

# **Negotiating the Unmapped: Native American Land Claims and the Limits of Justice**

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The history of Native occupation of what is now the United States stretches back thousands of years, with indigenous peoples across the continent developing diverse and complex cultures, societies, and systems of governance. Some tribes, perhaps most notably those which resided in the area of the Great Plains, lived a nomadic lifestyle prioritizing mobility for resource acquisition rather than fixed settlement.<sup>1</sup> On the other hand, nations such as the Haudenosaunee (the Iroquois Confederacy) and the Cherokee favored settling in permanent villages, eventually managing vast territories through complex social, political, and economic networks.<sup>2</sup> Upon contact with the Europeans, Native tribes and nations sought to navigate an increasingly complex world of shifting alliances and territorial pressures. **Though many tribes initially engaged with European settlers through trade and diplomacy, colonial efforts through the 16<sup>th</sup> and 17<sup>th</sup> centuries began a period of unprecedented land dispossession that accelerated with the formation of the United States.**

**Despite promoting an ideology of “manifest destiny”, which was deemed to justify the expansion of the United States at the expense of native peoples, the fledgling US government pursued an official policy of land acquisition through the use of treaties.** By this modus operandi, the process of land dispossession was given the status of legal legitimacy, presenting treaties as mutual agreements despite the fact that they were typically signed under duress or manipulated through deceit, with promises of land compensation or protection rarely upheld. The U.S. government also resorted to military force to enforce land seizures, particularly during the Indian Wars, as settler encroachments continued. The signing of treaties like the Fort

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<sup>1</sup> “The Plains Indians (U.S. National Park Service),” n.d., <https://www.nps.gov/articles/000/the-plains-indians.htm>.

<sup>2</sup> “Who We Are - Haudenosaunee Confederacy.” Haudenosaunee Confederacy, June 24, 2021. <https://www.haudenosauneeconfederacy.com/who-we-are/>.

Laramie Treaty of 1851 and 1868 with the Lakota Sioux promised territorial sovereignty, but these agreements were violated as soon as settler interests, such as the discovery of gold in the Black Hills, came into play.<sup>3</sup> As the U.S. expanded westward and further into Native territories, policies such as the Dawes Act of 1887 aimed to break up communal lands, erode tribal structures, and push Indigenous peoples toward assimilation into European-American agricultural practices. The Dawes Act led to the allotment of tribal lands to individual Native members, with "surplus" lands sold off to settlers, drastically reducing Native-held land by millions of acres.<sup>4</sup>

This legal method of land seizure was further protected by the longstanding doctrine of sovereign immunity, which prevented Native American tribes from initiating legal action against the US government without its consent. For a brief period of time following the establishment of the Court of Claims in 1855, which was meant to adjudicate monetary suits brought against the federal government, tribes could file suits based on treaty violations. However, Congress was quick to curtail this strategy with an amendment to the original bill in 1863 which “excluded from the new court’s jurisdiction any claim dependent on any treaty between a tribe and the United States.”<sup>5</sup> It wasn’t until the passage of the Indian Claims Act of 1946, following decades of campaigning on the part of legislators and tribal representatives, that the tribes were finally given the chance to bring claims before a federally sanctioned commission and potentially receive monetary compensation for land lost as a result of treaty violations. **However, despite**

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<sup>3</sup> Jeniffer Viegas, *The Fort Laramie Treaty, 1868: A Primary Source Examination of the Treaty That Established a Sioux Reservation in the Black Hills of Dakota* (New York: The Rosen Publishing Group, 2005), 46.

<sup>4</sup> “Dawes Act (1887),” National Archives | Milestone Documents, February 8, 2022, <https://www.archives.gov/milestone-documents/dawes-act>.

<sup>5</sup> Michael Lieder and Jake Page, *Wild Justice: the People of Geronimo vs. the United States* (New York: Random House, Inc., 1997), 53.

