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BETWEEN A ROCK AND A HARD PLACE: THE CURRENT SITUATION OF THE #LANDBACK MOVEMENT AND INDIGENOUS-IMAGINED FUTURES

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This Note will review the long and complex history of Indigenous resistance to the United States settler colonial project through a #LandBack lens and will discuss the different legal and political routes Tribes have taken in their attempts to reclaim and exercise sovereignty over their lands by working with the current American legal and property system. This reveals that the most recent Indigenous calls for land return signal the imminent exhaustion of existing legal and property routes for the #LandBack movement. Tribes working within the United States legal and property system have found themselves stuck between a rock and a hard place: submit to state jurisdiction for land owned in fee simple or grapple with the disadvantages of land held in trust by the federal government. Under this current system, #LandBack is conditioned on the consent of the United States. This note concludes with the idea that the most recent iteration of #LandBack is positioned to continue exploring Indigenous-imagined alternatives to the current regimes of property and federal Indian law.

* J.D. Candidate, Georgetown University Law Center, Class of 2023. This Note benefited greatly from the thoughtful feedback of Professor Sherally Munshi and the editors at the Arizona Journal of Environmental Law and Policy. As a non-Native settler, my hope for this Note is to draw greater attention to the historical route and hard-fought victories of the #LandBack movement from a legal perspective, recognizing the future of the movement is in Indigenous hands. All mistakes are my own.

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I. Introduction

#LandBack refers to the Indigenous-led movement to return stolen and dispossessed lands back into Indigenous hands.¹ In 2018, Arnell Tailfeathers (Blood Tribe of the Blackfoot Confederacy) purportedly coined the term in an internet meme and the phrase quickly became a hashtag that spread across Indian country.² Two years later, on Indigenous Peoples Day 2020, NDN Collective officially launched its LANDBACK campaign, which had been catalyzed by land defenders' demonstration against President Trump's Independence Day celebration at Mount Rushmore in Hesapa, the sacred Black Hills.³ However, NDN Collective's LANDBACK campaign is just the most recent high-profile iteration of a longstanding movement to return Indigenous land and re-establish political authority and jurisdiction over those lands. Similarly, while Arnell Tailfeathers'

¹ See NDN Collective, *LANDBACK*, <https://landback.org/> (last visited Nov. 17, 2021).

² See Michela Moscufo, *For These Indigenous Artists 'Land Back' Is Both A Political Message And A Fundraising Opportunity*, FORBES (Sep. 29, 2020) <https://www.forbes.com/sites/michelamoscufo/2020/09/29/for-these-indigenous-artists-land-back-is-both-a-political-message-and-a-fundraising-opportunity/?sh=65c9bac86c9c>.

³ NDN Collective, *NDN Collective LANDBACK Campaign Launching On Indigenous Peoples' Day 2020*, (Oct. 9, 2020), <https://ndncollective.org/ndn-collective-landback-campaign-launching-on-indigenous-peoples-day-2020/>.

hashtag may be a recent development, the movement he was referencing for the return of Indigenous lands is decidedly not.⁴

#LandBack is not limited to territory; many campaigns include calls to decolonize education, ensure food sovereignty, and protect environmental resources, among other focuses.⁵ Recognizing the specific legal, governmental, and financial influence of land⁶ and its central importance to the heart of the #LandBack movement, this note focuses its scope on the return of land to Indigenous nations.

This note will review the long and complex history of Indigenous resistance to the United States settler colonial project through a #LandBack lens, which reveals that the most recent Indigenous calls for land return signal the imminent exhaustion of existing legal and property routes for the #LandBack movement. Tribes working within the United States legal and property system have found themselves stuck between a rock and a hard place: submit to state jurisdiction for land owned in fee simple⁷ or grapple with the disadvantages of land held in trust by the federal government. Under this current system, #LandBack is conditioned on the consent of the United States. As a result, the most recent iteration of #LandBack is positioned to continue exploring Indigenous-imagined alternatives to the current regimes of property and federal Indian law.

Part II will contextualize #LandBack within the history of federal Indian policy. This will demonstrate how the movement is responding to current and historical impediments to the return of Indigenous land and the federal policies and legal rationale that have served as the vehicle for the theft and dispossession of Indigenous land on Turtle Island.⁸ Part III will discuss the different legal and political routes Tribes have taken in their attempts to reclaim and exercise sovereignty over their lands by working within the current American legal and property system. Part IV acknowledges the difficult position that property law and federal Indian law have placed Tribes in and explores Indigenous imagined alternatives for #LandBack that resist the framework established by the American settler colonial project.

⁴ Indigenous artist Isaac Murdoch, who uses the phrase in his artwork has said, “Land Back goes back a long way...[w]e’re not doing anything different ... we’re just on social media now.” Moscufo, *supra* note 2.

⁵ See NDN Collective, *Manifesto*, <https://landback.org/manifesto/> (last visited Nov. 17, 2021); Kanahus Manuel & Naomi Klein, ‘Land Back’ is More Than a Slogan for a Resurgent Indigenous Movement, *GLOBE & MAIL* (Nov. 9, 2020), <https://www.theglobeandmail.com/opinion/article-land-back-is-more-than-a-slogan-for-a-resurgent-indigenous-movement/>.

⁶ One of the most prominent Indigenous thinkers and historians of the twentieth century, lawyer Vine Deloria Jr. (Standing Rock Sioux) wrote, “Peoplehood is impossible without cultural independence, which in turn is impossible without a land base.” VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 180 (Univ. Okla. Press 1988) (1969).

⁷ Ownership in fee simple refers to full and absolute legal ownership. See *Fee Simple*, *Black’s Law Dictionary* (11th ed. 2019).

⁸ Turtle Island is the name for North America (or the planet Earth) in many North American Indigenous cultures. The name is based on a shared origin myth wherein a woman tosses dirt on a turtle’s back, which grows and grows until the turtle becomes Turtle Island. See TOM PORTER, *AND GRANDMA SAID...: IROQUOIS TEACHINGS, AS PASSED DOWN THROUGH THE ORAL TRADITION* 52–53 (2008).

II. #LandBack and the History of Indigenous Land Theft and Dispossession

Many Indigenous oral histories trace their presence on ancestral lands from time immemorial.⁹ Similarly, #LandBack is not new, and neither are settler colonial efforts at dispossession, which serve as the basis for resistance in the current movement. This Part traces the history of Indigenous resistance to the United States settler colonial project through a #LandBack lens to contextualize the work done by recent iterations of the movement for the return of Indigenous land.

A. Founding-Era: Treaty-making and the establishment of Indian title

The founders of the United States' early policy for Indigenous nations both recognized inherent tribal sovereignty and laid the groundwork to dispossess Indigenous land. The first era relied upon a policy of nation-to-nation treaty-making, which acknowledged Tribes as foreign independent political communities with inherent sovereignty.¹⁰ A mixed bag of coercion, consent, and opportunistic conduct — treaties marked binding formal agreements between two sovereigns, frequently in exchange for Indigenous-held land.

The first era of Indian policy was influenced by diplomatic choices made by the British crown before American independence. The British Proclamation of 1763 marked a boundary between the territory of Tribes and the American colonies by prohibiting British subjects from settling beyond the Appalachian Mountains and from purchasing Indian land directly.¹¹ However, settler attitudes of cultural superiority and desires for land led many colonists to disregard the law and move westward onto tribal land.¹² Even though the Proclamation of 1763 had been very

⁹ John Belshaw, Sarah Nickel & Chelsea Horton, *Since time immemorial*, THOMPSON RIVERS UNIV., <https://histindigenouspeoples.pressbooks.tru.ca/chapter/3-since-time-immemorial/> (last visited Nov. 17, 2021). Recently, an example of the scientific community's systemic disregard of Indigenous knowledge and memory was in the headlines after the discovery of ancient fossilized footprints in New Mexico pushed back the Western timeline of human habitation in North America "10,000 years beyond the previous mark enshrined by the purported experts in the field of archaeology." See Nick Martin, *The White Sands Discovery Only Confirms What Indigenous People Have Said All Along*, HIGH COUNTRY NEWS (Sept. 24, 2021).

¹⁰ *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial. . . The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings. . . We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.").

¹¹ Jennifer Monroe McCutchen, *Proclamation Line of 1763*, Mount Vernon Ladies Ass'n, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/proclamation-line-of-1763/> (last visited Nov. 21, 2021); STUART BANNER, *HOW THE INDIANS LOST THEIR LAND* 104 (2005).

