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History, Law, and Indian Claims: An Introduction

Kent McNeil and Jill E. Martin

IN THE PAST 25 YEARS, interest in Indian history has increased dramatically. This is part of a more general shift in historical focus, as many historians have realized that their predecessors tended to undervalue the roles and contributions of women, racial minorities, and other marginalized groups in the social, economic, and political development of North American society. In the American West, this shift in perspective has spawned a "new Western history" that has revitalized historical inquiry and deepened our understanding of the region's unique past.

The Indian nations occupy an essential and often central position in the history of the West, both in the United States and in Canada. Their presence and participation have profoundly influenced our perceptions of the region in both countries. For this reason alone, it is important for us to develop our understanding of those nations, and of the ways in which they have helped to shape Western history. But the study of Indian history also has special, contemporary significance, as it often underlies current legal claims that Indian nations have against the governments of the United States and Canada. While American and Canadian courts have approached Indian issues differently, in both countries Indian law has its historical roots in English common law, and has been formed in the context of actual historical events. This formative process is still going on today. Where Indian rights are concerned, history and law are therefore intertwined — they continually influence one another in absorbing and complex ways.

Some Indian claims are based on treaties that were signed with the Indian nations during the periods of colonization and of Westward expansion of the United States and Canada. Given the cross-cultural context in which these treaties were signed, their true meaning is seldom revealed by the documents themselves. Knowledge of the historical background and surrounding circumstances is therefore essential to their interpretation. Indian understanding of the meaning of the treaties also has to be ascertained as far as possible, and this involves looking beyond standard historical sources to the oral traditions of the Indian parties to these agreements.

Other Indian claims are based not on treaties, but on original Indian sovereignty and title to land, or on more limited resource use rights such as rights to hunt and fish. In the present-day this is especially so in Canada,

where large areas of the country, particularly in the Atlantic Provinces, Quebec and British Columbia, have not been affected by treaties involving land and natural resources. In its recent landmark decision in *Delgamuukw v. British Columbia* (1997), the Supreme Court of Canada decided that Indian title to land depends on proof that the claimed lands were occupied by the nation claiming them at the time of British assertion of sovereignty. So historical proof of occupation of lands, and determination of the date of British sovereignty, are now vital to contemporary Indian lands claims.

Kent McNeil's article on sovereignty on the Northern Plains addresses this matter mainly from the perspective of American law, as enunciated by Chief Justice Marshall in the seminal decisions on Indian rights that he wrote in the 1820s and 1830s. It questions some long-held assumptions about the validity of European, and hence American and Canadian, claims to sovereignty over regions where the colonizers had no effective occupation or control. If McNeil is correct, the 1803 Louisiana Purchase in particular may not have been effective to give the United States title to the territory it claimed west of the Mississippi that had not been previously occupied and controlled by Spain and France.

Peter d'Errico's article also examines Chief Justice Marshall's Indian jurisprudence, but from a different perspective. D'Errico challenges Marshall's reputation as a friend of the Indians by analyzing his decision in *Johnson v. McIntosh* (1823), and questioning his motives for reaching the decision he did. The decision is revealed as a rationalization, based on "Christian discovery" of North America and English Crown grants, of the private property rights of American citizens over the original rights of the Indian nations. Marshall's personal interest in lands in Kentucky, title to which rested on the same flimsy foundations, is a particularly intriguing part of this story.

Jill Martin's article on the Black Hills examines the Sioux claim to that uniquely beautiful region of what is now western South Dakota. The Sioux revere the Black Hills as a sacred part of their traditional homeland. As Martin points out, there is no doubt that the Hills were reserved to them by the Fort Laramie Treaty of 1868, and were taken by the United States in questionable circumstances and without just compensation after gold was discovered there by Custer's 7th Cavalry in 1874.

Martin makes a compelling case for the return of those lands that are still in the federal government's hands, comprising most of the Black Hills. As she demonstrates, this is a situation where justice and respect for the religious beliefs of an Indian nation should prevail over the economic and other interests of the United States.