**the ostensible good intentions of legislators and the hope tribes had in the commission, in conception and execution the ICC's operations highlighted the fundamental divide between indigenous and Western perceptions of land and its socioeconomic role, ultimately detracting from its ability to adequately compensate for the dispossession of Native American tribes.**

Examining the legal processes followed by the commission highlights some key aspects of this perceptual divide. The ICC's first goal when adjudicating claims cases was to establish the extent of land a tribe could claim ownership of under the doctrine of 'Indian title', which "rested on exclusive tribal use and occupation from 'time immemorial.'"<sup>6</sup> Any tribe bringing claims before the commission was responsible for procuring the expert testimony necessary to proving that the tribe had exclusively occupied the tract of land in question. Of course, this presented the researchers (anthropologists and historians) involved with a great number of evidentiary difficulties because "written records identifying Indian lands were nonexistent and oral accounts of land holdings were held to constitute inadmissible hearsay."<sup>7</sup> **Legal doctrines such as 'Indian title' thus highlight fundamental disparities between Indigenous and Western understandings of land and the relationships people held with it.**

**While the tribes that brought forth claims sought to operate within this judicial framework to the best of their ability, the contradiction could prove to be insuperable. If exclusive occupancy or use of an area since time immemorial could not be established to the commission's satisfaction, the tribe's ownership of the land was denied, and compensation was**

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<sup>6</sup> United States Indian Claims Commission. *United States Indian Claims Commission Final Report*. 95th Cong., 2d sess. September 30, 1978. <https://commons.und.edu/indigenous-gov-docs/167/>, 10.

<sup>7</sup> Richard J. Ansson Jr., *The Indian Claims Commission: Did the American Indians Really Have Their Day in Court?* (review of *Wild Justice* by Michael Lieder & Jake Page), 23 *American Indian Law Review* 207 (1998), <https://digitalcommons.law.ou.edu/ailr/vol23/iss1/8>, 211.

precluded. Although these judicial doctrines and practices were routine business in the United States legal system, they inevitably caused conflict and misunderstanding when applied in the context of Native American land claims, as they proved incapable of accounting for the realities of Indigenous land use, occupancy, and stewardship.

**Rather than viewing land as an asset under the ownership of a single individual or group, many Native American tribes understood land in terms of the resources available in a given area; the abstract, Western concept of land's economic or monetary value was completely unfamiliar.** One anthropologist acting as chief expert witness for the defense in *Indians of California vs. the United States* writes of his experience: “early in the research it became clear that land ownership in western legal terms was meaningless. Rather, ownership involved rights of usage...”<sup>8</sup> Moreover, while tribes and families might claim use of a particular area of land, other groups may be allowed access as well,<sup>9</sup> further complicating the tribes’ task of establishing their exclusive ownership of the land.

**Of course, even if a tribe had, in fact, been the exclusive occupants of an area of land since ‘time immemorial’, proving this to be the case was an enormously difficult task in its own right.** As mentioned above, oral traditions pertaining to knowledge of land and a tribe’s relationship to it were deemed inadmissible in court, and prior to European contact, written or pictorial records describing land use and occupancy were practically nonexistent. Where there are examples of indigenous cartographies, they tend to reflect conceptual rather than strictly geographical understandings of land. For instance, the Catawba Deerskin Map, one of the few

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<sup>8</sup> Ralph L. Beals, “The Anthropologist as Expert Witness: Illustrations from the California Indian Land Claims Case,” In *Irredeemable America: The Indians’ Estate and Land Claims* ed. Imre Sutton (Albuquerque: University of New Mexico Press, 1985), 141.

<sup>9</sup> U.S. Indian Claims Commission, *Final Report*, 11.

remaining Indigenous maps from the colonial period,<sup>10</sup> depicts the Indian nations immediately to the northwest of South Carolina. However, “rather than emphasizing geographic accuracy and scale, the map focuses on the network of relationships between the Indian nations and the English.”<sup>11</sup> This map depicts a web of circles representing various tribes, linked by lines which may represent political and economic, rather than geographic, distance. The largest circle, depicting a Catawba community, occupies a central position in this network, and English colonial settlements, while included, are positioned at the periphery. The absence of strict territorial boundaries reflects a conceptual rather than geographical approach, focusing on important relationships rather than fixed borders. In this case, even when creating a map specifically to illustrate political relationships between tribes, the indigenous author(s) neglected to delineate exact boundaries separating them. Although Native tribes certainly possessed detailed knowledge of the land around them, producing Western-style maps was simply not necessary for their political and cultural life.