¹² DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 103 (7th ed. 2017).

unpopular (and is often cited as a contributing cause to the American Revolution),¹³ the young United States government still desired total control over the purchase of Tribally-held land.

The first law to regulate economic activity between these groups was the Indian Trade and Intercourse Act of 1790.¹⁴ Also known as the Nonintercourse Act, it provided that:

No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.¹⁵

Later amendments to the statute also invalidated non-federally approved conveyances of Indigenous land.¹⁶ The 1834 version of the Act was codified and remains in effect today.¹⁷ Despite this clear federal policy, states continued to make land purchases from Tribes in direct violation of these acts. These violations would later provide a legal basis for northeastern Tribes' land return claims in the mid-twentieth century.¹⁸

The effect of Tribes no longer being able to make private land sales led to a cultural shift in the settler psyche to view tribal land rights as inferior.¹⁹ Federal control over the purchase of Indigenous land made it easier to believe that Tribes had lesser title.²⁰ The first federal case to firmly legitimize this pathway for Indigenous land dispossession was the foundational 1823 property law case *Johnson v. M'Intosh*, which found that the doctrine of discovery had relegated Indigenous possession of land to an inferior status.²¹

Johnson's controversy allegedly arose based on competing claims of title for land in Illinois that had formerly belonged to the Piankeshaw. Plaintiffs were represented by the heirs of Thomas Johnson who had purchased the land directly from the Piankeshaw in the 1770s.²² M'Intosh, the defendant, received the land by patent from the United States in 1818.²³ However, many legal scholars have noted that there was no real case or controversy to be heard by the Supreme Court because

¹³ McCutchen, *supra* note 11.

¹⁴ Act of July 22, 1790, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138 (1790).

¹⁵ *Id.*

¹⁶ See e.g., Act of March 1, 1793, Pub. L. No. 2-19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, Pub. L. No. 4-30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, Pub. L. No. 5-46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, Pub. L. No. 7-13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, Pub. L. No. 23-161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177).

¹⁷ 25 U.S.C. § 177.

¹⁸ See *infra* Part IV-C for discussion the Oneida cases.

¹⁹ See BANNER, *supra* note 11, at 108–09.

²⁰ *Id.* at 108.

²¹ See *Johnson v. M'Intosh*, 21 U.S. 543, 592 (1823).

²² See *id.* at 543.

²³ *Id.* at 560–61.

the parties' land claims did not actually overlap.²⁴ Moreover, neither party nor the Court questioned any of the facts in the complaint, which provides further evidence that the parties wanted a far-reaching decision from the Court on the validity of Indian land grants for the entire country.²⁵ The Court's Chief Justice, John Marshall, seized on this opportunity and wrote an opinion that expounded on the common law doctrine of Indian title, establishing it as an inalienable possessory interest for Tribes limited to the right of occupation.²⁶

The American settler-colonizing project required that Indigenous lands were easily alienable to settlers, but that these sales remained heavily controlled by the federal government. As a result, Marshall created a property scheme for the United States that relied upon the doctrine of discovery to determine that Indigenous nations had weak claims to sovereign possession of their land because predecessor European-Christian powers had "discovered" it and had transferred their better ownership claims the United States upon its founding.²⁷ Alternatively, and in line with natural rights theory and the normal route of "conquest," Marshall could have found that despite the creation of the United States, Tribes had retained possession to their lands in fee simple title.²⁸ Instead, Marshall determined that Indian title was limited to occupation and that only the United States could extinguish Indian title through purchasing the land or taking it by conquest.²⁹ The *Johnson* opinion established that title had to be ultimately vested in the United States in order to accomplish its project of land accumulation through Indigenous dispossession.

B. Nineteenth Century: Reservations and Removal Policy

The treaty-making policy combined with the Indian title extinguishment process formalized by *Johnson* allowed the American settler-colonial project to thrive via the acquisition of Indigenous land and relocation of Tribes onto smaller land bases called reservations. At the same time, demands for Indigenous land in the eastern United States made it politically popular for the federal government to violently force unwilling Tribes to move to reservations on faraway and unfamiliar territory out west. This following era of federal Indian policy is known for the creation of the reservations system and the simultaneous removal of many Tribes from their homelands in the name of American expansion.³⁰

²⁴ See also Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1092 (2000); see also Sherally Munshi, 'The Court of the Conqueror': Colonialism, the Constitution, and the Time of Redemption, in *LAW'S INFAMY: UNDERSTANDING THE CANON OF BAD LAW* (Austin Sarat, Lawrence Douglas & Martha M. Umphrey eds., 2021).

²⁵ See Kades, *supra* note 24, at 1093.

²⁶ See *M'Intosh*, 21 U.S. at 569. Prior to the discussion of Indian title in *Johnson v. M'Intosh*, the Court had briefly discussed the concept of Indian title as an occupancy right that was not alienable, but had not clearly defined it. See *Fletcher v. Peck*, 10 U.S. 87, 121 (1810). Indian title is also known as aboriginal title.

²⁷ See *M'Intosh*, 21 U.S. at 570.

²⁸ See GETCHES ET AL., *supra* note 12, at 78.

²⁹ *M'Intosh*, 21 U.S. at 587.

³⁰ See GETCHES ET AL., *supra* note 12, at 170.

By the nineteenth century, reservations appeared to be the federal government's best means of "civilizing" Indigenous people into adopting white cultural practices.³¹ The United States military was in charge of moving Tribes (often violently)³² onto (often resource-poor)³³ reservations which were much smaller than their original land holdings. After many Tribes outright resisted these military and colonial pressures, the federal government devised the removal policy.³⁴ However, the federal government's policy of relocation and forced removal of Tribes to reservations as an attempt at civilizing Indigenous people failed. Instead, instability from removal often created a forced dependency on federal support, which in turn inspired the following federal policy attempt at assimilation and attack on Indigenous landholdings.

C. 1887–1934: Detribalization through Allotment and Assimilation

The next era of federal Indian policy was allotment and assimilation: a program to de-tribalize Indigenous nations and open their treaty-secured land bases to white settlement. In 1871, Congress unilaterally ended its treaty-making with Tribes through an appropriations act.³⁵ The Dawes Act of 1887 marks the shift in federal Indian policy from treaty-making and the reservation system to the promotion of Indian farming and assimilation into white-dominant culture through land allotment.

The new policy era began in 1887, when Congress passed the Dawes Act, with a stated purpose "to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians..."³⁶ In other words, the Dawes Act took treaty guaranteed reservation lands held in trust for Tribes and reallocated these communal lands in fee simple to individual tribal members in order to detribalize them and reduce the reservation as a tribal land base. Reservations were surveyed and parcels of land were allotted to individuals based on their age and status, which also reinforced white-normative ideas about household organization.³⁷ These allotments were held in trust by the federal government, and then eventually issued by a forced fee patent to individuals.³⁸ The federal government retained the power to purchase unallotted reservation lands to be sold to "actual settlers" to establish homesteads

³¹ *See id.* at 153, 169.

³² Removal is often associated with the Trail of Tears: the federal government's forced march of the Cherokee Nation to Indian Territory from Cherokee homelands in the southeast, which killed nearly a quarter of the Cherokee population. Numerous other Indigenous peoples were forced by the federal government to move to reservations far from their ancestral homelands, including the Navajo, Choctaw, Creek, Chickasaw, Seminole, the Confederated Tribes of Siletz, and the Confederated Tribes of Grand Ronde, among many other Indigenous peoples. *See* GETCHES ET AL., *supra* note 12, at 153.

³³ *See id.* at 170.

³⁴ *See id.* at 153.

³⁵ *See* Indian Appropriations Act of 1871, Pub. L. No. 41-120, 16 Stat. 544, 566 (1871).

³⁶ Dawes Act of 1887, Pub. L. No. 49-105, 24 Stat. 388 (1887).

³⁷ *See* Dawes Act § 1.

³⁸ § 5.

within the Tribes' reservations.³⁹ Proceeds from these land sales were held in trust for Indians for their "education and civilization."⁴⁰ Tribal citizens who did not live on reservations could also receive an allotment from the public lands to pursue farming.⁴¹ The Act further established that individual allottees who adopted a "civilized life" could become United States citizens.⁴²

The effect of the Dawes Act was a total decimation of tribal land holdings. While the law was on the books from 1887–1934, Tribes lost 86 million of the 138 million acres they had held at the Act's passage to the federal government's sales for white settlement.⁴³ The allotment program created over 240,000 allotments, which implicated over 40 million acres of previously tribal-held reservation land.⁴⁴ Allotment also created heirs property issues, because the vast majority of allottees died intestate.⁴⁵ When allottees with fee land died intestate, their parcels continuously fractionated under state laws that made ownership continuously subdivided among descendants as generations went on.⁴⁶ This made it more difficult for descendants to establish title over their ancestors' land and made it more economically practical for descendants with small sections to sell their fractional interests instead.

