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The Louisiana Purchase: Indian and American Sovereignty in the Missouri Watershed

Kent McNeil*

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Like a historical mantra repeated time and again, it is asserted that the Louisiana Purchase doubled the size of the United States.¹ As this assertion takes for granted that the Purchase included the entire Missouri watershed, it rests on the assumption that France had a valid title thereto because, as a matter of common sense and international law, France could only convey title to territory that it actually owned.² But what basis is there for the assumption that France had sovereign title to the vast territory drained by the Missouri River that stretches from the Mississippi River to the Rocky Mountains? In actual fact, at the time of the Purchase in 1803 most of that territory had not even been explored, let alone possessed, by the French – it was occupied and controlled by many Indian nations, over whom France exercised no authority. As France clearly did not exercise *de facto* sovereignty over the Missouri watershed, any claim it had to the vast territory would have had to be a claim to *de jure* sovereignty based on law that did not depend on actual occupation and control. If so, what system of law could have given

* Distinguished Research Professor, York University, Toronto. I would like to thank Brent Arnold, Michael Burke, Ryan Gibson, and Dan McCabe for their indispensable research assistance, the Social Sciences and Humanities Research Council of Canada and Killam Trusts for their financial support, and Paul Mapp, Michel Morin, Kathy Simo, and two anonymous reviewers for their very helpful comments.

¹ E.g. see Merrill D. Peterson, “Louisiana!”, in Dolores Egger Labbe, ed., *The Louisiana Purchase Bicentennial Series in Louisiana History*, vol. III, *The Louisiana Purchase and Its Aftermath, 1800-1830* (Lafayette, 1998), 20 at 31; D.W. Meinig, *The Shaping of America: A Geographical Perspective on 500 Years of History* (New Haven, 1993), vol. 2, 11-12; Peter J. Kastor & François Weil, eds., *Empires of the Imagination: Transatlantic Histories of the Louisiana Purchase* (Charlottesville, 2009), 2.

² On the fundamental international law principle that a state cannot transfer territorial title that it does not have, see *Island of Palmas Case*, (1928) 2 R.I.A.A. 829, at 842; Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford, 2003), 120-21; Malcolm N. Shaw, *International Law*, 7th ed. (Cambridge, 2014), 360-61. Application of this principle to the Louisiana Purchase and France’s claim to Texas was acknowledged by Eugene C. Barker, Review of *Pichardo’s Treatise on the Limits of Louisiana and Texas*, edited by Charles Wilson Hackett, (1931) 35 *Southwestern Hist. Q.* 243, at 243.

France legal title to this immense territory, most of which no Frenchman had ever laid eyes on?

This article will probe, and attempt to answer, the troubling and too often neglected question of France's title to the Missouri watershed. Our discussion and analysis will rely on the vital distinction between *de facto* and *de jure* sovereignty. Assessing claims to *de facto* sovereignty is an empirical matter that depends on actual possession, control, and exercise of authority on the ground. As such, it is a subject for historical investigation. Assessment of claims to *de jure* sovereignty, on the other hand, necessarily involves deciding at the outset which body of law to apply, which raises a normative issue of moral and political philosophy: Which body of law *should* apply in the circumstances?³ Once that has been determined, a *de jure* assessment entails legal analysis in accordance with relevant principles and rules from the chosen body of law. While this analysis will obviously take known historical facts into account, it must be kept clearly in mind that, unlike *de facto* sovereignty, *de jure* sovereignty is a matter of mixed fact and law, not to be determined by historical methodology alone. In other words, it depends on the application of a particular body of legal rules to ascertained facts. This article will critically assess the validity of France's claim to territorial sovereignty over the Missouri watershed from both a *de facto* and a *de jure* perspective. This assessment will lead to a re-evaluation of the geographical extent of the Louisiana Purchase on the Northern Plains.

1. Sovereignty and the Indian Nations

Considered factually, sovereignty entails the actual exercise of political or governmental authority over peoples, or more commonly over peoples and territories (hence the term "territorial sovereignty") that are subject to that authority. *De facto* sovereignty's essential characteristic is the existence of an organized society that has political authority

³ See Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 *Queen's Law J.* 470; Burke A. Hendrix, *Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims* (University Park, PA, 2008); Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 *Can. J. of Law and Society* 145.

and is factually independent.⁴ Claims to *de facto* sovereignty can be assessed on this basis in historical and present contexts by factual investigation. As there is no need to resort to law, the criteria for *de facto* sovereignty can be applied universally, without entering into the normative question of whether it is appropriate to apply a particular body of law to a given people or territory.

In this context, it is also essential to distinguish between territorial sovereignty and title to land. Whereas the former involves the exercise of governmental authority by a political entity (the sovereign), the latter is a form of property that can be held, in Euro-American systems of law, either privately by individuals and corporations or publicly by governments (the property owners). Territorial sovereignty and title to land are therefore conceptually and legally distinct, which is why individuals and corporations can have private property rights in lands that are under the territorial sovereignty of the United States. This article is concerned with territorial sovereignty, not title to land.⁵

It is often assumed that European claims to territorial sovereignty in North America during the period of colonization have to be evaluated on the basis of the law of nations, now called international law. This is a *de jure* approach involving an initial choice of law that ignores the reality that the Indigenous peoples of this continent had (and have) their own systems of law that would be more relevant for assessing their *de jure* sovereignty.⁶ The justification for the sole application of the law of nations in this

⁴ See Kent McNeil, "Sovereignty and Indigenous Peoples in North America" (2016) 22:2 *UC Davis J. of International Law & Policy* 81. On the concept of sovereignty, see Charles Edward Merriam, *History of the Theory of Sovereignty since Rousseau* (New York, 1972); F.H. Hinsley, *Sovereignty*, 2nd ed. (Cambridge, 1986); John Hoffman, *Sovereignty* (Minneapolis, 1998); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge, 2010).

⁵ On Indigenous land rights, see Kent McNeil, *Common Law Aboriginal Title* (Oxford, 1989); Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Sydney, 2008); Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Oxford, 2014). On the distinction between sovereignty and title to land, see Emmerich de Vattel, *The Law of Nations*, 1758, trans. by Charles G. Fenwick (Washington, 1916), 84; John Westlake, *International Law*, 2nd ed. (Cambridge, 1910), vol. 1, 86-90; Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London, 1966), 99, 625-36. For an informative recent article that regrettably does not take this distinction into sufficient account, see Robert Lee, "Accounting for Conquest: The Price of the Louisiana Purchase of Indian Country" (2017) 103:4 *J. of Am. Hist.* 921.

⁶ See Daniel K. Richter & James H. Merrell, eds., *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600-1800* (Syracuse, 1987); Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York, 1997); Theodore Binnema, *Common and Contested Ground: A Human and Environmental History of the Northwestern Plains* (Norman, 2001); Taiaiake Alfred, "Sovereignty", in Joanne Baker, ed., *Sovereignty*

context rests on two premises, both of which are wrong: first, that the Indigenous peoples were inferior to Europeans and incapable of exercising sovereignty in accordance with their own systems of law; and second, that the law of nations was universal because it was based on natural law.⁷ The first premise is obviously racist and false. The second premise is also false, especially in the context of colonization, because this aspect of the law of nations was formulated by European nations and jurists, partly to justify European colonial claims.⁸ Their self-serving resort to universally applicable natural law therefore rings hollow. Moreover, by the nineteenth century the ascendancy of legal positivism led most European jurists to acknowledge and accept that what by then was known as international law was a body of rules developed by European nations, principally through customary practices and conventions, not by resort to universally applicable norms. As such, it would have applied principally to European nations and their overseas counterparts, such as the United States and the Latin American states after they became independent, to regulate relations among themselves. It would not have applied to other peoples in the world who did not participate in its formation or consent to be bound by it.⁹

Given that the essential ingredient of *de facto* sovereignty is the existence of an organized, independent political society, there can be no doubt that the Indigenous peoples of North America were sovereign. Prior to European colonization, they were organized as nations and exercised independent authority over their internal and external affairs, as well as over specific territories.¹⁰ This reality was in fact accepted by Chief

Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination (Lincoln, 2005), 33.

⁷ See E.B.F. Midgley, *The Natural Law Tradition and the Theory of International Relations* (New York, 1975); R.P. Anand, *Confrontation or Cooperation? International Law and the Developing Countries* (Dordrecht, 1987), 13-15; S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (New York, 2004), 15-31.

⁸ See Max Savelle, *Empires to Nations: Expansion in America, 1713-1824* (Minneapolis, 1974), 138-43; Anand, above n.7, 19-31; Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, 2005).