Another example of this culturally embedded approach to land and territory is found in the diplomatic frameworks of peoples indigenous to the Great Lakes region and northeastern North America, where the term “a dish with one spoon” refers to the concept of sharing land to the mutual benefit of all its inhabitants.<sup>12</sup> These tribes held ceremonies upon making such agreements during which communal representatives exchanged wampum belts symbolizing and recording their treaty, perhaps the most well-known of which is the “Dish with One Spoon”

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<sup>10</sup> Tim St. Onge, “Celebrating Native American Cartography: The Catawba Deerskin Map,” The Library of Congress, November 30, 2016, <https://blogs.loc.gov/maps/2016/11/celebrating-native-american-cartography-the-catawba-deerskin-map/>.

<sup>11</sup> St. Onge, “Catawba Deerskin Map.”

<sup>12</sup> Fred Glover, “A Dish With One Spoon,” The Canadian Encyclopedia, March 31, 2020, accessed December 7, 2024, <https://www.thecanadianencyclopedia.ca/en/article/a-dish-with-one-spoon>.

wampum commemorating an agreement between the Haudenosaunee and Anishinaabe peoples prior to European contact.<sup>13</sup> **However, this notion of mutually shared responsibility for and benefit from land would conflict with the European concept of private property, which emphasized exclusive ownership, fixed boundaries, and individual control - principles that would later underpin US legal frameworks governing land claims and dispossession.**

**Despite the difficulty – or impossibility – of reconciling the realities of Native American history and culture with the exigencies of a Western legal system, the Indian Claims Commission required indigenous groups to fit their claims into a framework that required exact demarcations, exclusive ownership rights, and written records to substantiate them.** The commission itself came to acknowledge some of the problems inherent to this approach: in producing the map appended to the ICC’s Final Report, the commission utilized Charles C. Royce’s compilation *Indian Land Cessions in the United States* (1899), which translated “the often-vague treaty calls into precise boundaries.”<sup>14</sup> Despite noting that mapping Native land cessions “is a subtractive process, and often the cession did not match the true ownership of the land,”<sup>15</sup> Royce’s *Indian Land Cessions* was one of the few comprehensive cartographic sources the commission could rely upon, and played a key role in the determining the extent of land a given tribe was entitled to, and the monetary compensation that would follow this determination.

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<sup>13</sup> Indiana University Libraries, “Midwest Indigenous Cartography Project,” *ArcGIS StoryMaps*, May 15, 2023, <https://storymaps.arcgis.com/stories/b74a7eb626904f5b8c22a41e462474fb>.

<sup>14</sup> U.S. Indian Claims Commission, *Final Report*, 127.

<sup>15</sup> *Ibid.*

As mentioned above, ascertaining with any certainty the precise boundaries of a tribe's occupied land area required consulting the testimony of expert witnesses. However, the sources these experts relied upon were incomplete and multifaceted, and their testimonies often further complicated the litigatory process. Anthropologist Julian H. Steward of the University of Illinois made the point that "virtually no evidence presented in these cases can properly be called 'primary evidence,' 'firsthand knowledge,' or an 'eye witness account'" and that "it is therefore ridiculous to proclaim that the facts speak for themselves."<sup>16</sup> Nevertheless, when confronted with the complications and uncertainties of determining tribal land boundaries, the commissioners ultimately went beyond the evidence, consulting the theories, interpretations, and opinions of expert witnesses.<sup>17</sup> **Considering the commission's assumption that Native oral traditions relating to land usage and occupancy constituted inadmissible hearsay, a willingness to make use of the opinions and hypotheses of Western academics can only be illustrative of its inherent biases which disadvantaged the Indigenous peoples the commission was ostensibly founded to assist and compensate.**

**The commission possessed more fundamental and insidious biases as well, reflective of the historical biases of the US government as it managed its affairs with the Native peoples it continually dispossessed.** For instance, the term "tribe", as the ICC Final Report notes, "came to be used generally after the Federal Government began exclusively handling Indian relations."<sup>18</sup> Before the sweeping land seizures the US government executed through the 19<sup>th</sup> century, the term "nation" had been more common, referring more so to a cultural than a

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<sup>16</sup> U.S. Indian Claims Commission, *Final Report*, 6

<sup>17</sup> Ibid.