Many of the allotted parcels were not useful for the agriculture intended by the Dawes Act. As a result, non-Indian reformers suggested amending the statute to allow allottees to lease their holdings.⁴⁷ Leasing became dominant on many reservations, which also led to mounting pressure to reduce the twenty-five year trust period so parcels could be sold even faster.⁴⁸ Over time, the statute was amended to make these quick Indian allotment sales possible, while the federal government also continued to resell surplus reservation land to white homesteaders.⁴⁹ The allotment program led to the dispossession of Indigenous land and opened up their treaty-secured land bases to white settlement, resulting in a checkerboard pattern of landownership within reservation boundaries.⁵⁰ The allotment process ended through the passage of the Indian Reorganization Act of 1934,⁵¹ but the Dawes Act remains a dark chapter in the American project of land accumulation through Indigenous dispossession and assimilation.

³⁹ *Id.*

⁴⁰ *Id.* This money was historically mismanaged by the federal government. *See* BANNER, *supra* note 11, at 277.

⁴¹ Dawes Act § 4.

⁴² § 6.

⁴³ *See* BANNER, *supra* note 11, at 257.

⁴⁴ *Id.* at 278.

⁴⁵ Dying intestate refers to dying without a valid will. *See Intestate*, Black's Law Dictionary (11th ed. 2019).

⁴⁶ *See* BANNER, *supra* note 12, at 277 (2005).

⁴⁷ *Id.* at 280.

⁴⁸ *See id.* at 280–81.

⁴⁹ *See id.* at 281–82, 285 (referencing the Burke Act of 1906 and other acts of Congress to end the trust period early for some allottees at the discretion of local Indian agents).

⁵⁰ *See id.* at 285.

⁵¹ *See* Pub. L. No. 73-383 § 1, 48 Stat. 984, 984 (1934) ("hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.").

D. Twentieth Century to the Present: Reorganization, Termination and Self-Determination Policies

Despite great efforts by the federal government to detribalize Indigenous nations through allotment — “a mighty pulverizing engine to break up the tribal mass” — tribal culture and existence endured.⁵² The following era of federal Indian policy was ushered in by the Indian Reorganization Act (IRA), a policy created by non-Indians attempting to reverse the ill-effects of allotment by encouraging tribal self-government through the revitalization of traditional tribal structures.⁵³ Today, many Indian law scholars recognize the IRA as fundamentally paternalist because it required the approval of the Secretary of the Interior for many tribal government decisions and pressured Tribes adopting the Act to form governments that were nontraditional and instead resembled western democratic models.⁵⁴ Moreover, the successes of the IRA in securing better control and management over tribal property were necessitated by the federal government’s own devastating policy of allotment. Ultimately, the gains of the reorganization era were undone or put in jeopardy by the following era of federal Indian policy: termination.

The federal government’s termination policy was premised on the racist notion that assimilation into white American society could be accomplished through terminating the existence of Tribes and their government to government relationship with the United States.⁵⁵ Under its plenary power,⁵⁶ Congress has the power to unilaterally extinguish the special status and rights of Tribes without their consent.⁵⁷ From 1945 to 1961, Congress did just that — terminating approximately 109 Tribes through individual termination acts.⁵⁸ This effectively ended the trust relationship and made fundamental changes to tribal land ownership.⁵⁹ For example, after the passage of a termination act, the lands of many small Tribes were appraised and then sold to the highest bidder.⁶⁰

Following World War II, Tribes that were not terminated were subject to a small window in which they could assert land claims against the United States in federal court under the Indian Claims Commission Act.⁶¹ Before the Act’s passage, Tribes

⁵² GETCHES ET AL., *supra* note 12, at 216 (quoting Theodore Roosevelt).

⁵³ See *id.* at 217–18.

⁵⁴ See *id.* at 225 (explaining how the Bureau of Indian Affairs officials pressured the Hopi Tribe to adopt a constitution vesting broad powers in one central Tribal council, despite the fact that officials knew it was not the traditional Hopi governance model).

⁵⁵ See *id.* at 230.

⁵⁶ The doctrine of plenary power refers to the judicially recognized congressional powers inherent to sovereignty that are neither enumerated in nor limited by the U.S. Constitution. See *e.g.*, Munshi, *supra* note 24, at 66. The origin of the plenary power in federal Indian law comes from *United States v. Kagama*, finding Congress had plenary power over all Tribes, based on white-supremacist ideology that referred to Indigenous nations as “weak” and in need of protection by the federal government. See *United States v. Kagama*, 118 U.S. 375, 384–85 (1886).

⁵⁷ See GETCHES, ET AL., *supra* note 12, at 230.

⁵⁸ *Id.* at 235.

⁵⁹ See *id.*

⁶⁰ See *id.* at 236.

⁶¹ See Act of August 13, 1946, Pub. L. No. 79-726, 60 Stat. 1049.

could only bring claims against the United States if Congress passed specific legislation authorizing suits under a partial waiver of the federal government's sovereign immunity.⁶² The Act established the Indian Claims Commission (ICC) which heard 370 petitions before its termination in 1978.⁶³ Attorneys from the United States Department of Justice defended the federal government against these claims zealously. Many of ICC's determinations were unsatisfying or downright unfair to Tribal claimants and the process has been found to have violated international human rights law.⁶⁴

The present era of self-determination in federal Indian policy began in the 1970s. Despite its name, the era of self-determination is not without the specter of settler colonialism. Tribes still must contend with systems created by the United States government in service to the nation as a settler colonial project. Particularly, in the #LandBack context, Tribes are at an impasse between the limitations of fee simple ownership and the federal land in trust system. Both function within the settler colonialist framework and legitimize ultimate control by the United States. The complex legal, political, and historical context surrounding the #LandBack movement is important to acknowledge to understand how the movement has responded to the multitude of impediments blocking the return of Indigenous land. The #LandBack movement's response to these obstacles is further explored in Part III.

III. Legal Routes for #LandBack

The #LandBack movement has employed many different tactics since the end of the termination era. This Part will primarily focus on the legal and political routes many Tribes have taken thus far in their attempts to reclaim and exercise greater sovereignty over their lands: litigation, legislation, property acquisition, eminent domain, and other forms of advocacy. As Indigenous nations and their advocates have pursued these strategies over the years, one thing has become increasingly clear to #LandBack activists: working within the American legal and property system has restricted the full potential of #LandBack in favor of settler colonial interests.

A. Black Hills Land Claims Litigation

One of the primary legal avenues of the #LandBack movement since the mid-twentieth century has been litigation. In particular, federal statutes authorizing suits against the United States have provided openings for Tribes to bring claims for unfair dealings with the federal government—sometimes resulting in compensation. As discussed in Part I, the Indian Claims Commission Act⁶⁵ was

⁶² See GETCHES, ET AL, *supra* note 12, at 306.

⁶³ U.S. Dep't of Justice, *Lead Up to the Indian Claims Commission Act of 1946*, <https://www.justice.gov/enrd/lead-indian-claims-commission-act-1946> (last visited Nov. 21, 2021). Following the termination of the Commission, unresolved claims were transferred to the United States Court of Federal Claims. The last case filed under the Act was resolved in 2006.

⁶⁴ See *infra* Part II-B for discussion of *United States v. Dann*.

⁶⁵ Act of August 13, 1946, Pub. L. No. 79-726, 60 Stat. 1049 discussed *supra* in Part I-E.

passed in 1946 to create a new mechanism for federal courts to resolve Tribal claims against the United States once and for all by waiving the United States' sovereign immunity for this limited purpose.⁶⁶ The 1980 Supreme Court case *United States v. Sioux Nation of Indians* represents how litigation has been used by the #LandBack movement in response to the passage of the Indian Claims Commission Act and other special jurisdictional statutes.