⁹ See William Edward Hall, *A Treatise on International Law*, 2nd ed. (Oxford, 1884), 40; C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford, 1967).

¹⁰ See Robert H. Lowie, *Indians of the Plains* (1954, reprinted Lincoln, 1982); Edwin Thompson Denig, *Five Indian Tribes of the Upper Missouri: Sioux, Arikaras, Assiniboines, Crees, Crows*, edited by John C. Ewers (Norman, 1961); Daniel K. Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge, MA, 2001); Binnema, above n.6; Colin G. Calloway, *One Vast Winter Count:*

Justice John Marshall in three early judgments of the United States Supreme Court, and has become a fundamental tenet of federal Indian law. In *Johnson v. M'Intosh*, decided in 1823, Marshall said that the Indians' "rights to complete sovereignty, as independent nations, were necessarily diminished" by the principle "that discovery gave title to the [European] government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."¹¹ This title by discovery was not just to territorial sovereignty; it was also proprietary, as it gave the discovering European government a right of pre-emption that prevented other Europeans as well as its own subjects from acquiring Indian lands.¹²

In the second case, *Cherokee Nation v. Georgia*, Marshall decided in 1831 that the Indian tribes, after incorporation within the acknowledged boundaries of the United States, were "domestic dependent nations" rather than foreign nations.¹³ A year later in *Worcester v. Georgia*, he again acknowledged the pre-existing *de facto* sovereignty of the Indian nations:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.¹⁴

He also clarified that the discovery principle applied only among the European powers:

It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those [the Indian nations] already in possession.¹⁵

The Native American West Before Lewis and Clark (Lincoln, 2003); James H. Merrell, "Second Thoughts on Colonial Historians and American Indians" (2012) 69:3 *William and Mary Quarterly* 451 at 478-83.

¹¹ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), 573-74. For critical discussion, see Robert J. Miller et al., *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford, 2010). For background to *Johnson v. M'Intosh*, see Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed the Indigenous Peoples of Their Lands* (New York, 2005).

¹² *Johnson v. M'Intosh*, above n.11. See Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 *McGill Law J.* 473 at 487-502.

¹³ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), 17.

¹⁴ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), 542-53.

¹⁵ *Ibid.* at 544. Marshall C.J.'s restated position is consistent with the principle that customary international law applies only to the community that created it and the rule that treaties bind only the parties. On custom, see Carleton Kemp Allen, *Law in the Making*, 7th ed. (Oxford, 1964), 67-160. On the rule respecting treaties, expressed by the maxim *pacta tertiis nec nocent nec prosunt*, see Lord McNair, *The Law of Treaties* (Oxford, 1961), 309-21; Brownlie, above n.2, 598-600.

Thus, for the complete sovereignty and land ownership that the Indian nations had enjoyed prior to the arrival of Europeans to be diminished, something more than mere discovery was required: the discovering European nation had to consummate its title by bringing the Indian nations and their territories under its dominion, which could be accomplished by conquest or treaty. After that occurred, the Indian nations nonetheless retained their title to any lands that had not been taken by or surrendered to the European nation in question or subsequently the United States, and also retained their internal sovereignty and authority to govern themselves and their remaining territories.¹⁶

2. The Louisiana Purchase

Turning to the Missouri watershed, numerous Indian nations, including the Arapaho, Arikara, Assiniboine, Blackfoot, Cheyenne, Crow, Grow Ventre, Hidatsa, Iowa, Kansa, Mandan, Missouriia, Omaha, Osage, Otoe, Pawnee, Ponca, and Sioux nations, occupied the region as independent political entities at the time of the arrival of Europeans.¹⁷ They would therefore have met the criteria for *de facto* sovereignty outlined above.¹⁸ Nonetheless, there can be no doubt that these nations are now within the territorial limits of the United States. So how and when did this occur? The standard answer, as already mentioned, is that the whole of the Missouri watershed became part of the United States in 1803 as a result of the Louisiana Purchase.¹⁹ This response is based on the

¹⁶ *Worcester v. Georgia*, above n.14, especially 557-61. See also *Ex Parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004); *Cohen's Handbook of Federal Indian Law*, Nell Jessup Newton, ed. (New Providence, NJ, 2012), §15.04.

¹⁷ See *Handbook of North American Indians*, vol. 13, *Plains*, edited by Raymond J. DeMallie (Washington, 2001), especially the map at ix, and works cited in n.10 above.

¹⁸ See Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (Boston, 2014), especially 25. Although the political and social organization of these nations varied greatly from that of European nations, *de facto* sovereignty depends, not on internal organization, but on effective control by independent political entities over peoples, or more commonly over peoples and territories, the boundaries of which do not need to be fixed or clearly defined. See the works cited in n.4 above.

¹⁹ In addition to the works cited in n.1 above, see Jon Kukla, *A Wilderness So Immense: The Louisiana Purchase and the Destiny of America* (New York, 2003), especially 286-87, 415 n.6; Peter J. Kastor, *The Great Acquisition: An Introduction to the Louisiana Purchase* (Great Falls, 2003), especially 14; *The Nation's Crucible: The Louisiana Purchase and the Creation of America* (New Haven, 2004), especially 3-6, 42, 204-5. Compare Vine Deloria, Jr., "Frenchmen, Bears, and Sandbars", in Alvin M. Josephy, Jr., ed., *Lewis and Clark Through Indian Eyes* (New York, 2007), 5; Richard White, "The Louisiana Purchase and the Fictions of Empire", in Kastor & Weil, above n.1, 37.

questionable assumption that France had territorial sovereignty over the entire Missouri watershed immediately prior to transferring Louisiana to the United States.

The legality of the Louisiana Purchase was contested on two main grounds. First, Spain contended that the Purchase violated a promise by France not to alienate the territory. Spanish protests against the Purchase were, however, brushed aside by the United States, and were soon dropped in favour of a Spanish diplomatic strategy of limiting the boundaries of Louisiana in the west, southwest and southeast.²⁰ A more serious question was raised in the United States, where some politicians doubted that the federal government had the constitutional authority to extend the boundaries of the Republic by purchasing additional territory. President Thomas Jefferson himself entertained serious doubts of this kind, and considered a constitutional amendment to deal with the problem, but in the end diplomatic concerns and political pressures prevailed over his constitutional scruples.²¹ The matter was resolved in the debates over the Purchase in Congress, where both the Federalists and, more incongruously, the Republicans, eventually accepted that the United States could acquire additional territory by purchase or conquest.²²

It is not my intention to question the legal validity of the Louisiana Purchase on these or other grounds. For present purposes, I accept that France had good title to *some*

²⁰ See Charles Wilson Hackett, ed., *Pichardo's Treatise on the Limits of Louisiana and Texas*, 4 vols. (Austin, 1931-46); Thomas Maitland Marshall, *A History of the Western Boundary of the Louisiana Purchase, 1819-1841* (Berkeley, 1914), 18-19; E. Wilson Lyon, *Louisiana in French Diplomacy, 1759-1804* (1934, reprinted Norman, 1974), 231-50; Léon Sarpy, "The Louisiana Purchase, Its Title Legality" (1964) 12 *Louisiana Bar J.* 301; Alexander DeConde, *This Affair of Louisiana* (New York, 1976), 193-208; J.C.A. Stagg, *Borderlines in Borderlands: James Madison and the Spanish-American Frontier, 1776-1821* (New Haven, 2009).

²¹ See Jefferson to John Breckinridge, Senator from Kentucky, 12 August 1803, in Merrill D. Peterson, ed., *The Portable Thomas Jefferson* (New York, 1977), 494 at 497; David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville, 1994), 244-51.

²² See Henry Adams, *History of the United States During the First Administration of Thomas Jefferson* (1891-96, reprinted New York, 1962), vol. 2, 78-115; Everett Somerville Brown, *The Constitutional History of the Louisiana Purchase, 1803-1812* (Berkeley, 1920), 14-83; Dumas Malone, *Jefferson and His Time*, vol. 4, *Jefferson the President: First Term, 1801-1805* (Boston, 1970), 311-32; Peter A. Appel, "The Louisiana Purchase and the Lewis & Clark Expedition: A Constitutional Moment?", in Kris Fresonke and Mark Spence, *Lewis & Clark: Legacies, Memories, and New Perspectives* (Berkeley, 2004), 87. The Supreme Court affirmed constitutional authority to acquire new territory in *Sere v. Pitot*, 10 U.S. (6 Cranch) 332 (1810), 336-37; *American Insurance Company v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828), 542; *Dorr v. United States*, 195 U.S. 138 (1903), 140. On whether the Purchase met international law standards, see Stéphane Beaulac, "Vattel's Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America" (2003) 63 *Louisiana Law Rev.* 1327.

territory and that it validly conveyed that title to the United States in 1803. My concern is with the boundaries of the transferred territory, particularly in the north and west, and the assumption that the territory encompassed the whole of the Missouri watershed. This involves tracing France's title back to its origins, and evaluating this assumption in light of the *de facto* sovereignty of the Indian nations who inhabited the region.

