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"We Hold the Government to Its Word": How *McGirt v. Oklahoma* Revives Aboriginal Title

ABSTRACT. This Note analyzes for the first time how *McGirt v. Oklahoma* could revive aboriginal-title land claims against the United States and create an opening for Land Back litigation. It argues that *McGirt* directs lower courts to enforce aboriginal title's congressional-intent requirement strictly and renews the relevance of an overlooked case from 2015, *Pueblo of Jemez v. United States*. In *Pueblo of Jemez*, the Tenth Circuit unknowingly demonstrated how insisting on clearer proof of congressional intent to extinguish title would implement *McGirt*'s holding and remove the jurisdictional bars – sovereign immunity and preclusion – that have prevented aboriginal-title litigation.

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INTRODUCTION

Although the Land Back movement's goal—returning land to American Indians[1]—is older than the United States, it has recently gained new momentum.[2] Land Back efforts include pursuing fee-simple ownership by American Indians, but other sets of property rights are also available. Given the variety of American Indian groups and their unique histories, restoring land requires different legal strategies and may lead to different outcomes across regions and tribes.[3]

Creativity has characterized the movement's successes. In recent years, some tribes have partnered with private nonprofits,[4] for-profit companies,[5] and

1. Because of its specific meaning in Federal Indian law, this Note uses the term "American Indian" to refer to the Indigenous peoples of the contiguous United States. Where specific nations or communities are referenced, I use their Indigenous names or, as appropriate, the name by which a federally recognized tribal government identifies. *See generally Native American and Indigenous Peoples FAQs*, UCLA EQUITY, DIVERSITY & INCLUSION (Apr. 14, 2020), https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs [https://perma.cc/BC2M-JLCW] (noting that the term "American Indian" has a "specific legal context").

2. The fact that I, a person with no Indigenous heritage, am writing this Note is one example of the Land Back movement's success in spreading awareness. For additional discussion of Land Back, see Andrea Guzman, *A Call to Return Land to Tribal Nations Grows Stronger*, MOTHER JONES (Apr. 30, 2021), https://www.motherjones.com/environment/2021/04/land-back-tribal-nations-sovereignty-treaties-white-supremacy [https://perma.cc/RA57-ZDBS].

3. *Id.* ("[Land Back is] going to be different for every case. Everyone's land is going to be in a different tribal nation, which means every sovereign nation has a different legal process for doing that Land Back exchange.").

4. *See, e.g.*, Nisqually Valley News Staff, *Nisqually Land Trust, Nisqually Tribe Purchase 2,200 Acres of Land*, CHRONICLE (May 18, 2021, 3:03 PM), https://www.chronline.com/stories/nisqually-land-trust-nisqually-tribe-purchase-2200-acres-of-land,265577 [https://perma.cc/N6KV-U7L6] (describing the reacquisition of 2,200 acres of land in southwest Washington by the Nisqually Indian Tribe); Emily Weyrauch, *Returning Land to Tribes Is a Step Towards Justice and Sustainability, Say Wabanaki, Environmental Activists*, BEACON (Dec. 1, 2020), https://mainebeacon.com/returning-land-to-tribes-is-a-step-towards-justice-and-sustainability-say-wabanaki-environmental-activists [https://perma.cc/E6G8-RX7K] (describing the Elliotsville Foundation's transfer of 735 acres of land to the Penobscot Nation); Mario Koran, *Northern California Esselen Tribe Regains Ancestral Land After 250 Years*, GUARDIAN (July 28, 2020), https://www.theguardian.com/us-news/2020/jul/28/northern-california-esselen-tribe-regains-land-250-years [https://perma.cc/X3PU-R95T] (describing how the Western Rivers Conservancy, funded by the California Natural Resources Agency, purchased and transferred almost 1,200 acres of Big Sur land to the Esselen Tribe).