The Sioux Nation's claim arose out of the federal government's unjust taking of the Black Hills in 1876 in violation of the Fort Laramie Treaty of 1868.⁶⁷ When gold was discovered in the sacred Black Hills in 1874, the federal government desperately wanted the Sioux Nation to cede these reservation lands.⁶⁸ The refusal of Sioux leaders led to the federal government's subsequent violation of the Fort Laramie Treaty. The Sioux Nation had ceded land to the federal government several times before, but the 1868 treaty required that any further cession of land had to be signed by at least three-fourths of all adult male members of the Tribe.⁶⁹ Facing widespread starvation after Congress coercively stopped appropriating funds for the Sioux Nation's subsistence rations, ten percent of adult Sioux men signed over the Black Hills to federal officials.⁷⁰ Even though the three-fourths requirement had not been met, Congress covered its tracks by passing a statute to officially abrogate the treaty in 1877.⁷¹

Throughout the twentieth century, the Sioux Nation continued to bring actions against the federal government, alleging that the 1877 Act had been an illegal taking of the Black Hills. In 1920, after several years of lobbying, Congress first passed a special jurisdictional statute to allow the Sioux Nation to bring its claim against the United States.⁷² However, after two decades of litigation the claim was unanimously dismissed by the Court of Claims in 1942 as a "moral claim not protected by the Just Compensation Clause."⁷³ This temporarily left the Sioux Nation without further recourse.

Following the passage of the Indian Claims Commission Act, the Sioux Nation brought its claim again, resulting in another lengthy legal battle.⁷⁴ This time the Court of Claims found that the 1877 Act had been a taking of the Black Hills and that the government owed millions of dollars in just compensation to the Nation for its "dishonorable dealings."⁷⁵ During the appeal process, after the government brought *res judicata* and collateral estoppel defenses stemming from the 1942

⁶⁶ See *United States v. Dann*, 470 U.S. 39, 45 (1985) ("The 'chief purpose of the [Act was] to dispose of the Indian claims problem with finality.") (citing H.R. Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945)).

⁶⁷ See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980). Throughout this Note I have made the choice to use the name of the Indigenous Tribe or Nation at the time the relevant litigation was filed for clarity and consistency; however, I recognize that many of the parties' names may be different in the present day.

⁶⁸ *Id.* at 377.

⁶⁹ *Id.* at 376.

⁷⁰ See *id.* at 382.

⁷¹ See *id.* at 382–83.

⁷² See *id.* at 384.

⁷³ *Id.*

⁷⁴ See *id.* at 384–86.

⁷⁵ *Id.* at 386, 389 (quoting *United States v. Sioux Nation of Indians*, 518 F.2d 1298, 1302–06).

decision, Congress passed a special statute in 1978 to allow the Court of Claims to review the merits of the Black Hills claim without contending with the government's affirmative defenses.⁷⁶ On appeal, the Court of Claims affirmed that there had been a taking of the Black Hills and that the federal government owed a principal sum of just compensation to the Sioux Nation plus annual interest.⁷⁷

When the Supreme Court considered the case in 1980, it affirmed the Court of Claims decision.⁷⁸ Agreeing with the lower court that "a more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history,"⁷⁹ the Court held that the 1877 Act had been a taking of tribal property.⁸⁰ The federal government was obligated to justly compensate the Sioux Nation for the Black Hills, including interest.⁸¹ However, the Sioux Nation wants its sacred ancestral lands returned, not to be merely compensated for them.

As a result, the Sioux Nation has never collected on its money judgment from the 1980 decision and continues to demand a return of the Black Hills.⁸² Since 2011, the judgment with interest now totals over one billion dollars.⁸³

The complex procedural history of the Black Hills claim demonstrates the drawbacks to litigating #LandBack claims in the American legal system. Litigation can last decades and result in harsh and unfavorable decisions for Tribes. Even when federal courts side with Tribes, the remedies available are typically monetary, not a return of their land. A second blow: many Tribes, like the Sioux Nation, have been barred from bringing further #LandBack litigation because they previously accepted Indians Claims Commission money judgments or settlements.⁸⁴ The gatekeeping of justice and land return for Indigenous nations functions within a contrived legal rationale intended to protect the United States as a settler colonial project. Following many unsatisfying results from the Indian Claims Commission, #LandBack advocates also looked to international human rights law as a possibility for return of Indigenous land in the United States.

B. International Human Rights Law and the Dann Sisters

Mary and Carrie Dann (Western Shoshone), known as the Dann sisters, are two of the most famous #LandBack activists of the last century and are known for bringing international attention to their efforts to reclaim their ancestral land from settlers. In the 1970s, the Dann sisters were cited by the Bureau of Land Management for grazing cattle on their ancestral lands without a federal permit.⁸⁵

⁷⁶ GETCHES ET AL., *supra* note 12, at 405–06.

⁷⁷ *Id.* at 406.

⁷⁸ *Sioux Nation of Indians*, 448 U.S. at 423–24.

⁷⁹ *Id.* at 386, 389 (quoting *Sioux Nation of Indians*, 518 F.2d at 1302).

⁸⁰ *Id.* at 423–24.

⁸¹ *Id.*

⁸² Lakota People's Law Project Action Ctr., *Return Mount Rushmore and Black Hills to Lakota!*, <https://action.lakotalaw.org/action/land-back> (last visited Nov. 24, 2021).

⁸³ Tom LeGro, *Why the Sioux Are Refusing \$1.3 Billion*, PBS NEWS HOUR (Aug. 24, 2011) https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23.

⁸⁴ See GETCHES ET AL., *supra* note 12, at 320.

⁸⁵ *United States v. Dann*, 470 U.S. 39, 43 (1985).

The United States' trespass action reached the Supreme Court, where it ruled against the Danns, holding that the Western Shoshone's aboriginal title⁸⁶ had been extinguished when an ICC money judgment was placed into a trust account by the federal government.⁸⁷ It did not matter that the Danns had received nothing for their land because the Western Shoshone, like the Sioux Nation, had not yet withdrawn funds from the settlement account.⁸⁸ On remand the Danns received another losing decision from the Ninth Circuit, which denied any further claim based on their individual possession of aboriginal title because of the Western Shoshone acceptance of ICC payments and subsequent federal actions like the Taylor Grazing Act of 1934.⁸⁹

Having exhausted all remedies available in U.S. courts, the Danns turned to international human rights law for relief.⁹⁰ In 2002, the Inter-American Commission of Human Rights of the Organization of American States, an international adjudicatory body, found that the Indian Claims Commission had violated the human rights of the Dann sisters by extinguishing their ancestral property rights without proper compensation.⁹¹ Twice the United Nations Committee on the Elimination of Racial Discrimination has also issued warning statements to the United States for its policies regarding the privatization of Western Shoshone ancestral lands.⁹² The United States has declined to comply with the requests of these international bodies.⁹³

Both the Black Hills claim litigation and the Dann sisters' dead end in international law demonstrate the difficulty of bringing claims against the United States without its consent. Even in instances where there is strong recognition of the property rights of Indigenous nations, the American legal system has found ways to delegitimize these rights, just as Chief Justice Marshall found a way to legitimize the dispossession of Indigenous land in order for the United States to expand in *Johnson v. M'Intosh*.⁹⁴ The following series of cases provide an example of #LandBack claims brought under a different legal theory, but with ultimately similar results.

C. Oneida Litigation, the Unification Theory, and Laches

In 1795, the State of New York purchased 100,000 acres of land from the Oneida Nation in direct violation of the Nonintercourse Act of 1793.⁹⁵ As discussed in Part I-A, many eastern states, like New York, ignored the clear prohibition

⁸⁶ Aboriginal title is also known as Indian title. See discussion of Indian title *supra*, in Part I-A.

⁸⁷ *Dann*, 470 U.S. See *id.* at 49–50.

⁸⁸ See *id.*

⁸⁹ See *Dann*, 873 F.2d 1189, 1200 (9th Cir. 1989).

⁹⁰ See GETCHES ET AL., *supra* note 12, at 318–19.

⁹¹ *Dann v. United States*, Case 11.140, Inter-Am. Comm'n. H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 (2002).

⁹² GETCHES ET AL., *supra* note 11, at 318–19.

⁹³ *Id.*

⁹⁴ See discussion of *Johnson v. M'Intosh* *supra* in Part I-A.