The treaty between France and the United States that gave effect to the Louisiana Purchase is of no real assistance in determining the territory's extent. Despite deliberate attempts by Robert Livingston and James Monroe, the American negotiators in Paris, to get a definition of the boundaries in the treaty, the French refused to provide one.²³ Consequently, the treaty stated simply that France ceded to the United States "for ever and in full Sovereignty the said territory [Louisiana] with all its rights and appurtenances as fully and in the Same manner as they have been acquired by the French Republic in virtue of the above mentioned Treaty concluded with his Catholic Majesty."²⁴ The treaty referred to in this clause was the Treaty of San Ildefonso, concluded in 1800, whereby the King of Spain had transferred Louisiana back to France, "with the Same extent that it now has in the hands of Spain, and that it had when France possessed it; and Such as it Should be after the Treaties subsequently entered into between Spain and other States."²⁵ France had possessed Louisiana prior to the Treaty of Fontainebleau in 1762, whereby she undertook to cede to Spain "all the country known by the name of Louisiana, as well as New Orléans and the island on which that town is situated."²⁶ Beyond New Orléans

²³ See François Barbé-Marbois, *The History of Louisiana* (1830, republished Baton Rouge, 1977), 283-86; Marshall, above n.20, 8; DeConde, above n.20, 169-70; Kukla, above n.19, especially 286-87, 415 n.6.

²⁴ Treaty for the Cession of Louisiana between France and the United States, Paris, 30 April 1803, Art. 1, in Clive Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry, NY), vol. 57 (1969), 27 at 31.

²⁵ Preliminary and Secret Treaty between France and Spain, concluded at San Ildefonso, 1 October 1800, Art. 3, in Frances Gardiner Davenport & Charles Oscar Paullin, eds., *European Treaties bearing on the History of the United States and its Dependencies* (Gloucester, MA), vol. 4 (1967), 181, as translated in Art. 1 of the Treaty for the Cession of Louisiana, above n.24, 30. On the Treaty of San Ildefonso, see Adams, above n.22, vol. 1, 352-76; Arthur Preston Whitaker, *The Mississippi Question, 1795-1803: A Study in Trade, Politics, and Diplomacy* (Gloucester, MA, 1962), 176-86.

²⁶ Preliminary Act of Cession between France and Spain, Fontainebleau, 3 November 1762, in Davenport & Paullin, above n.25, vol. 4, 91 (my translation of the French). On whether France and Spain reached a separate agreement on the bounds of Louisiana in the southwest, see Richard R. Stenberg, "The Western Boundary of Louisiana, 1762-1803" (1931) 35 *Southwestern Hist. Q.* 95-108; *idem*, "The Boundaries of the Louisiana Purchase" (1934) 14 *Hispanic American Hist. Rev.* 32-64.

and the “island” on which it stands, what was the country that France possessed as Louisiana?²⁷

In attempting to answer this question, it is important to distinguish between the territory France *claimed to possess* and the territory she *actually possessed*. The assumption that the Louisiana Purchase encompassed the whole of the Missouri watershed is based on France’s *de jure* territorial claim, not on the extent to which she was actually able to make good on that claim by taking *de facto* possession.²⁸ It is therefore essential to undertake an assessment of the *validity* of France’s claim to the entire Missouri watershed, which depends in turn on the factual and legal bases for that claim.

3. France’s Claim to the Missouri Watershed

French explorers, missionaries, and fur-traders were the first Europeans to make contact with the Indian nations inhabiting the Missouri watershed. Before the establishment of permanent French settlements at New Orléans and along the lower Mississippi Valley, beginning around 1700, these French visitors were few and far between, and as far as is known did not venture up the Missouri from the Mississippi. France’s claim to the Missouri watershed was nonetheless originally based on these explorations, along with formal assertions of sovereignty by representatives of the French King. In 1671 at Sault Ste. Marie, far to the north and east, Simon François Daumont, Sieur de Saint-Lusson, acting upon instructions from Jean Talon, Intendant of New France, formally proclaimed sovereignty over a vast, vaguely-defined expanse of North America in the name of his King.²⁹ Before delegates from fourteen Indian nations, he claimed possession of lakes Huron and Superior “and of all the other countries, rivers, lakes and tributaries,

²⁷ As our focus is on the Missouri watershed, this article does not address the question of the boundaries between Louisiana and West Florida and Spanish Texas: see French Ensor Chadwick, *The Relations of the United States and Spain: Diplomacy* (1909, reissued New York, 1968), 61-85; Marshall, above n.20; Philip Coolidge Brooks, *Diplomacy and the Borderlands: The Adams-Onís Treaty of 1819* (Berkeley, 1939).

²⁸ See White, above n.19; Cécile Vidal, “From Incorporation to Exclusion: Indians, Europeans, and Americans in the Mississippi Valley from 1699 to 1830”, in Kastor & Weil, above n.1, 62.

²⁹ See Francis Borgia Steck, *The Jolliet-Marquette Expedition, 1673* (Glendale, CA, 1928), 125-30; John Anthony Caruso, *The Mississippi Valley Frontier: The Age of French Exploration and Settlement* (Indianapolis, 1966), 151-53.

contiguous and adjacent thereto, as well discovered as to be discovered, which are bounded on one side by the North and West Seas and on the other side by the South Sea, including all their length or depth”.³⁰ This proclamation of territorial sovereignty was followed by the official journey of Louis Jolliet and Father Jacques Marquette down the Mississippi from the Wisconsin River as far as mouth of the Arkansas, mainly to ascertain whether the great river emptied into the South Sea (the Pacific) and to obtain commercial benefits for France. These explorers were probably the first Europeans to see the Missouri, at the place where it flows into the Mississippi.³¹

More significantly for our purpose of ascertaining France’s claim, in 1682 René-Robert Cavelier, Sieur de La Salle, led a French expedition from the Illinois River down the Mississippi to its mouth, where he formally took possession in the name of Louis XIV, by virtue of the commission he had received from him,

... of this country of Louisiana, seas, harbors, ports, bays, and straits adjacent and all the nations, peoples, provinces, cities, towns, villages, mines, minerals, fisheries, rivers, and tributaries, encompassed within the expanse of the said Louisiana, from the mouth of the great river Saint-Louis on the east side, also called the Ohio, Olighinsipou ou Chukagoua, and with the consent of the Chaouesnons, Chicachasas and other peoples who live there with whom we have made alliance, and also the length of the river Colbert, or Mississippi, and rivers which flow into it, from its source on the other side of the country of the Sioux or Nadouesioux, with their consent and that of the Ototantas, Islinois, Matsigamea, Akansas, Natchez, Koroas, who are the most important nations who live there, with whom alliance has been made by ourselves or other Frenchmen, to its mouth in the sea or gulf of Mexico, ... on the assurance from all these nations that we have been the first Europeans who have descended or ascended the said river Colbert.³²

³⁰ My translation of “Procès-verbal de la prise de possession des pays situés vers les lacs Huron et Supérieur”, in Pierre Margry, ed., *Voyages des Français sur les grands Lacs et Découverte de l’Ohio et du Mississipi (1614-1684)* (Paris, 1879), 96 at 97. For a complete English translation, see E.B. O’Callaghan, ed., *Documents Relative to the Colonial History of the State of New York* (Albany), vol. 9 (1855), 803-4.

³¹ See Steck, above n.29 at 159, 218-19.

³² My translation of French text in Pierre Margry, ed., *Lettres de Cavelier de la Salle et Correspondance relative à ses Enterprises (1678-1685)* (Paris: D. Jouaust, 1877), 191-92. A translation of La Salle’s entire speech is in John W. Monette, *History of the Discovery and Settlement of the Valley of the Mississippi, by the Three Great European Powers, Spain, France and Great Britain* (New York, 1846), vol. 1, 144.

While one can be sceptical of the consent of the Indian nations to this taking of possession and of their assurances respecting the activities of other Europeans,³³ here at least was a clear assertion of French sovereignty over the entire Missouri watershed. Apparently, La Salle was not particularly concerned that no Frenchman had done more than view the point at which that river flows into the Mississippi from the west.