Jeremy Mumford's article on the voting rights of the Métis in the north-central United States examines one aspect of the history of a people who have always been caught in the middle between Indian and White societies, and who have more often than not been marginalized in the process. After nations like the Sioux were dispossessed of most of their lands, the White settlers who moved in to replace them often did not acknowledge the rights of the Métis, either as "Indians" or as American or Canadian citizens. In Canada, this neglect of Métis rights led to two rebellions on the prairies, in 1869-1870 and 1885, headed by the charismatic Métis leader Louis Riel. Some of the grievances behind these rebellions remain unresolved to this day, as the Métis are still struggling to have their unique status and rights acknowledged by the Canadian government. In the United States, relations with the Métis were less dramatic, but as Mumford reveals were still characterized by racial prejudice and denial of democratic rights.

Bonnie Bozarth's article moves us from the 19th to the 20th century in its examination of the impact of Public Law 280, enacted by Congress in 1953, on the Flathead Indian Reservation in western Montana. In the states where it applies, that federal statute provides for the extension of much of the states' civil and criminal jurisdiction onto Indian reservations. It was part of a new policy of termination that was aimed at destroying the quasi-sovereign status of the Indian nations and assimilating their members into American society. Bozarth's article discusses how politics and economics were intertwined with the jurisdictional issues and demonstrates how it was ultimately economic pressure that permitted the Flathead Reservation to achieve in the 1990s a partial retrocession of some of the tribal authority they had lost in the 1960s. Their experience could prove useful to other Indian nations who are struggling to regain a portion of their lost autonomy.

The last two articles in this issue take us to the Pacific Northwest. Russel Barsh draws on his personal involvement as a lawyer defending members of the Lummi Reservation smokehouse in Washington State in his description of the history of efforts by the Coast Salish to maintain the *syewen* or winter dance, their traditional religion. As Barsh points out, suppression of Indian religions, including the winter dance, was an

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explicit objective of federal Indian policy from the 1870s to the 1930s, and went hand-in-hand with Christianizing missionary endeavors. Since then, interference with the practice of Indian religions has been less direct, as it has been aimed at achieving conflicting societal goals such as multipurpose use of public lands or elimination of the use of hallucinogens such as peyote, rather than suppression of Indian religions as such. Barsh's own experience involved a particularly poignant conflict between the right of parents to provide religious instruction to their children and the right of children not to be subjected to physical abuse. In his article, he challenges us to examine our own values before condemning religious practices that may initially appear unacceptable.

The final article by Lori Ann Roness and Kent McNeil examines the use of Indian oral histories in Canadian courts to establish Indian claims, especially claims to land. In the *Delgamuukw* decision, mentioned above, the Supreme Court of Canada directed that oral histories have to be admitted into court as evidence even though they are hearsay, and have to be given equal weight with standard sources of history such as written documents. However, Roness and McNeil point out that oral histories are influenced by societal values and worldviews that are different from the values and worldviews that underlie the writings of Canadian historians. In determining the "facts" upon which their decisions must be based — for example, determining whether an Indian nation was in occupation of certain lands when Britain asserted sovereignty — Canadian judges are therefore placed in the very difficult position of trying to evaluate oral histories that are rooted in belief systems that are often very different from their own. One is left wondering whether Canadian courts are really the appropriate forum for resolving these kinds of claims.

A common feature of almost all these articles, some of which were written by historians and some by lawyers, is the impact of past events and policies — be it a treaty, a federal statute, suppression of Indian religious freedom, or some other occurrence or action — on Indian nations today. More often than not, these past events and policies have had legal as well as practical consequences that are ongoing. Present-day Indian claims, both in the United States and in Canada, almost invariably have a historical basis. So where Indian nations are concerned, historians have to take account of law, and lawyers have to take account of history. As the articles in this issue demonstrate, interdisciplinary work in this area is not just a matter of academic choice — it is a real necessity if informed understanding is to be achieved and the claims of Indian nations are to be justly resolved.

