v. Arkansas Louisiana Gas Co.*, the plaintiff railroad brought suit against the defendant gas company for trespass after the gas company installed pipelines beneath the railroads' subsurface lands right-of-way.[117] The court held that the gas company properly sought permission from and compensated both dominant and servient estate holders, as the railroad had failed to acquire title and therefore did not need to grant the gas company permission.[118] Many railroads were left with nothing but easements, despite the Act's intention to provide them the opportunity to acquire title during the 2.5 year period.

In any case, it is clear that railroads were generally somewhat limited in the property interests they could acquire on Indian land, due in part to the trust status of the land.[119] Similarly, private parties who held title to the land – including tribes (via treaty) and allottees – were severely limited in their ability to alienate the land, which made land transfers to railroads difficult to complete or found to be void after the fact.[120] For courts at the time, and even those looking back in the twenty-first century, the analysis to determine what property interest a railroad had on Indian is incredibly difficult: What rights could the railroads legally acquire? What powers do the federal government, the tribes, or individual Indian allotees have to convey the land?

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[117] *Kansas City S. R. Co. v. Arkansas Louisiana Gas Co.*, 476 F.2d 829 (10th Cir. 1973).
[118] *Id*. at 830.
[119] *See* Gutensohn v. McGuirt, 194 Okla. 64 (Ok. 1944).
[120] *See* Swinomish Indian Tribal Cmty. V. BNSF Ry. Co., 951 F.3d 1142 (9th Cir. 2020) (holding that the Interstate Commerce Commission Termination Act "does not repeal the Indian Right of Way Act and does not defeat the Tribe's right to enforce conditions in a right-of-way easement agreement pursuant to the Right of Way Act.").

Despite this difficulty, courts in later years have determined that railroads acquired *only* easements through the 1899 Indian Right-of-Way Act, just as they did under the 1875 General Right-of-Way Act.[121] The distinction here is important: An easement is a limited property interest. It is ultimately a right to use a tract of land, rather than occupy or possess the land, and that right is usually confined to a specific purpose.[122] The 1899 Act did not allow for acquisition of land in fee simple, the broadest property interest allowed by law.[123] Furthermore, railroad service in the U.S., particularly in the West, has declined drastically since its peak in the early twentieth century, and those railroads' easements acquired under the Right-of-Way Acts have had those property rights terminated as rail service is abandoned.[124]

b. Railroad Acquisition of Indian Land

In the late nineteenth and early twentieth centuries, railroad construction was at its peak, and the laws were changing frequently, so the true property interests held by each party were figured out later. One area of confusion that remains is whether railroads could acquire fee interests through private conveyance. For example, in 1934, the Oklahoma Supreme Court held that a deed conveyed a fee interest to the Southern Kansas Railway Company, despite the fact that the railroad was statutorily limited to an easement only.[125] The defendant, who owned the abutting land to the railroad, claimed that the disputed portion of land accredited to her when abandoned by the railway company, whereas the plaintiff took a quitclaim deed from the railway company upon abandonment and therefore claimed title.[126] The court found in favor of the

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[121] *Sand Springs Home v. State ex rel. Dept. of Hwys.*, 536 P.2d 1280 (Ok. 1975).
[122] *Mich. Dep't of Nat. Res. v. Carmody-Lahti Real Estate, Inc.*, 472 Mich. 359, 699 N.W.2d 272 (2005).
[123] *Aoyagi v. Estate of Aoyagi*, 139 Haw. 295, 389 P.3d 132 (Ct. App. 2017)
[124] *Aubert v. St. Louis-San Fran. Ry. Co.*, 251 P.2d 190 (Ok. 1952); *Kan. City S. Rw. Co. v. Ark. Louis. Gas Co.*, 476 F.2d 829 (10th Cir. 1973).
[125] *Marland v. Gillespie*, 33 P.2d 207 (Ok. 1934).
[126] *Marland*, 33 P.2d at 208.

plaintiff, holding that the deed conveying the land from the private party to the railroad contained no language indicated an intention to limit the estate.[127] Decades earlier, the Supreme Court held that a right-of-way granted under the 1875 Right-of-Way Act was a "limited fee with a right of reverter."[128]

However, the Oklahoma Supreme Court reversed its position on this issue less than 10 years after its decision in *Marland*. In *Gutensohn v. McGuirt*, the court held that a deed from a restricted Indian could not later pass a fee interest, partially because of the limited federal authorization granted to the receiving railroad grantee.[129] The case contained similar facts to *Marland*, where a tract of land abandoned by a railway was claimed by both the railway's trustee (plaintiff) and the present owner of title to the land from which the right-of-way was deed (defendant).[130] The land was originally part of an allotment to an enrolled Creek citizen, who executed a deed of conveyance to the Fort Smith & Western Railroad Company for a tract of land formerly comprising the disputed right-of-way.[131] The court, in looking to the Act of Congress which authorized the railroad to constructed and operate through the Creek Nation, found that the railroad did not have the authority to acquire fee-simple title to the land, and therefore the deed attempting to convey it was a nullity.[132]

In *Marland*, a sale from a private party to a railroad was limited because of the Right-of-Way Act's restriction on the railroad, which did not allow for a conveyance of fee simple absolute. In *Gutensohn*, a similar sale was limited because both the seller (owner of allotted

[127] *Id*. at 212.
[128] *Rio Grande Rw. Co. v. Stringham*, 239 U.S. 44 (1915).
[129] *Gutensohn v. McGuirt*, 147 P.2d 777 (Ok. 1944).
[130] *Id*. at 779.
[131] *Id*. at 779-80.
[132] *Id*. at 781.