On what basis, then, should the validity of La Salle's assertion of sovereignty over the Missouri watershed be assessed? Obviously, his declaration of French possession in 1682 was not a descriptive, empirical statement. Rather, it was in the nature of a legal proclamation that should be evaluated normatively. But what is the appropriate system of norms to be applied in this context? At least three possibilities present themselves: French law, the law of the Indian nations who inhabited the Missouri watershed, and the emerging European law of nations.

Regarding French law, there is no reason why it should determine the question of sovereignty in a geographical region where few French subjects were present and where the French King neither exercised nor was capable of exercising authority. While binding on French subjects, French law could have no application to anyone else in a region occupied only by Indian nations who had neither accepted nor been brought under French authority. So even if French law at the time provided for the acquisition of sovereignty by the kind of declaration La Salle had made,³⁴ examination of that law would not be particularly useful in attempting to resolve the matter of sovereignty over the Missouri watershed vis-à-vis anyone other than Frenchmen. Moreover, despite La Salle's pretentious claims, it is not at all clear that officials in France thought these kinds of assertions were effective to give the French King sovereignty over Indigenous peoples in North America. An indication of this can be found in a memorandum drafted by Gérard

³³ Spaniards had explored parts of the Mississippi Valley: see Monette, above n.32, vol. 1, 1-109; Patricia K. Galloway, *The Hernando de Soto Expedition: History, Historiography and "Discovery" in the Southeast* (Lincoln, 1997); William H. Goetzmann & Glyndwr Williams, *The Atlas of North American Exploration: From the Norse Voyages to the Race to the Pole* (Norman, 1998), 34-35 (map).

³⁴ On how France made territorial claims in North America, see John Thomas Juricek, *English Claims in North America to 1660: A Study in Legal and Constitutional History*, Ph.D. dissertation, History, University of Chicago, 1970, especially 125-212; Patricia Seed, *Ceremonies of Possession in European Conquest of the New World, 1492-1640* (Cambridge, 1995), especially 41-68; Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America", in John McLaren et al., eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver, 2005), 50.

de Rayneval,³⁵ secretary to Charles Gravier, Comte de Vergennes, the French Minister of Foreign Affairs, and delivered with a covering letter dated September 6, 1782, to John Jay, one of the American diplomats who were in France to negotiate the peace treaty that would end the American War of Independence and recognize the United States as an independent nation-state.³⁶ Although written a century after La Salle's assertion of sovereignty, the memorandum is relevant because it reveals official French thinking on the extent of Louisiana, specifically the boundary between Louisiana and the territory Great Britain received from France by the Treaty of Paris of 1763. In it Rayneval wrote that, prior to this treaty, "France possessed Louisiana and Canada, and she regarded the savage peoples east of the Mississippi either as independent or as being under her protection."³⁷ This admission reveals that, while the European powers made grandiose territorial claims when dealing with one another, at the same time they acknowledged that they did not have sovereignty over the Indigenous peoples who actually occupied these territories. An exchange between John Jay and the Conde de Aranda, the Spanish Ambassador in Paris, during their negotiations at the same time over the eastern boundary of Louisiana, confirms that Spain shared this understanding:

³⁵ Rayneval is better known as a prominent French jurist who wrote a leading text on the law of nations, entitled *Institutions du Droit de la Nature et des Gens* (1803, new edition of 1832 republished Paris, 1851). Significantly, Rayneval wrote therein that sovereignty could not be acquired by symbolic acts of possession (such as La Salle's assertion of French sovereignty over the Mississippi's western drainage basin): *ibid.*, vol. 1, 293.

³⁶ This memorandum was based on a longer memorandum prepared by Rayneval, apparently with Vergennes's approval, while Jay was negotiating with the Conde de Aranda, the Spanish Ambassador to France, over the location of what might become the boundary between the United States and Spanish Louisiana (on these negotiations, see DeConde, above note 18 at 35-40). The original French versions of these memoranda, along with a record of the negotiations between Jay and Aranda, are in Samuel Flagg Bemis, "The Rayneval Memoranda of 1782 on Western Boundaries and Some Comments on the French Historian Doniol" (1937) 47:1 *Proceedings of the American Antiquarian Society* (New Series), 15 at 19-21, 42-79, and 24-37, respectively. In the September 6 memorandum, Rayneval claimed as well that England, in negotiations with France in 1755 over the limits of their respective territories in North America, regarded the Indigenous peoples ("Peuplades sauvages") between the territory claimed by England and the Mississippi as independent: *ibid.* at 19. Similarly, in his record of the negotiations with Jay, Aranda noted that on all the maps "the region beyond the main boundary lines of the [English] colonies is savage country, to which both of us parties have equally good, or indeed *equally unreasonable rights*": *ibid.* at 27 (Bemis's translation, my emphasis).

³⁷ *Ibid.* at 19 (my translation). For insight into the meaning of "protection" in this context, see Gilles Havard, "'Protection' and 'Unequal Alliance': The French Conception of Sovereignty over Indians in New France", in Robert Englebert & Guillaume Teasdale, eds., *French and Indians in the Heart of North America, 1630-1815* (East Lansing, 2013), 113. Note that Marshall C.J., in *Worcester v. Georgia*, above note 14 at 560-61, observed that, by the law of nations, a weaker nation does not lose its independence by placing itself under the protection of a stronger nation.

“Few ministers plenipotentiary,” stated Jay [in reference to the territory between the southern Appalachian Mountains and the Mississippi that Aranda claimed should not be part of the United States], “have discretionary powers to transfer and cede to others the country of their sovereigns.”

“But, it isn’t your country,” insisted Aranda. “What right have you to the territory of the free and independent Indians?”

“The right of preëmption over them, and of sovereignty over them in respect to other nations, the same as His Catholic Majesty in Mexico and Peru,” Jay answered.³⁸

If high-ranking French and Spanish officials had these kinds of doubts in 1782 about their nations’ sovereignty over the Indigenous peoples *east* of the Mississippi, where the European presence was greater than *west* of that river’s northern reaches,³⁹ surely they would have maintained at least as strong doubts about their nations’ sovereignty over the Missouri watershed prior to the cession of Louisiana from Spain to France in 1800 and from France to the United States in 1803.

Further on the American position as presented by Jay, Thomas Jefferson expressed his understanding of the meaning of the right of pre-emption in an opinion he provided, as Secretary of State, to President George Washington in 1793:

I considered our right of pre-emption of the Indian lands, not as amounting to any dominion, or jurisdiction, or paramountship whatever, but merely in the nature of a remainder after the extinguishment of a present right, which gave us no present right whatsoever, but of preventing other nations from taking possession, and so defeating our expectancy; that the Indians had the full, undivided and independent sovereignty as long as they choose to keep it, and that this might be forever.⁴⁰

³⁸ Quoted and translated in Bemis, above n.36 at 35.

³⁹ See Caruso, above n.29; Carl J. Ekberg, *French Roots in the Illinois Country: The Mississippi Frontier in Colonial Times* (Urbana, IL, 1998).

⁴⁰ Andrew A. Lipscomb, ed., *The Writings of Thomas Jefferson* (Washington, 1903-4), vol. 1, 340-41, as quoted in Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley, 1994), 227. However, Jefferson later showed some ambivalence on the issue of Indian sovereignty. In a letter to Meriwether Lewis, dated 22 January 1804, he stated in relation to Louisiana: “Being now become sovereigns of the country, without however any diminution of the Indian rights of occupancy we are authorised to propose to them in direct terms the institution of commerce with them.” He instructed Lewis to inform the Indian nations “through whose country you will pass” that the Americans had now replaced the Spanish and the French as the Indians’ “fathers and friends”, and that the Americans desired to continue friendly trading relations with them. Donald Jackson, ed., *Letters of the Lewis and Clark Expedition with Related Documents, 1783-1854*, 2nd ed. (Urbana, 1978), vol. 1, 165-66. See also Jefferson’s speech, 16 July 1804, to the chiefs and warriors of the Osage Nation who came to see him in Washington on the invitation of Lewis: *ibid.* at 200-2.