⁹⁵ See *Oneida Cnty v. Oneida Indian Nation of New York*, 470 U.S. 226, 229 (1985) [hereinafter *Oneida II*].

against state or private purchases of Indian land without federal approval.⁹⁶ For generations, many Indigenous leaders in the northeast held the belief that these early conveyances to states had been unfair.⁹⁷ By the 1960s, a new legal strategy developed to bring these claims in federal court.⁹⁸

Instead of suing the federal government, in 1970 the Oneida Nation brought a test case against the Oneida and Madison counties of New York, seeking damages for the fair rental value of their land currently owned and occupied by the counties.⁹⁹ The Oneida Nation's theory was that the land transactions were void because the state had violated the Nonintercourse Act and therefore, the Tribe retained title to the land under its 1788 Treaty and federal law.¹⁰⁰ The district court dismissed, holding that the action was created under state law and that there was no subject matter jurisdiction under either 28 U.S.C. § 1331¹⁰¹ or § 1362.¹⁰²

In *Oneida I*, the Supreme Court first considered whether the district court had proper subject matter jurisdiction over Oneida Nation's claim. At the district court level, the Oneida Nation's claim had been dismissed for violating the well-pleaded complaint rule, which prevents plaintiffs from creating federal question jurisdiction by anticipating the federal question will arise in a defense to their claim.¹⁰³ The Supreme Court reversed, finding that well-pleaded complaint rule did not apply because the complaint asserted to arise from three federal issues: aboriginal title, treaties, and a federal statute.¹⁰⁴ Therefore, Oneida Nation's claim did arise under federal law to establish proper federal question jurisdiction.¹⁰⁵ The case was remanded back to the district court, which considered the counties' defenses.

The Supreme Court considered and rejected all the counties' arguments in *Oneida II*. First, the Court held that the Oneida Nation had a federal common law right to sue to enforce their aboriginal land rights based on its precedents recognizing Indian property rights.¹⁰⁶ The Oneida Nation's federal common law right of action had not been pre-empted by the Nonintercourse Acts because there was no indication Congress had intended preemption in the statute or its legislative

⁹⁶ See *supra* Part I. In fact, the Secretary of War, Thomas Pickering, warned two New York governors that their transaction was illegal and required federal approval, which was ignored by the state. See *Oneida II*, 470 U.S. at 232.

⁹⁷ See GETCHES ET AL., *supra* note 12, at 105.

⁹⁸ See *id.*

⁹⁹ See *Oneida II*, 470 U.S. at 229.

¹⁰⁰ See *Oneida Indian Nation of New York v. Oneida County*, 414 U.S. 661, 664–65 (1974) [hereinafter *Oneida I*].

¹⁰¹ Section 1331 establishes federal question subject matter jurisdiction, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

¹⁰² Section 1362 reads, "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362.

¹⁰³ GETCHES ET AL., *supra* note 12, at 115.

¹⁰⁴ *Oneida I*, 414 U.S. at 677–78.

¹⁰⁵ *Id.* at 678.

¹⁰⁶ *Oneida II*, 470 U.S. at 235.

history.¹⁰⁷ The Court then rejected all of the counties' other affirmative defenses.¹⁰⁸ The Court did not consider laches because the counties had not properly reasserted the defense on appeal.¹⁰⁹ However, in the last case of the *Oneida* trilogy, the Court did decide to apply laches to bar Oneida Nation's claim, citing the question left open in *Oneida II*.¹¹⁰ The application of laches would become a powerful tool of the United States legal system to bar #LandBack claims.

Two decades after *Oneida I* and *II*, the Oneida Nation purchased parcels of land on the open market where they opened a gas station, convenience store, and textile facility.¹¹¹ Under a unification theory, Oneida Nation sought to exercise its federally protected possessory rights over these parcels owned in fee simple because the land was within the boundary of the Tribe's original treaty reservation.¹¹² Generally, states cannot exercise civil regulatory authority to tax property or activities within a federally-recognized Tribe's reservation boundaries if it would interfere with tribal self-government or conflict with federal policy.¹¹³ Relying on this principle, Oneida Nation claimed tax immunity from the city of Sherill, New York over these parcels within its reservation boundaries.¹¹⁴ The city then brought an eviction action against the Tribe in state court.¹¹⁵

In *City of Sherrill*, the Supreme Court held that Oneida Nation could not re-establish regulatory authority over land purchased through the open market.¹¹⁶ The Court based its decision on the settled expectations of the state and non-Indians. Virtually chastising Oneida Nation for its failure to bring its claims until the late twentieth century, the Court found:

The wrongs of which [Oneida Nation] complains in this action occurred during the early years of the Republic. For the past two centuries, New York and its county and municipal units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. [citation omitted] And not until the 1990's did [Oneida Nation] acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. [citation omitted] This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through

¹⁰⁷ *Id.* at 237–38.

¹⁰⁸ See *id.* at 240–50. Ultimately, on remand, the district court entered money judgments against the counties but concluded that the counties were entitled to set-off the value of the improvements made to the property from the fair rental value damages. The district court awarded Oneida Nation damages totaling around \$35,000 with interest in 2002. See *Oneida Indian Nation v. Cnty of Oneida*, 217 F. Supp.2d 292, 310 (N.D.N.Y. 2002).

¹⁰⁹ See *Oneida II*, 470 U.S. at 244–45.

¹¹⁰ *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 213–14 (2005) (citing *Oneida II*, 470 U.S. at 253 n. 27).

¹¹¹ *Id.* at 202.

¹¹² See Brief for Respondent at 9–12, *Sherill*, 544 U.S. 197 (No. 03–855), 2004 WL 2246333.

¹¹³ See 1 FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01 (2019).

¹¹⁴ *Sherill*, 544 U.S. at 211.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 203.

equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [Oneida Nation] from gaining the disruptive remedy it now seeks.¹¹⁷

In its opinion, the Court failed to acknowledge that Oneida Nation had been unable to pursue its #LandBack claims in federal court without a special jurisdictional statute until the late 1960s.¹¹⁸ In fact, it had been unclear to legal scholars what capacity Tribes had to sue in federal court up until the mid-twentieth century.¹¹⁹ As a result of its failure to grapple with the historical context of Oneida Nation's claim, the Court applied the equitable doctrines of laches, acquiescence, and impossibility to protect the interests of settlers.¹²⁰

The implication of the *Sherill* decision was that Oneida Nation could not exercise sovereignty over re-purchased lands within its reservation so long as the parcels were held in fee simple. Instead, the city could assess taxes against Oneida Nation's property within their reservation boundaries because the Tribe no longer had regulatory authority over these parcels. The *Oneida* trilogy of cases represents how the equitable doctrine of laches has been applied to protect settler governments against #LandBack claims, making it even harder for Tribes to regain sovereignty over dispossessed lands.¹²¹ In its *Sherrill* opinion, the Court also highlighted the fee to trust program run by the Department of the Interior as the "proper avenue" Congress had provided for tribal land acquisition.¹²² This avenue and its shortcomings are explored in the following section.

D. Land Acquisition and Fee To Trust Programs

Another strategy for the #LandBack movement has been tribal land acquisitions programs. Over the decades following the termination era, nearly every Tribe created one.¹²³ Using their land acquisition programs, many Tribes have purchased land from title owners, lobbied and litigated for the return of land, and participated in federal acquisition programs. Generally, these programs result in the returned land being converted into trust land, meaning these lands are "held in trust by the federal government for the beneficial ownership of the Tribe" or an individual

¹¹⁷ *Id.* at 216–17.

¹¹⁸ Not until 1966 did Congress pass legislation to establish original jurisdiction in federal district courts to federal question claims brought by federally recognized Indian tribes regardless of the amount in controversy. *See* Act of Oct. 10, 1966, Pub. L. No. 89-635, § 1, 80 Stat. 880 (codified as 28 U.S.C. § 1362).

¹¹⁹ For a discussion of this confusion *see generally* Richard B. Collins, *To Sue and Be Sued: Capacity and Immunity of American Indian Nations*, 51 CREIGHTON L. REV. 391, 394– (2018).

¹²⁰ *See Sherill*, 544 U.S. at 212.

¹²¹ Describing the most recent uses of laches in Indian land claims as "new laches," Professor Kathryn E. Fort argues that this application cannot truly be called an equitable doctrine because Tribal interests are never weighed properly into considerations. *See* Kathryn E. Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375, 402 (2011).

¹²² *Sherill*, 544 U.S. at 220–21.

¹²³ *See* GETCHES ET AL., *supra* note 12, at 320.

Indian.¹²⁴ For example, the return of Blue Lake to Taos Pueblo in 1970, thought of as the first return of Tribal land without payment, was returned to Taos Pueblo in trust status.¹²⁵

While there are instances where Tribes or their members sometimes own fee simple land within reservation boundaries, the *Sherrill* decision lauds fee to trust programs as the securest options presently available for Tribes to protect and enhance their land base while retaining sovereignty over their lands.¹²⁶ The scheme is one of the most fundamental to federal Indian law. Under the Indian Reorganization Act of 1934, the Secretary of the Interior is authorized to acquire land for Tribes to be held in trust by the federal government.¹²⁷ Land held in trust by the federal government for Tribes becomes Indian country, which is exempt from state and local taxation.¹²⁸ The benefit to tribal land holdings being categorized as Indian country is that tribal sovereignty is recognized by the United States as at its strongest over lands under this designation. Placing land into trust can help clarify political jurisdiction and allow Tribes to develop their land for important community and economic needs, such as housing or gaming projects.¹²⁹ However, there are many caveats and limits to the security that trust status can offer when it exists within the system of a settler colonial state.