Indian land with alienation restrictions) and the buyer (railroad) were restricted. Although restrictions on conveying fee simple existed in both situations, the conveyance was only deemed void in the latter case. Generally, there is a greater history of case law to suggest that a fee deed conveyed by a restricted Indian landowner is ultimately void.[133] To this day, however, there are hundreds of contradictory federal statutes and cases interpreting the ability of railroads to acquire land from Indian tribes or individuals, so the issue remains complicated.

IV. Historical Impact on Indigenous Communities

Indigenous peoples are rarely included in histories of railroad development throughout the United States, or their inclusion is meant to "set the scene" for westward expansion without delving into the effects of the expansion. In many regards, the transcontinental railroad burgeoned the process of settler colonialism throughout the American West. Settlers were encouraged to ride the newly created railways out west, establish communities on indigenous land, and instill settler values and ideals into the governments and culture of those lands.[134] The West displayed the opportunity of new land the natural resources it contained, and the railroad encouraged Americans to take advantage of that opportunity.

Native Americans played various roles throughout the construction process of the transcontinental railroad. For the Cheyenne, railroad construction was incredibly economically detrimental, interrupting intertribal trade. This led to a long-term economic shift for the tribe, which began to rely on payments from the federal government according to new treaties.[135] Alternatively, other tribes assisted in the construction. Some Pawnee men assisted the U.S. Army

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[133] *Estoril Produc. Co. v. Murdock*, 822 P.2d 129 (Ok. App. 1991).
[134] Sam Vong, *The Impact of the Transcontinental Railroad on Native Americans*, Jun. 3, 2019, https://americanhistory.si.edu/explore/stories/TRR.
[135] *Id*.

in defending against attacks. The Pawnee were allies to the Union Pacific Railroad in the Plains, and the railroad offered free passage on its work trains.[136] However, this new form of wage labor for Pawnee tribal members led to an increased imposition of white farming practices and boarding schools.[137]

There were also countless instances of Native resistance against the railroad's construction and the settlers that came with it. For example, so-called "tribal raiders" terrorized livestock and shot up work crews, but the most vulnerable group was often the route surveyors, who went ahead of the work crews and lacked the safety of a group.[138] In August of 1867, a group of Cheyenne men attempted to derail a train by tying a stick across the rails, killing a crew of repairmen and leaving only one survivor.[139] One year later, in 1868, a group of Sioux men attempted a similar blockade, going so far as to remove rails and wooden ties, resulting in another wreck and killing more crewmen.[140] Despite colonial violence and imposition onto indigenous lands, many of the same tribes are still fighting today against industrial encroachments upon their land, including fracking, piping, and coal mining.[141]

Native resistance to railroad construction was met with a policy of "containment" by the U.S. Army and state militias. These groups enforced the construction by systematically ambushing resistant indigenous communities, attacking food sources and targeting tribal

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[136] American Experience, *Native Americans and the Transcontinental Railroad*, https://www.pbs.org/wgbh/americanexperience/features/tcrr-native-americans-and-transcontinental-railroad/.
[137] *Id*.
[138] American Experience, *Native Americans and the Transcontinental Railroad*, https://www.pbs.org/wgbh/americanexperience/features/tcrr-native-americans-and-transcontinental-railroad/.
[139] *Id*.
[140] *Id*.
[141] Sam Vong, *The Impact of the Transcontinental Railroad on Native Americans*, Jun. 3, 2019, https://americanhistory.si.edu/explore/stories/TRR.

diplomatic leaders.[142] The newly constructed railroads facilitated military tactics by allowing for easy transport of troops and equipment over large distances in a limited amount of time.[143]

The impacts were widespread. As previously mentioned, throughout this process, the federal government granted millions of acres of land to railroad companies which actually belonged to tribal nations. The construction also decimated the buffalo population, a crucial resource which was typically hunted for food, shelter, and trade by the Great Plains tribes, including the Lakota, Arapaho, and Cheyenne.[144] The bison population decreased from tens of millions in the early nineteenth century to near extinction, which greatly affected the tribes' way of life and resulted in their increased reliance on the U.S. government.[145] This ecological attack on native tribes went further than the bison; hunting grounds were destroyed to make room for laid tracks and the communities of white settlers which grew around them.[146] The federal government's decimation of indigenous ways of life was not only in response to construction resistance; it was meant to suppress these communities and encourage assimilation.

V. Conclusion

As illustrated, the historical and legal ties between the concept of Indian land ownership and the U.S. railroad system have existed for nearly two centuries, and outside industrial interests continue to threaten indigenous lands today. There is still limited research in this intersection, but hopefully this paper can provide some insight into the historical development of

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[142] *Id*.
[143] *Id*.
[144] Lakshmi Gandhi, *The Transcontinental Railroad's Dark Costs: Exploited Labor, Stolen Lands*, Oct. 8, 2021, https://www.history.com/news/transcontinental-railroad-workers-impact.
[145] *Id*.
[146] Silkroad, *The Transcontinental Railroad and Native Lands: A Story of Displacement and Desolation*, Nov. 19, 2023, https://www.silkroad.org/blog/2023/6/27/the-swannanoa-tunnel-79yhe-rrtt4.

Indian land ownership and its connection with railroads, highways, and other infrastructure needs which may threaten the sovereignty of tribal land.