The understanding that European and American claims to territorial sovereignty were only valid vis-à-vis one another, and did not diminish the sovereignty of the Indian nations, is consistent with Chief Justice Marshall's pronouncement in *Worcester v. Georgia* that the doctrine of discovery applied only among the European nations that had agreed to it, and could not affect the pre-existing rights of the Indian nations, including their right to independence. It also explains why France, England, and the United States negotiated treaties with the Indian nations, rather than just entering into real estate transactions with them to acquire their lands: these nations had, and to some extent continue to have, sovereignty, and so the colonizing powers had to negotiate with them on a nation-to-nation basis.⁴¹

Modern research into French-Indigenous relations in North America in the 17th and 18th centuries confirms that France did not claim sovereignty over Indigenous peoples who were not integrated into the French colonial regime.⁴² Beyond the French settlements along the St. Lawrence, the lower Mississippi, and in other isolated locations, French relations with the Indian nations were commercial in nature, involving acquisition of furs in exchange for European utensils, blankets, weapons, and other items. Describing the French presence west of Lake Superior in the period before the cession of New France to Britain in 1763, historian William Eccles states:

The western posts of the French, all but the main bases Niagara, Detroit, Michilimackinac, and eventually, Grand Portage, consisted of little more than a three- to four-meter-high log palisade thirty-odd meters long on each side, enclosing four or five clay-chinked log cabins with bark roofs. The “presents” that the French were constrained to give the Indian nations every year were regarded by the latter as a form of rent for the use of the land where the posts stood and as a fee for the right to travel on the Indians' territory.⁴³

⁴¹ See Marshall C.J.'s decisions, discussed above at nn.11-16, and references in n.16. On Indian treaties, see Prucha, above n.40; Williams, above n.6; James Youngblood [Sákéj] Henderson, *Treaty Rights in the Constitution of Canada* (Toronto, 2007).

⁴² See Michel Morin, *L'Usurpation de la souveraineté autochtone: Le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord* (Montréal, 1997); *idem*, “Des nations libres sans territoire? Les Autochtones et la colonisation de l'Amérique française du XVI^e au XVIII^e siècle” (2010) 12 *Journal of the History of International Law* 1; Michael Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* (Philadelphia, 2012); Havard, above n.37.

⁴³ W.J. Eccles, “Sovereignty-Association, 1500-1783” (1984) 65 *Can. Hist. Rev.* 475 at 498 (footnotes omitted), citing secondary and archival sources, including fur trade journals. See also Cornelius J. Jaenen, “French Sovereignty and Native Nationhood during the French Régime”, in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto, 1991), 19.

The reality was that the French lacked both the capacity and the desire to exercise control over the territories of the Indigenous peoples who were their commercial partners and with whom they needed to maintain cordial and respectful relations. But if, at the same time, the French were able to keep rivals out by asserting sovereignty over these territories vis-à-vis other European nations, they would be able to monopolize the fur trade and retain the benefit of it for themselves.

The second body of law we have identified as relevant to the issue of *de jure* sovereignty in the Missouri watershed at the time of the Louisiana Purchase is the law of the Indian nations. Their law would be much more apposite than French law because they actually inhabited the region and did exercise *de facto* sovereignty. Included would be both the internal law of the various Indian nations, and any inter-nation law developed to govern their diplomatic and commercial relations with one another.⁴⁴ While ascertaining the content of these bodies of law prior to European exploration of the Missouri watershed is no easy task, due in part the temporal distance of well over two centuries and the fact that these societies relied on oral traditions rather than writing to record their legal norms, there can be little doubt that the laws of these nations would not have acknowledged the validity of a proclamation of possession and assertion of sovereignty expressed at the mouth of the Mississippi by a foreigner who had never even visited their territories. Evidence of this can be found in the records of the Lewis and Clark Expedition of 1804 to 1806 that reveal various degrees of bewilderment, scepticism, and hostility to assertions of American sovereignty.⁴⁵ Resistance to American authority by

⁴⁴ On their inter-nation trade relations, see John C. Ewers, *Indian Life on the Upper Missouri* (Norman, 1968), 14-31. For an account of the internal legal system of one of the nations inhabiting the Missouri watershed, see K.N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, 1941). However, this account, based on twentieth century field work, does not necessarily reflect Cheyenne law prior to 1803, as legal systems are not static.

⁴⁵ See Gary E. Moulton, ed., *The Definitive Journals of Lewis & Clark* (Lincoln, 1986-93), especially vols. 3-4; James P. Ronda, *Lewis and Clark among the Indians* (Lincoln, 1984), 16-132; Josephy, above n.19; John C. Ewers, "Plains Indian Reactions to the Lewis and Clark Expedition", in James P. Ronda, ed., *Voyages of Discovery: Essays on the Lewis and Clark Expedition* (Helena, 1998), 171. As Ewers points out, prior to Lewis and Clark the Europeans the Indian nations would have met on the Missouri were mostly traders, so they would have regarded these new arrivals in the same way.

some Northern Plains Indian nations well into the nineteenth century is further evidence of their tenacious belief in their own independence.⁴⁶

As for the law of nations, in the seventeenth century it was still in its infancy. We have also seen that it was not “international” in any global sense – instead, it was a European body of law developed in part to regulate the acquisition of overseas colonies by the European powers. As such, its application would have been limited to the European nations. It would not bind the Indian nations of the Missouri watershed who did not participate in its formation and did not consent to be subject to it.

To the extent, however, that there was a body of European law governing the acquisition of colonies in the late seventeenth century, La Salle’s 1682 declaration of French possession of the Missouri watershed might have had juridical effect vis-à-vis other European nations. In fact, Thomas Jefferson viewed the extent of Louisiana as a matter of law and relied on his understanding of international law, based on the practice of nations, to support his opinion that the Louisiana Purchase included the entire Missouri watershed. In a historical manuscript, “The Limits and Bounds of Louisiana”, based on research he undertook in his own library and dated September 7, 1803, Jefferson wrote:

... the practice of nations, on making discoveries in America, has sanctioned a principle that “when a nation takes possession of any extent of sea-coast, that possession is understood as extending into the interior country to the sources of the rivers emptying within that coast, to all their branches, and the country they cover.” I. Mem. de l’Amerique 116.⁴⁷

The quoted passage from “Mem. de l’Amerique” is a loose translation of a memorial, dated October 4, 1751, that had been presented by French Commissioners to their British counterparts during negotiations over the boundary between Acadia (Nova Scotia, ceded by France to Britain by the Treaty of Utrecht, 1713) and New France. Significantly, France’s claim that possession of a sea-coast extends to the sources of its rivers was a

⁴⁶ See Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987); Jeffrey Ostler, *The Plains Sioux and U.S. Constitutionalism from Lewis and Clark to Wounded Knee* (Cambridge, UK, 2004); Richard W. Etulain, *Beyond the Missouri: The Story of the American West* (Albuquerque, 2006); Dunbar-Ortiz, above note 18.

⁴⁷ Thomas Jefferson, “The Limits and Bounds of Louisiana”, in Saul K. Padover, ed., *The Complete Jefferson* (1943, reprinted Freeport, NY, 1969), 259 at 261. See also Jefferson to Senator John Breckinridge, 12 August 1803, in Peterson, above n.21, 494 at 495; Jefferson to Meriwether Lewis, 16 November 1803, in Jackson, above note 40, vol. 1, 136 at 137.

bargaining position in a diplomatic exchange over the limits of Acadia, not a statement of the law of nations accepted by the British.⁴⁸ Jefferson's conclusion that the practice of nations had sanctioned such a principle was thus not supported by the materials he relied upon. Moreover, as the sources of the Acadian rivers referred in the French memorial are generally less than 50 miles from the sea, this could not serve as a precedent for the vast Missouri watershed, the headwaters of which are approximately 2500 miles from the point where the Missouri flows into the Mississippi and 3740 miles from the Gulf of Mexico. We therefore need to reassess the validity of Jefferson's understanding of the practice of nations, and his assumption that France had sovereignty over the entire Missouri watershed, even vis-à-vis other European nations and the United States, by examining the law of nations prior to the Louisiana Purchase.⁴⁹

4. The Law of Nations, and French and Spanish Possession of the Missouri Watershed

Actual possession apart, it appears there was no real agreement among the European nations at the time of La Salle's assertion of French sovereignty in 1682, the time of the Louisiana Purchase in 1803, or any time in between, on what was necessary to acquire sovereignty over territory already inhabited by non-European peoples. In some instances, conquest or treaties of cession were relied upon. In other cases, the European nations claimed territorial title by virtue of discovery, papal grants, symbolic acts of possession, royal charters, or a combination thereof. The method chosen by any particular European nation to assert sovereignty seems to have been determined more by self-interest and the social, historical, and diplomatic context than agreed upon legal norms. The Spanish and

⁴⁸ The French Commissioners admitted that the limits of Acadia had never been determined, so it was up to the commissioners to establish the boundary. They suggested a watershed boundary because it was the usual and most convenient approach. For Britain's response, see "Memorial presented by His Majesty's Commissaries to the Commissaries of His Most Christian Majesty . . . , 23 January 1753", in *The Memorials of the English and French Commissaries Concerning the Limits of Nova Scotia or Acadia* (London, 1755), 235-543. Although the British response did not address France's watershed argument directly, in subsequent negotiations they rejected equivalent French contentions in relation to the St. Lawrence and Ohio drainage basins: see Max Savelle, *The Origins of American Diplomacy: The International History of Anglo-America, 1492-1763* (New York, 1967), 395-419.