The U.S. Department of the Interior runs several land acquisition programs and fee-to-trust programs for Tribes. The Land Buy-Back Program for Tribal Nations was established following the *Cobell v. Salazar* Settlement Agreement, which resulted from a class action brought against the federal government for the alleged historic mismanagement of Indian trust funds.¹³⁰ It has provided over \$1.9 billion for the U.S. Department of the Interior to purchase fractional interests in trust or restricted fee land in order to make it easier for Tribes to put their trust land to beneficial use.¹³¹ This program recently ended in November 2022.¹³²

The Fee to Trust land acquisition program has existed longer and involves an administrative process where Tribal parties can submit an application to the Bureau of Indian Affairs, which will consider the several factors and then reach a decision on its ability to take the land into trust.¹³³ Because the Fee to Trust program is run by an executive agency, its administration is subject to the priorities of the President's political appointees. The changes in fee to trust program administration between the Obama and Trump administrations demonstrates how difficult it can be for Tribes to get their land put into trust when it is subject to political whims. Over eight years, the Obama administration put over 560,000 acres of tribal fee

¹²⁴ COHEN, *supra* note 113.

¹²⁵ Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437.

¹²⁶ See Leonard Powell, PowerPoint Presentation, Fee-To-Trust: Recent Developments, California Indian Law Association (on file with the author).

¹²⁷ 25 U.S.C. § 5108.

¹²⁸ See *id.*

¹²⁹ Powell, *supra* note 126.

¹³⁰ See GETCHES ET AL., *supra* note 12, at 375.

¹³¹ Heirs property issued resulting from allotment are discussed *supra* Part I-C.

¹³² U.S. Dep't of the Interior, *Land Buy-Back Program for Tribal Nations*, <https://www.doi.gov/buybackprogram> (last visited Jan. 2, 2023).

¹³³ 25 C.F.R. § 151 (2022).

land into trust.¹³⁴ In contrast, over four years, the Trump administration put a mere 75,000 acres into trust.¹³⁵ In April 2021, there were reportedly still roughly 1,000 applications pending under the Biden administration.¹³⁶

In the last decade, the ability of the U.S. Department of the Interior to place land into trust has been severely limited by the Supreme Court for hundreds of Tribes federally recognized after the passage of IRA. In 1991, the Narragansett Indian Tribe purchased land in fee simple adjacent to its land holdings and asked the Secretary of the Interior to place this land into trust.¹³⁷ Like Oneida Nation, the Narragansett Indian Tribe had pursued #LandBack litigation in the 1970s for Rhode Island's violations of the Nonintercourse Act.¹³⁸ Their litigation ultimately ended in a land settlement of 1,800 acres after the passage of the Rhode Island Indian Claims Settlement Act of 1978.¹³⁹ However, unlike other trust land, the Act provided that the settlement land was "subject to civil and criminal laws and jurisdiction of the State of Rhode Island."¹⁴⁰

After the Secretary of the Interior accepted the Tribe's purchased fee land into trust, the state of Rhode Island sued, arguing that the phrase "now under Federal jurisdiction" in the IRA meant that it only applied to Tribes who had been recognized before the Act's passage in 1934.¹⁴¹ Under their argument, the Narragansett Indian Tribe's land would not qualify because the Tribe was not officially recognized by the federal government until 1983.¹⁴² In *Carcieri v. Salazar*, the Court agreed with Rhode Island, holding that the Secretary of the Interior's power to take land into trust under the IRA only applied to Tribes under federal supervision at the Act's passage.¹⁴³ As a result of this decision, Indian law scholars argue that federal legislation is likely needed to amend the IRA to include Tribes federally recognized after 1934.¹⁴⁴ However, a statute resolving this issue has yet to be enacted, allowing each administration to interpret the IRA more narrowly or broadly based on their political priorities.

The Mashpee Wampanoag Tribe has been one of the Tribes most visibly affected by the *Carcieri* decision, and their recent legal struggles demonstrate the severe limitations of the U.S. Department of the Interior Fee to Trust programs.

¹³⁴ Powell, *supra* note 126.

¹³⁵ *Id.*

¹³⁶ See *id.* In December 2022, the Biden administration issued a proposed rule that would amend the current land into trust acquisition regulations and "seeks to make the land into trust process more efficient, simpler, and less expensive to support restoration of tribal homelands." Land Acquisitions, 87 Fed. Reg. 74334 (proposed Dec. 5, 2022) (to be codified at 25 C.F.R. pt. 151).

¹³⁷ See *Carcieri v. Salazar*, 555 U.S. 379, 385 (2009).

¹³⁸ See Bethany C. Sullivan & Jennifer L. Turner, *Enough Is Enough: Ten Years of Carcieri v. Salazar*, 40 PUB. LAND & RES. L. REV. 1, 51 (2019).

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citing Pub. L. No. 95-395 § 9, 92 Stat. 813, 817 (1978)).

¹⁴¹ *Carcieri*, 555 U.S. at 385–86.

¹⁴² See *id.* at 384.

¹⁴³ *Id.* at 395–96.

¹⁴⁴ See Sullivan & Turner, *supra* note 138, at 59 (2019); see also Olivia Miller, *The Post-Carcieri Struggle for Tribal Land and the Case of the Mashpee Wampanoag*, 73 ADMIN. L. REV. 451, 467 (2021).

After the Tribe's federal recognition in 2007,¹⁴⁵ the Tribe acquired land and submitted a fee-to-trust application to the Secretary of the Interior.¹⁴⁶ After the application was finally approved in 2015, residents of Taunton, Massachusetts challenged the U.S. Department of the Interior's decision.¹⁴⁷ The First Circuit determined that the Bureau of Indian Affairs had improperly applied the IRA and could not place the Mashpee Wampanoag's land into trust status.¹⁴⁸ As a result of the decision, the U.S. Department of the Interior moved to revoke the land's federal trust status.¹⁴⁹

The Mashpee Wampanoag challenged this decision in the United States District Court for the District of Columbia. In 2020, the court held that the Secretary of the Interior's decision to revoke the land from federal trust had violated the Administrative Procedure Act as arbitrary, capricious, an abuse of discretion, and contrary to law.¹⁵⁰ The court remanded the decision back to the agency.¹⁵¹ As of 2021, the Biden administration has dropped the Trump administration's appeal of the decision, but the conflicting decisions have left the door open to future challengers while *Carcieri* remains good law.¹⁵²

Ultimately, the Department of the Interior's land acquisition programs can help some Tribes secure greater protection over their land base by putting fee land into trust, but these protections ultimately place tribal lands within a scheme controlled by the federal government to the benefit of settler colonialist politics. Congress' plenary power to unilaterally change federal Indian policy and fluctuating political priorities within the Executive branch serve both as a potential tool to enhance federal land acquisition programs and their likely foil. The next section demonstrates that there may be understudied routes for #LandBack based on Tribes' reserved sovereign powers.

E. Tribal power of eminent domain and *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*

The Hualapai Tribe's ancestral homelands and present-day reservation include land within the Grand Canyon National Park. The Tribe owns and operates the Grand Canyon Skywalk, "a glass-bottomed viewing platform suspended 70 feet over the rim of the Grand Canyon with the Colorado River flowing thousands of

¹⁴⁵ It took 32 years for the Mashpee Wampanoag to be federally recognized after the Tribe's initial application in 1975. Miller, *supra* note 144, at 463–64.

¹⁴⁶ *Id.* at 464.

¹⁴⁷ *Id.* at 453–64.

¹⁴⁸ Littlefield v. Mashpee Wampanoag Indian Tribe, 951 F.3d 30, 41 (1st Cir. 2020).

¹⁴⁹ Memorandum from the Sec'y of the Interior, U.S. Dep't of the Interior, to Director, Bureau of Indian Affs., regarding Littlefield v. Mashpee Wampanoag Indian Tribe, 951 F.3d 30 (1st Cir. 2020) (Mar. 27, 2020), <https://www.doi.gov/sites/doi.gov/files/uploads/littlefield-v-mashpee-wampanoag-indian-tribe-951-f.3d-30-1st-cir.-2020-signed-2020.03.27.pdf>.