<sup>18</sup> U.S. Indian Claims Commission, *Final Report*, 10.



political unity.<sup>19</sup> In fact, prior to Western contact, these groups may have shared similar customs, language, and culture, but did not act as political units, which were much smaller bodies corresponding to towns or villages.<sup>20</sup> However, during the “treaty era” of the 19<sup>th</sup> century, the Native peoples of North America gradually became more accustomed to this Western categorization, thus ceding to the Western view of indigenous socio-political organization as they were continually forced to cede their lands.

**As alluded to above, the treaties crucial to this process of land dispossession reflect the US government’s desire to legitimize its seizure of Native American territories.** The ICC notes in its Final Report: “historical precedent and national policy called for the United States to acquire this land by the legal forum of treaty-making and legislation rather than the simpler method of conquest and confiscation.”<sup>21</sup> Acquiring land by these means may have partly motivated by a desire to prevent future conflicts with the land’s native inhabitants, however, this Western inclination toward legal legitimacy would ultimately support the tribes’ efforts to acquire representation and compensation for themselves, as they continued to engage with an adversarial judicial system in an effort to ameliorate their circumstances.

**While these efforts eventually led to the establishment of the ICC, it is important to highlight the ways in which the work of the commission itself can be viewed as a continuation of the US government’s broader efforts to legitimize its conquests.** For instance, the language employed by the commission, particularly its use of terms like “land cessions”, further shaped the narrative of Native American dispossession. By framing the transfer

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<sup>19</sup> Ibid.

<sup>20</sup> A.L. Kroeber, “Nature of the Land-Holding Group” *Ethnohistory* 2, no.4 (1955): 303, <https://doi.org/10.2307/480561>.

<sup>21</sup> U.S. Indian Claims Commission, *Final Report*, 1.

of Indigenous lands to the US government as a process of “cession”, the ICC perpetuated a narrative that minimizes the coercive and unjust methods often involved in these transactions. In this view, the commission’s goal of settling land disputes through financial settlements reflected an effort to transform a history of dispossession into a resolved legal matter, so as to close the books on centuries of conquest and displacement.

**However, it is important to resist playing into a narrative which elides the agency of Indigenous peoples and reduces their role to passive victims rather than active participants who resisted and adapted to pressures of colonial expansion.** While the US government may have had its own goals in establishing the ICC, the tribes that dealt with the commission did so conscientiously, seeking the most favorable outcome for their communities. The research generated by tribal representatives working with anthropologists and historians promoted greater academic interest in Native American cultures and histories, leading to the creation of an invaluable research depository in the Great Lakes-Ohio Valley Ethnohistory Collection at Indiana University, for instance.<sup>22</sup> Moreover, tribes that brought claims before the commission became much more acquainted with the workings of the US judicial system, “the potential of the courts and the operation of law in forwarding Indian interests”<sup>23</sup> Lessons from ICC cases continue to inform Native tribes in contemporary legal dealings, underscoring the importance of engaging with the legal system to assert indigenous sovereignty and protect community interests. While the ICC had many flaws in the conception and execution of its goals, its legacy includes a wealth of invaluable cultural and historical knowledge and a demonstration of Indigenous resilience and agency in navigating and resisting structures of colonial power.

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<sup>22</sup> Nancy Oestreich Lurie, “The Indian Claims Commission.” *The Annals of the American Academy of Political and Social Science* 436 (1978): 109. <http://www.jstor.org/stable/1042172>.

<sup>23</sup> Lurie, *Indian Claims Commission*, 109.

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