⁴⁹ Although President at the time, Jefferson's opinion on the question of the territorial extent of France's *de jure* sovereignty in Louisiana was just that, an *opinion* lacking international legal authority. Moreover, despite his broad-ranging legal curiosity and learning, Jefferson was not a law of nations jurist, and as he admitted his opinion was based on the limited resources available in his library.

Portuguese, for example, relied heavily on discovery and the grants they had received by papal bulls, whereas the French and the English favored methods such symbolic acts and royal charters that promoted their own interests.⁵⁰

French claims derived from La Salle's 1682 expedition were based upon discovery and his formal declaration of possession, which he attempted to fortify by alleging the consent of the Indian nations he had encountered. As a means of asserting sovereignty, discovery was sometimes relied upon by the French and English to counter Iberian claims based on prior papal grants.⁵¹ However, while discovery combined with a formal declaration of sovereignty may have accorded some priority to the discovering power *as against other European nations*, unless followed by actual possession within a reasonable time its value even in that context expired.⁵² It is therefore necessary to determine the extent to which France was able to make good on La Salle's actions by effectively occupying the territory he claimed.⁵³

La Salle's settlement at Matagorda Bay on the Gulf Coast west of the Mississippi failed, but in 1686 his companion Henri de Tonti founded Arkansas Post, near the place where the Arkansas River flows into the Mississippi. Although John Caruso referred to this post as "the oldest [European] settlement in the Lower Mississippi Valley", in reality it initially consisted of a single log house with no more than six French inhabitants.⁵⁴ Anxious to establish French control of the Lower Mississippi to ward off Spanish and English claims after the 1697 Treaty of Ryswick, Louis XIV's Minister of Marine, Louis Phélypeaux, Comte de Pontchartrain, sent an expedition under Pierre Moyne, Sieur

⁵⁰ See works cited in n.34 above and, more generally, M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London, 1926); Julius Goebel, Jr., *The Struggle for the Falkland Islands: A Study in Legal and Diplomatic History* (1927, reissued Port Washington, NY, 1971), 47-119.

⁵¹ Spain did rely on papal grants to dispute La Salle's claims, especially after he attempted to establish a settlement at Matagorda Bay in 1685: see Caruso, above n.29, 225.

⁵² Early jurists rejected discovery as a means of acquiring sovereignty over territory inhabited by Indigenous peoples: see Francisco de Vitoria, *De indis et de ivre belli relectiones*, 1557, trans. by J. Bate (Washington, 1917), 139; Hugo Grotius, *The Law of War and Peace*, 1625, trans. by Francis W. Kelsey (New York, 1925), 550. By the nineteenth century, however, discovery was thought by some to confer an inchoate title against other Europeans that could be consummated by occupation: see discussion of Marshall C.J.'s judgments in text accompanying notes 11-16 above; Hall, above n.9, 98-100; Lindley, above n.50, 129-38.

⁵³ France's claim by discovery alone would be all the weaker because Spaniards actually explored parts of the Lower Mississippi Valley earlier: see above n.33.

⁵⁴ Caruso, above n.29, 220. See Morris S. Arnold, *Unequal Laws Unto a Savage Race: European Legal Traditions in Arkansas, 1686-1836* (Fayetteville, AR, 1985), 5-6.

d'Iberville, to found a colony there.⁵⁵ In 1699, Iberville built Fort Maurepas on the east side of Biloxi Bay. The following year, he erected Fort de la Boulage (or Mississippi Fort) near the mouth of the Mississippi.⁵⁶ Caruso wrote that this “may have been one of the most important forts that France built in all of North America”, as it “secured for that country the vast territory of Louisiana, from which many American states were eventually carved.”⁵⁷ Thomas Jefferson was also of the view that the activities of La Salle, Tonti and Iberville established France’s “formal and actual possession” of the Gulf Coast from Mobile to Matagorda Bay and up the Mississippi to the Illinois River, which he thought gave France territorial title by the law of nations over the western watershed of the Mississippi and its tributaries, including the Missouri.⁵⁸

Examining the law of nations, there can be little doubt that it would have accorded sovereignty to France, as against other European states, over territory that was actually possessed and controlled by her. But would France have had sovereignty over any territory that was not in her possession and control? In particular, would the establishment of a French fort near the mouth of the Mississippi, assuming it allowed her to control access to the Mississippi from the sea, have given France sovereignty over the distant Missouri watershed, despite the absence of French subjects and the evident fact that its true possessors were the Indian nations who actually lived there?

Claims to territory adjacent to or inland from a seacoast or river mouth that is actually possessed are based on geographical contiguity, and are thus said to depend on the contiguity (or hinterland) doctrine. Significantly, in the first half of the nineteenth century the main proponent of an expansive interpretation of this doctrine was the United States itself, first in its dispute with Spain over the south-western boundary of Louisiana,⁵⁹ and then with Britain over entitlement to the Oregon country.⁶⁰ In each case,

⁵⁵ Caruso, above n.29, 225-28. See also John C. Rule, “Jérôme Phélypeaux, Comte de Pontchartrain, and the Establishment of Louisiana, 1696-1715” in John Francis McDermott, ed., *Frenchmen and French Ways in the Mississippi Valley* (Urbana, IL, 1969), 179.

⁵⁶ See Samuel Wilson, Jr., “Colonial Fortifications and Military Architecture in the Mississippi Valley”, in John Francis McDermott, ed., *The French in the Mississippi Valley* (Urbana, IL, 1965), 103 at 105-10.

⁵⁷ Caruso, above n.29, 237.

⁵⁸ Jefferson, above n.47, 260-61.

⁵⁹ See Hall, above n.9, 103-5, and works cited in n.20 above.

American diplomats self-interestedly contended for a watershed application of the contiguity doctrine, but ultimately compromised these claims of the United States by accepting other boundaries.⁶¹

As the nineteenth century progressed, international jurists debated both the validity and the meaning of the contiguity doctrine. If anything like a consensus was reached, it was that claims to a watershed based on possession of a sea-coast or river mouth had to be reasonable. While geographical contiguity might be used to claim a drainage basin up to a not-too-distant range of mountains, the doctrine could not be used to claim vast territories that extended far beyond the effective occupation and control of the colonizing nation, especially where possession of a river mouth did not prevent access to the interior by other routes.⁶² This had to be especially so in situations where the interior was not vacant, but was in fact occupied by Indian nations.⁶³ As a consequence, American claims to the entire Mississippi and Columbia watersheds on the basis of possession of the mouths of those rivers were generally rejected by international jurists.⁶⁴

⁶⁰ See Hall, above n.9, 105-7; Lindley, above n.50, 277-80; Travers Twiss, *The Oregon Territory, Its History and Discovery* (New York, 1846), 194-99; Donald A. Rakestraw, *For Honour or Destiny: The Anglo-American Crisis Over the Oregon Territory* (New York, 1995).

⁶¹ The boundary with Spanish Texas and New Mexico, settled by the Adams-Onís Treaty of 1819, ran in part along the Red and Arkansas rivers, both flowing into the Mississippi: see Marshall, above n.20; Brooks, above n.27; Warren A. Beck & Ynez D. Haase, *Historical Atlas of the American West* (Norman, 1989), 40 (map). The boundary with British Columbia, set by the 1846 Oregon Boundary Treaty, cut off American claims north of the 49th parallel to the Columbia River's source: see Beck & Haase, 41 (map).

⁶² See Hall, above n.9, 101-2; Lindley, above n.50, 279-80. More recently, international jurists have been even more forceful in rejecting expansive interpretation of the contiguity doctrine: see R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester, 1963), 74-76; Charles G. Fenwick, *International Law*, 4th ed. (New York, 1965), 409; Thomas D. Grant, "Defining Statehood: The Montevideo Convention and Its Discontents" (1999) 37 *Columbia J. Transnat'l Law* 403, at 420-33.

⁶³ Nineteenth century jurists' disregard of Indigenous peoples in this context has been rendered untenable by the opinion of the International Court of Justice in the *Western Sahara Case*, 1975 I.C.J.R. 12, advising that the territories of socially and politically organized peoples, even if nomadic, were not *terra nullius* and so could not be acquired simply by European occupation. Consequently, discussions of the contiguity concept in modern international law limit it to vacant territory (Antarctica, uninhabited islands, and maritime areas): see Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (The Hague, 1997), 51-61, 262-65; Brownlie, above n.2, 147-49.