¹⁵⁰ Mashpee Wampanoag Tribe v. Bernhardt, 466 F. Supp.3d 199, 236 (D.D.C. 2020).

¹⁵¹ *Id.*

¹⁵² Associated Press, *Feds Drop Legal Battle Against Mashpee Lands*, INDIAN COUNTRY TODAY (Feb. 20, 2021) <https://indiancountrytoday.com/news/feds-drop-legal-battle-against-mashpee-lands#:~:text=%E2%80%94The%20Mashpee%20Wampanoag%20Tribe%20scored,the%20tribe's%20land%20in%20Massachusetts.>

feet below.”¹⁵³ Before its completion, a Hualapai tribal corporation had entered into a revenue-sharing contract with a Nevada corporation for its management and operation.¹⁵⁴ Later dissatisfied with its deal, the Nevada corporation attempted to force the tribal corporation to engage in arbitration pursuant to the contract.¹⁵⁵ Instead, the Hualapai Tribal Council passed a resolution allowing the Tribe to exercise its eminent domain power to condemn the Grand Canyon Skywalk property for public use in order to acquire the Nevada corporation’s interest in the property.¹⁵⁶ When the Nevada corporation brought suit in federal court, the Ninth Circuit held that exhaustion of tribal remedies was required before proceeding in federal court.¹⁵⁷ The Nevada corporation would have to return to Hualapai Tribal Court to seek relief.

Although relatively unexplored by legal scholars, the *Grand Canyon Skywalk* case represents possibilities for Tribes to reassert their sovereign regulatory powers over non-member property interests within their reservation through eminent domain. Exercising these powers would likely keep lands within Indigenous hands, but would force Tribes to once again reckon with the fallbacks of either fee simple ownership or federal trust status.

F. Tribal advocacy for the return of land at the local and state level

In the last few decades, there have been notable reclamation efforts by Tribes advocating for return of their land from local governments and state agencies, especially in California. Duluwat Island is the traditional site of the Wiyot’s annual world renewal ceremony and also the infamous 1860 massacre of the Wiyot by white settlers.¹⁵⁸ The Wiyot first repurchased 1.5 acres of the island in 2000 following a grassroots fundraising campaign.¹⁵⁹ Since the early 2000s, the city council of Eureka, California has repeatedly transferred ownership of its holdings on Duluwat Island back to the Wiyot people.¹⁶⁰ As of 2019, the Tribe owned most of the remaining land on the island.¹⁶¹

Also in 2019, the California Public Utilities Commission (CPUC) adopted a formal tribal land transfer policy for surplus lands owned by utility companies. Under this policy, if a public utility company in California identifies surplus lands

¹⁵³ *Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa Inc.*, 715 F.3d 1196, 1198–99 (9th Cir. 2013).

¹⁵⁴ *Id.* at 1199.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* at 1206.

¹⁵⁸ *See* Harmeeet Kaur, *Indigenous People Across the US Want Their Land Back – And the Movement is Gaining Momentum*, CNN (Nov. 26, 2020)

<https://edition.cnn.com/2020/11/25/us/indigenous-people-reclaiming-their-lands-trnd/index.html>.

¹⁵⁹ *Native American Tribe Regains Island Taken After 1860 Massacre*, AL JAZEERA (Oct. 21, 2019) <https://www.aljazeera.com/news/2019/10/21/native-american-tribe-regains-island-taken-after-1860->

[massacre#:~:text=Most%20of%20an%20island%20off,decimated%20by%20settlers%20in%201860.&text=An%20island%20off%20the%20coast,and%20flush%20with%20invasive%20species.](https://www.aljazeera.com/news/2019/10/21/native-american-tribe-regains-island-taken-after-1860-massacre#:~:text=Most%20of%20an%20island%20off,decimated%20by%20settlers%20in%201860.&text=An%20island%20off%20the%20coast,and%20flush%20with%20invasive%20species.)

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

that it wants to dispose of, it must first contact and offer the right of first refusal to the Tribe whose ancestral homeland the utility occupies.¹⁶² The policy allows for transfers by donation or purchase.¹⁶³ As of fall 2021, there have been a few land transfers along Hat Creek to the Pit River Tribe, with more planned in the future.¹⁶⁴

The recent #LandBack work and reclamation efforts of Indigenous nations in California is remarkable. Some have even recognized the return of Duluwat Island as the first return of Indigenous land from a municipality in the United States without strings attached.¹⁶⁵ However, the no-strings-attached sentiment is more nuanced considering *Sherill*. As a result of the *Sherill* decision, once Tribes regain possession of their ancestral lands, they must choose between submitting to state regulation and taxation or to the federal government through an application to convert their fee land into trust status. This reality is faced by the vast majority of Indigenous nations seeking the return of their land.¹⁶⁶ All of this is the result of the United States property and legal regime and it puts Tribes between a rock and a hard place. Indigenous imagined alternatives are necessary to envision a reality where #LandBack is not premised on the consent of the American settler colonial project.

IV. Indigenous-imagined alternatives and #LandBack's future

As discussed in Part II, both fee simple ownership and land held in federal trust function within a settler colonial framework that benefits and legitimizes the control of the United States government over Indigenous nations and their land. This Part will explore Indigenous-imagined alternatives for #LandBack that resist this framework. This note's invocation of the Indigenous imagination is rooted in a framework for radical imagination articulated by Taiaiake Alfred (Mohawk) and directed at settlers. Alfred defines radical imagination as "reenvisioning your existence on this land without the inherited privileges of conquest and empire. It is accepting the fact of a meaningful prior Indigenous presence, and taking action to support struggles not only of social and economic justice, but political justice for

¹⁶² See Final Tribal Land Transfer Policy, Cal. Pub. Utils. Comm'n, adopted on Dec. 5, 2019, available at <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/news-and-outreach/documents/bco/tribal/final-land-transfer-policy-116.pdf>.

¹⁶³ *Id.*

¹⁶⁴ Mike Mangas & Adam Robinson, *Return of Tribal Land: Ancestral Land in Hat Creek Returned to Pit River Tribe*, ABC-KRCR (Nov. 8, 2021) <https://krctrv.com/news/local/return-of-tribal-land-ancestral-land-in-hat-creek-returned-to-pit-river-tribe>.

¹⁶⁵ See Kaur, *supra* note 158.

¹⁶⁶ The Pueblos of New Mexico are a fascinating counter-example. The Pueblos hold their land in fee simple as a result of first coming into contact with and often resisting Spanish colonization before being incorporated into the United States. Pueblo land is held in fee simple, but is considered Indian country, and generally cannot be taxed within jurisdictional boundaries by the state of New Mexico under federal law. See Phaedra Haywood, *County Can't Tax Pueblo Over Former Property*, SANTA FE NEW MEXICAN (Mar. 3, 2010) https://www.santafenewmexican.com/news/local_news/county-cant-tax-pueblo-over-former-property/article_751de255-41c1-595b-a653-92c14d582934.html.

Indigenous nations as well.”¹⁶⁷ Relying on Alfred’s framework to reject the settler colonial bind imposed on the #LandBack movement, Part III works to center Indigenous perspectives on the future of #LandBack.

A. Coequal Sovereignty and the Return of Public Lands to Indigenous Hands

Many Indigenous thinkers have posited joint or coequal sovereignty with the United States as a viable way to put land back into Indigenous hands. Scholars like Emily Riddle (Nehiyaw) have contended that Indigenous political traditions contain the possibility for shared jurisdiction by rejecting the need for exclusive control over a territory.¹⁶⁸ In this vein, Canadian-Indigenous scholar Leanne Betasamosake Simpson (Mississauga Nishnaabeg) has traced the precolonial history of the Nishnaabeg Nation and Haudenosaunee Confederacy.¹⁶⁹ Her research on the Gdoo-naaganinaa, a pre-colonial treaty between these two Indigenous nations, demonstrates that an Indigenous understanding of sovereignty rejects the western notion of exclusivity to “allow for diverse, overlapping Indigenous jurisdictions and sovereignties.”¹⁷⁰ In the present, many overlapping jurisdictions exist between the United States and Indigenous nations, especially over reservation lands. However, this system is trapped within a hierarchy that recognizes Tribal sovereignty as subordinate to the United States’ ultimate authority.

Indigenous-imagined alternatives reject this hierarchy and emphasize that sovereignty is built through relationships. In order to decolonize the concept of overlapping jurisdiction, settlers must reimagine themselves as “human beings in equal and respectful relation to other human beings and the natural environment.”¹⁷¹ An understanding of sovereignty built on relationships and rejecting the western notion of exclusivity can be read in harmony with other #LandBack calls regarding the return of federal public lands.

In fall 2021, one of NDN Collective’s LANDBACK campaign demands was the return of “[a]ll public lands back into Indigenous hands.”¹⁷² David Treuer (Ojibwe) has made a similar call for the return of public lands in the form of most national park sites. He argues that tribal ownership of the national parks would serve both tribal government interests and American society through better stewardship.¹⁷³ In April 2021 he proposed that:

All 85 million acres of national-park sites should be turned over to a consortium of federally recognized tribes in the United States. (A few areas run by the National Park Service, such as the National

¹⁶⁷ Taiaiake Alfred, *What is Radial Imagination? Indigenous Struggles in Canada*, 4 AFFINITIES: J. RADICAL THEORY, CULTURE & ACTION, 5, 5 (2010).

¹⁶⁸ See THE RED NATION, THE RED DEAL: INDIGENOUS ACTION TO SAVE OUR EARTH 132 (2021).

¹⁶⁹ See *id.*, at 131.

¹⁷⁰ *Id.*

¹⁷¹ Alfred, *supra* note 167, at 5–6.

¹⁷² NDN Collective, *supra* note 5.

¹⁷³ See David Treuer, *Return the National Parks to the Tribes*, ATLANTIC (Apr. 12, 2021) <https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/>.

Mall, would be excepted.) The total acreage would not quite make up for the General Allotment Act, which robbed us of 90 million acres, but it would ensure that we have unfettered access to our tribal homelands. And it would restore dignity that was rightfully ours. To be entrusted with the stewardship of America's most precious landscapes would be a deeply meaningful form of restitution.¹⁷⁴

The return of the United States' national parks to Indigenous control advocated by Treuer would drastically alter land holdings within the American legal and property systems. To explain its viability, Treuer points to the expertise of tribal leadership at governance, crafted over “centuries of legal, political, and physical struggle” and through a long historical practice of “administering... widely dispersed holdings and dealing with layers of bureaucracy.”¹⁷⁵ In rejecting infeasibility arguments with Indigenous expertise, Treuer's point also demonstrates that dismantling the jurisdictional hierarchy imbedded in federal Indian law and moving to coequal sovereignty over public lands would cut through artificial layers of authority without much fanfare and to the benefit of all Americans by reinvigorating the national parks system and repatriating dispossessed land to many Tribes.

Treuer's vision also seeks to protect Tribes from the “partisan back-and-forth in Washington,”¹⁷⁶ which Part II-E noted will remain a hindrance as long as federal Indian land policy is subject to Congress' plenary power and Executive prerogatives. It is unclear what the ownership scheme would be for the consortium of federally-recognized tribes Treuer envisions would run these sites.¹⁷⁷ It may be that Treuer's idea would still function within the current system, but that he has found a way for some Tribes to maneuver around state taxation due to states' inability to tax federal property. However, the program Treuer has imagined also leaves open the possibility for rejection of fee simple ownership and hints at a potential rejection of trust land status.¹⁷⁸ Co-equal jurisdiction also seems fundamental to the scheme envisioned by Treuer, which echoes the understandings of Indigenous sovereignty put forth by both Riddle and Simpson and incorporated into *The Red Deal*.¹⁷⁹

Movements for the return of Indigenous land have had a variety of successes globally. Across the Pacific Ocean, the Kuku Yalanji people recently regained control of public lands in the form of Daintree National Park from the Queensland government of Australia after four years of negotiation.¹⁸⁰ The Kuku Yalanji will jointly manage several national parks with the Queensland government, but will

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ RED NATION, *supra* note 168, at 131–32.

¹⁸⁰ Jaclyn Diaz, *A Historic Rainforest and Other Lands Have Been Returned to Indigenous Australians*, NAT'L PUB. RADIO (Oct. 5, 2021),

<https://www.npr.org/2021/10/05/1043256101/indigenous-australians-get-land-back-queensland>.

eventually regain sole management of their ancestral lands.¹⁸¹ Although a great success for the Kuku Yalanji, it is worth noting that #LandBack movements in colonized lands have generally had to craft their legal justifications for land return under a settler colonial framework when bringing their claims. Even in Australia, where Indigenous land interests are recognized in 40 percent of the country's land mass,¹⁸² #LandBack movements have had to center many of their demands around the concept of aboriginal or native title.¹⁸³ This means that although Indigenous land rights may be recognized in the form of aboriginal title, these rights still can be "extinguished" by a settler government.¹⁸⁴ This title system functions within the same hierarchy that subordinates Indigenous political jurisdictions as lesser to settler authorities. Therefore, Indigenous claims to land and the exercise of political authority over it require rejection of both aboriginal title and western ideas of exclusive ownership as one future for #LandBack.

B. Indigenous Rejection of Settler Colonialism Through Anti-Capitalist Occupation

A rejection of the distinction between aboriginal title and settler title could work to undo the subordinate land ownership available to Indigenous nations within the United States. However, the rejection of colonial capitalism called for by many Indigenous thinkers and collectives like the Red Nation would likely reject the idea of title ownership over land completely. Instead, a decolonized radical imagination of land rejects the notion that "this land and everything on and in it as mere resources for capitalist enterprise."¹⁸⁵

In its 10 Point Program, the Red Nation demands the repatriation of Indigenous lands and the end to capitalism-colonialism as an occupying force:

Colonial economies interrupt cooperation and association and force people instead into hierarchical relations with agents of colonial authority who function as a permanent occupying force on Native lands... Political possibilities for Native liberation therefore cannot emerge from forms of economic or institutional development, even if these are Tribally controlled under the guise of 'self-determination' or 'culture.' They can only emerge from directly challenging the capitalist-colonial system of power through collective struggle and resistance...Capitalism-colonialism means death for Native peoples. For Native peoples to live, capitalism and colonialism must die.¹⁸⁶

¹⁸¹ *Id.*

¹⁸² Nat'l Indigenous Australians Agency, *Land and Housing*, <https://www.niaa.gov.au/indigenous-affairs/land-and-housing> (last visited Nov. 26, 2021).

¹⁸³ *Mabo v. Queensland [No. 2]* (1992) 175 CLR 1 (Austl.)

¹⁸⁴ *See id.*

¹⁸⁵ Alfred, *supra* note 167, at 5.

¹⁸⁶ The Red Nation, *10 Point Program*, <http://therednation.org/10-point-program/> (last visited Nov. 26, 2021).

This rejection of colonial capitalism called for by the Red Nation necessitates the rejection of land politics created by settler colonial nations and subjected on Indigenous nations without their full consent. One response has been Indigenous-led occupation tactics that reject the forces of colonial capitalism.

Nick Estes (Lower Brule Sioux) has traced the history of many Indigenous anti-capitalist occupations in the last fifty years, including the occupation of Alcatraz by Indians of All Tribes, the occupation of Wounded Knee by the American Indian Movement, and the ongoing occupation of water protectors' camps protesting pipelines across Turtle Island.¹⁸⁷ As Parts I and II noted, the history of Indigenous resistance to the dispossession of Indigenous land is long and ongoing. These anti-capitalist occupations have been successful in drawing international attention to the destruction caused by colonial capitalism and historic wrongs perpetuated by the United States as a settler colonial project.¹⁸⁸ Most recently in this long history, the #NoDAPL camps have served as a place of Indigenous liberation where water protectors have drawn upon "abolition geography" to create a future free from settler colonialism in the present.¹⁸⁹ "Abolition geography" as a framework for the #LandBack movement acknowledges the possibility of a future free from settler colonialism built by the people and that ultimately results in the return of Indigenous land.

V. Conclusion

Tracing the long and complex history of Indigenous resistance to the United States settler colonial project through a #LandBack lens demonstrates a powerful truth: Tribes' most recent calls for the return of their land signals the imminent exhaustion of existing legal and property avenues for this movement. Stuck between the limitations of fee simple ownership and the disadvantages of federal trust status, the only routes to #LandBack presently available require the consent of the United States and reinforce a hierarchy that subordinates Tribes. As a result, activists and advocates within the #LandBack movement will likely continue exploring Indigenous-imagined alternatives to the current regimes of property and federal Indian law systems. These alternatives reject settler colonialism and capitalism as the framework in which return of Indigenous land must occur and center Indigenous understandings of sovereignty in the future of #LandBack.

¹⁸⁷ See generally NICK ESTES, OUR HISTORY IS THE FUTURE (2019).

¹⁸⁸ See *id.* at 254.

¹⁸⁹ See *id.* at 253.