⁶⁴ See Twiss, above n.60, 194-99; T.J. Lawrence, *The Principles of International Law*, 4th ed. (London, 1911), at 156-57; Lindley, above n.50, 277-80. These authors distinguish between occupation of a coastal strip, which could give sovereignty up to a proximate height of land, and occupation of a river mouth, which would not give sovereignty over an extensive watershed. However, one respected jurist dismissed both these applications of the contiguity doctrine as "fanciful", stating the general rule to be "that occupation reaches as far as it is effective": L. Oppenheim, *International Law: A Treatise*, vol. 1, *Peace* (London, 1905), 279.

French possession of the Mississippi, however, was not confined to the river's mouth. Starting around the time of the construction of Fort de la Boulage by Iberville in 1700, France established a number of settlements and forts on the Mississippi below the Missouri, including Cahokia (c. 1696), Kaskaskia (1703), Fort Rosalie (Natchez, 1716), New Orléans (1718), Baton Rouge (1719), Fort de Chartres (1719), Prairie du Rocher (c. 1722), and Ste. Geneviève (c. 1735).⁶⁵ French presence on the Missouri River itself was first established by fur traders and explorers, most notably Étienne Veniard de Bourgmont and Pierre Gaultier de Varennes, Sieur de La Vérendrye, and his sons.⁶⁶ In 1714, Bourgmont ascended the Missouri, probably as far as the Platte River. In the winter of 1723-24, as Commandant of the Missouri River with instructions from Paris to establish a military post there to counteract Spanish incursions, he built Fort d'Orléans on the north bank, near the present-day town of Wakenda, Missouri. From there, he journeyed westward to Padouca, an encampment of Comanches or Plains Apaches, east of the Big Bend of the Arkansas, where he formed an alliance with the assembled chiefs.⁶⁷ William Goetzmann and Glyndwr Williams described this alliance as “still-born”, as the “faltering French colony of Louisiana could not support so distant an enterprise, and in 1728 Fort d'Orléans was abandoned.”⁶⁸ In 1744, however, another French fort, Cavagnial (or Cavagnolle), was built further upstream, a few miles above the mouth of the Kansas River near present-day Leavenworth, Kansas. It was apparently

⁶⁵ See Meinig, above n.1, vol. 1 (1986), 193-202; Ekberg, above n.39, 34-35; Glenn R. Conrad, ed., *The Louisiana Purchase Bicentennial Series in Louisiana History*, vol. 1, *The French Experience in Louisiana* (Lafayette, LA, 1995). For maps, see Goetzmann & Williams, above n.33, 99; William E. Foley & C. David Rice, *The First Chouteaus: River Barons of Early St. Louis* (Urbana, IL, 2000), 19. However, Ste. Geneviève was the only lasting French settlement on the Mississippi's west bank prior to the cession of Louisiana to Spain.

⁶⁶ Other French traders and explorers included Charles Claude du Tisé (1719) and Pierre and Paul Mallet (1739-40); see Caruso, above n.29, 261-62; A.P. Nasatir, ed., *Before Lewis and Clark: Documents Illustrating the History of the Missouri, 1785-1804* (1952, republished Lincoln, 1990), vol. 1, 18-19, 28; W.J. Eccles, “French Exploration in North America, 1700-1800” in John Logan Allen, ed., *North American Exploration*, vol. 2, *A Continent Defined* (Lincoln, 1997), 149; Goetzmann & Williams, above n.33, 94-95, 98-99 (maps); White, above n.19, 42-49.

⁶⁷ See Caruso, above n.29, 257-58, 267-77; Nasatir, above n.66, vol. 1, 20-21; Frank Norall, *Bourgmont, Explorer of the Missouri, 1698-1725* (Edmonton, 1988), 47, 51-80.

⁶⁸ Goetzmann & Williams, above n.33, 94 (map), 95. See also Norall, above n.56, 89.

maintained until 1764, when French forts were evacuated after the cession of Louisiana to Spain.⁶⁹

Unlike Bourgmont, La Vérendrye approached the Missouri from the north by travelling overland from posts he had established on what are now the Canadian Prairies. In 1738, he reached the Mandan villages near present-day Bismarck, North Dakota. In 1742, in the hope of finding a route to the Pacific, he sent two of his sons, François (the Chevalier) and Louis-Joseph, back to the Missouri. After visiting the Mandan villages, they travelled across the Plains and met Indians who may have been Cheyenne around the Black Hills, and then returned to Mandan country via what were probably Arikara villages on the Missouri near present-day Pierre, South Dakota.⁷⁰ While the travels of La Vérendrye and his sons did not result in any French settlements on the Upper Missouri, they did open up a fur trade route that was utilized for many years by French Canadian (and later British) traders, as Lewis and Clark learned first-hand when they arrived at the Mandan villages in 1804.⁷¹

The French did, therefore, explore the Missouri at least as far as the Mandan villages, and did carry on trade with the Indian nations on the Upper Missouri. They also established forts on the Lower Missouri, none of which became permanent settlements. These forts were minor establishments, housing only a few soldiers, traders, and sometimes their wives and families.⁷² They would not have enabled France to control the countryside, as the Indian nations who lived there far outnumbered the French.⁷³ There can be no doubt that the French were allowed to pass through Indian territories and establish an occasional post or fort because the Indian nations valued the trade goods they

⁶⁹ See Nasatir, above n.66, vol. 1, 28, 41-42, 52; C.E. Hoffhaus, "Fort de Cavagnial: Imperial France in Kansas, 1744-1764" (1964) 30:4 *Kansas Hist. Q.* 425; James S. Aber, "Fort de Cavagnial, Kansas", online <http://academic.emporia.edu/aberjame/geomorph/cavagnial.htm>.

⁷⁰ See Nasatir, above n.66, vol. 1, 31-34; Caruso, above n.29, 303-17; Goetzmann & Williams, above n.33, 96-97 (map).

⁷¹ See W. Raymond Wood & Thomas D. Thiessen, eds., *Early Fur Trade on the Northern Plains: Canadian Traders Among the Mandan and Hidatsa Indians, 1738-1818* (Norman, 1985); Nasatir, above n.66, vol. 1, especially 32-57, 92-94, 102-15; Ronda (1984), above n.45, 73-79; Deloria, above n.19, 6-13; Elizabeth A. Fenn, *Encounters at the Heart of the World: A History of the Mandan People* (New York, 2014).

⁷² Fort Cavagnial, at its height in 1751-52, had only about 50 residents: Aber, above n.69, 3.

⁷³ On Louisiana's French population, see Vidal, above n.25; Paul Lachance, "The Louisiana Purchase in the Demographic Perspective of Its Time", in Kastor & Weil, above n.1, 143. On Indian populations, see Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (Norman, 1987); David Henige, *Numbers from Nowhere: The American Indian Contact Population Debate* (Norman, 1998).

were able to obtain from them, not because the French were militarily superior. Apart from their occupied posts and forts, French possession and control of the Missouri region were nonexistent.

After the cession of Louisiana to Spain in 1762, but before the actual transfer, St. Louis was founded by Pierre de Laclède Liguist in 1764. The first Spanish Governor of Louisiana, Antoino de Ulloa, sent Captain Francisco Ríu y Morales and a company of 44 men to St. Louis in 1767 to assert Spanish authority over Upper Louisiana. On Ulloa's instructions, Ríu commenced construction of two forts on the Missouri, Don Carlos on the south bank near the confluence with the Mississippi and Charles on the north bank, for the purposes of controlling the Indians and the fur trade, and preventing the British (to whom French territory east of the Mississippi had been ceded by the Treaty of Paris in 1763) from ascending the Missouri and establishing settlements. However, construction of Fort Charles may not have been completed, and Fort Don Carlos was evacuated in 1769 after the French inhabitants of New Orléans revolted. Thereafter, Spain administered Upper Louisiana from St. Louis, without ever establishing a substantial Spanish population there.⁷⁴ French settlers, however, did establish a permanent community on the north bank of the Missouri about 21 miles upstream from the Mississippi in 1769, first called Les Petites Côtes and later St. Charles.⁷⁵ Beyond that, apparently no attempt was made by the Spanish to establish forts or settlements on the Missouri until the 1790s.

Alarmed by their inability to exclude British traders from the Upper Missouri, Spanish authorities finally reacted by sending three successive expeditions up the river. While neither Jean Batiste Truteau (1794-96) nor Antoine Simon Lecuyer (1795) reached the Mandan villages and built the fort they were supposed to establish there, Scotsman James Mackay (1795-97) was more successful.⁷⁶ On behalf of the Spanish Governor and the St. Louis merchants who had formed the Missouri Company, he ascended the river

⁷⁴ See Caruso, above n.29, 332-33; Foley & Rice, above n.65, 13-15; Lachance, above n.73. Anne F. Hyde, in *Empires, Nations, and Families: A New History of the North American West, 1800-1860* (New York, 2012), at 35, writes that the Spanish governors of Louisiana considered St. Louis "to be a raw frontier outpost. More than thirty years of Spanish occupation had little impact on the community's architecture, customs, or language."

⁷⁵ See Caruso, above n.29, 335-36.

⁷⁶ See W. Raymond Wood, *Prologue to Lewis and Clark: The Mackay and Evans Expedition* (Norman, 2003).

and built a trading house just north of the Platte, and Fort Charles somewhat further upstream at the Omaha village of Chief Black Bird. From there, Mackay sent his lieutenant, Welshman John Evans, to search for a route from the Missouri to the Pacific. Evans reached the Mandan villages, and took possession of a fort there that belonged to British traders, over which he hoisted the Spanish flag. However, this assertion of Spanish authority was short-lived, as both Mackay and Evans returned to St. Louis in 1797, after which Spanish and British traders continued to compete in the Upper Missouri country,⁷⁷ though neither Spain nor Britain had possession or control, as the real masters of the region were still the Indian nations.⁷⁸ This is confirmed by the fact that Lewis and Clark had to negotiate their way up the Missouri and present suitable gifts to the leaders of the nations whose territories they traversed.⁷⁹

Such was the extent of European possession of the Missouri when Louisiana was transferred back to France in 1800 and then to the United States in 1803.⁸⁰ One permanent French settlement (St. Charles, a few miles up the Missouri) had been established, and a few French and Spanish posts and forts of minor proportions had been built and then abandoned. French, Spanish and British fur traders all operated on the Missouri, but did not hold possession of any territory for their respective governments. The reality was that, apart from a small area near the mouth of the river, in 1803 the Indian nations were as much in possession of the Missouri watershed and were as sovereign as they had been at the time of La Salle's fanciful declaration of French possession in 1682. The meagre European presence along the Missouri was at the sufferance of the Indian nations, not the other way around.

⁷⁷ See Nasatir, above n.66, vol. 1, 65-115; Wood & Thiessen, above n.71, 27-29, 46, 49-50; Aubrey Diller, "A New Map of the Missouri River Drawn in 1795" (1955) 12 *Imago Mundi* 175. This European trade was nonetheless limited geographically and quantitatively, as, "[p]rior to 1805, intertribal trade was the dominant commerce on the Upper Missouri": Ewers, above n.44, 31.

⁷⁸ Even in Lower Louisiana, where there were permanent European settlements and the French and Spanish did exercise real jurisdiction, the Indian nations were largely beyond their authority and control: see Lawrence & Lucia B. Kinnaird, "Choctaws West of the Mississippi, 1766-1800" (1979-80) 83 *Southwestern Hist. Q.* 349; Morris S. Arnold, "Cultural Imperialism and the Legal System: The Application of European Law to Indians in Colonial Louisiana" (1997) 42 *Loyola Law Rev.* 727; Juliana Barr, "There's No Such Thing as 'Prehistory': What the Longue Durée of Caddo and Pueblo History Tells Us about Colonial America" (2017) 74:2 *William and Mary Quarterly* 203.

⁷⁹ See Moulton, above n.45, vols. 3-4; Ronda, above n.45 (1984), 16-132; Josephy, above n.19.

⁸⁰ The formal transfer from Spain to France took place on November 30, 1803, in New Orléans, after the Louisiana Purchase and 20 days before the formal transfer of the territory to the United States: see Ripley Hitchcock, *The Louisiana Purchase and the Exploration, Early History and Building of the West* (Boston, 1903), 86-89; DeConde, above n.20, 204-6.

So even if one were to ignore the Eurocentric state of the so-called law of nations and the difficulty of applying it to Indian nations that were outside its scope, that body of law would not have given France or Spain territorial sovereignty over any but a tiny portion of the Missouri watershed. Given that La Salle's declaration was not followed by effective occupation of the Missouri region, it would not have resulted in French sovereignty there.⁸¹ The only territory that could have passed from France to Spain in 1762 was the territory actually possessed by France as Louisiana. Nor was Spain successful in extending its possession of the Missouri watershed beyond a small area near the mouth of the river. So when Spain retroceded the territory to France in 1800 and France transferred it to the United States in 1803, virtually none of the Missouri watershed would have been included.

5. Conclusion

This article concludes that the Louisiana Purchase could not have included more than a tiny fraction of the Missouri watershed because France did not have territorial sovereignty, either *de facto* or *de jure* in the European law of nations, over most of the vast region in 1803. However, while France cannot have transferred a title that it did not have to the United States, this does not obliterate the significance of the Purchase on the Northern Plains. The fact remains that Jefferson *thought* the United States had acquired sovereignty over the entire Missouri watershed in 1803, and the American government acted accordingly. The Purchase eliminated France as a colonial rival in the region, and Britain and Spain subsequently settled their territorial claims with the United States by agreeing on the international boundaries that were established along the 49th parallel to

⁸¹ Effective occupation, by means of the exercise of jurisdiction through enforcement of laws and administrative control as well as by physical presence, became the international law standard for assessing claims to sovereignty from at least the last half of the 18th century: see Emmerich de Vattel, above n.5, 85; Rayneval, above n.35, vol. 1, 293; Jennings, above n.62, 20-35; Brownlie, above n.2, 136-42; Shaw, above n.2, 363-66. International tribunals have applied this standard to claims going back to the seventeenth century: see *Island of Palmas Case*, above n.2; *Legal Status of Eastern Greenland Case*, (1933) 2 P.C.I.J., Series A/B, No. 43; *Minquiers and Ecrehos Case*, 1953 I.C.J.R. 47.

the Rocky Mountains by the Convention of Commerce of 1818⁸² and along the 42nd parallel to the Pacific by the Adams-Onís Treaty of 1819.⁸³

The significance of the conclusion that the Louisiana Purchase included very little of the Missouri watershed therefore lies mainly in the relationship between the United States and the Indian nations who lived, and continue to live, there. The Purchase did not, and could not, provide the United States with territorial sovereignty over the Indian nations who were the true masters of most of that vast region in 1803. So despite what Jefferson may have thought, when Meriwether Lewis and William Clark ascended the Missouri River to the Rocky Mountains in 1804-05, they were traversing Indian, not American, territory. Nor would their Corps of Discovery have acquired sovereignty over the Missouri watershed for the United States, as they were no more able to take possession of the region and exercise authority over the Indian nations than their French and Spanish precursors had been. In actual fact, American sovereignty, both *de facto* and *de jure*, was not acquired until much later, as settlement extended west of the Mississippi and the Indian nations were brought under American control by military force and treaty. The Indian treaties on the Northern Plains are therefore not simply land transactions whereby the United States acquired real property rights from Indian nations who were already under American sovereignty. They are nation-to-nation agreements that are as much about territorial sovereignty as they are about land, and need to be understood as such.⁸⁴ Of course, this extension of American sovereignty did not happen all at once – it was a gradual process that was probably not complete until sometime between the Battle of the Little Big Horn in 1876 and the Massacre at Wounded Knee in 1890. As a consequence, the American frontier in the Missouri watershed was not just a frontier of settlement. It was an international boundary between the United States and the Indian nations that was gradually pushed north and west as these nations were incorporated into the United States, and became, in Chief Justice Marshall’s words, “domestic dependent

⁸² See A.L. Burt, *The United States, Great Britain, and British North America: From the Revolution to the Establishment of Peace after the War of 1812* (New Haven, 1940), 399-426.

⁸³ See Marshall, above n.20; Brooks, above n.27. Of course the latter boundary was moved far to the south after the Mexican-American War by the Treaty of Guadalupe Hidalgo, 1848.

⁸⁴ See Jill St. Germain, *Broken Treaties: United States and Canadian Relations with the Lakotas and the Plains Cree, 1868-1885* (Lincoln, 2009); Suzan Shown Harjo, ed., *Nation to Nation: Treaties Between the United States & American Indian Nations* (Washington, 2014).

nations” that nonetheless retained their own internal sovereignty.⁸⁵ Until that happened, the Indian nations were the only sovereigns on the Northern Plains.

⁸⁵ *Cherokee Nation v. Georgia*, above n.13. See text accompanying nn.13-16 above.