5. *See, e.g.*, Brooke Migdon, *Lumber Company Returns Waterfront Property to Native American Tribe in Washington State at No Cost*, HILL (Dec. 25, 2021), https://thehill.com/changing-america/sustainability/environment/587152-lumber-company-returns-waterfront-property-to [https://perma.cc/U86C-HMNC] (detailing a lumber company's return of over 1,000

religious organizations[6] to reclaim stewardship of thousands of acres of ancestral land. Other groups, like the Yurok and Wiyot Tribes of northern California, have purchased land outright.[7] Still others have asserted their stewardship by shaping national land policy through protests and grassroots organizing.[8] Land Back has also gained recognition in the legislative and executive branches: recently, Congress statutorily returned thousands of acres of land to the Leech Lake Band of Ojibwe,[9] and the Department of Interior (DOI) took steps to facilitate tribal applications to place land into federal trust.[10]

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acres to the Squaxin Island Tribe and describing the action as part of the Land Back movement); Diana Graettinger, *Tribe Celebrates Return of Island*, BANGOR DAILY NEWS (2002), http://www.bigorrin.org/archive71.htm [https://perma.cc/T42W-GGED] (detailing a papermaking company's return of land to the Passamaquoddy Tribe).

6. *See, e.g.*, Kaylea Hutson-Miller, *Wyandotte Nation to Receive Deed to 'Sacred' Site*, JOPLIN GLOBE (Sept. 14, 2019), https://www.joplinglobe.com/news/local_news/wyandotte-nation-to-receive-deed-to-sacred-site/article_f154f340-3430-5e62-89a3-39b028fa8ad5.html [https://perma.cc/5RPD-NUBX] (describing how United Methodist Global Ministries returned land to the Wyandotte Nation, as it had promised when the Wyandotte were forced from the land some 176 years ago by the federal government).

7. *See* Hallie Golden, *'Piecing Together a Broken Heart': Native Americans Rebuild Territories They Lost*, GUARDIAN (Feb. 20, 2021), https://www.theguardian.com/environment/2021/feb/20/native-americans-rebuild-lost-territories-real-estate [https://perma.cc/CX57-8JDE] (describing how the Yurok Tribe has reacquired about 80,000 acres of land); Harmeet Kaur, *Indigenous People Across the US Want Their Land Back—and the Movement Is Gaining Momentum*, CNN (Nov. 26, 2020, 6:24 PM ET), https://www.cnn.com/2020/11/25/us/indigenous-people-reclaiming-their-lands-trnd [https://perma.cc/3DE3-ZR35] (noting that the Wiyot Tribe regained 240 acres of land through a partnership with the city of Eureka).

8. *See, e.g.*, *Indigenous Resistance Against Carbon*, INDIGENOUS ENV'T NETWORK, *and* OIL CHANGE INT'L 12 (Aug. 2021), https://www.ienearth.org/wp-content/uploads/2021/09/Indigenous-Resistance-Against-Carbon-2021.pdf [https://perma.cc/YQ55-GDG9] (describing how American Indian protests over the past decade have stalled or stopped twenty-one fossil-fuel projects in the United States and Canada, forestalling emissions equivalent to over twenty-five percent of both countries' annual greenhouse-gas emissions).

9. Leech Lake Band of Ojibwe Reservation Restoration Act, Pub. L. No. 116-255, 134 Stat. 1139 (2020); *see also* Shirley Sneve, *Tribes Reclaiming Lands 'Actually Happening,'* INDIAN COUNTRY TODAY (Jan. 15, 2021), https://indiancountrytoday.com/news/tribes-reclaiming-lands-actually-happening [https://perma.cc/6W3Y-N6SY] (describing the Leech Lake Band of Ojibwe Reservation Restoration Act).

10. *Interior Department Takes Steps to Restore Tribal Homelands, Empower Tribal Governments to Better Manage Indian Lands*, U.S. DEP'T OF INTERIOR (Apr. 27, 2021), https://www.doi.gov/pressreleases/interior-department-takes-steps-restore-tribal-homelands-empower-tribal-governments [https://perma.cc/8TM5-KD2V]; Aliyah Chavez, *Interior Sets New Path Through Land Maze*, INDIAN COUNTRY TODAY (Apr. 28, 2021), https://indiancountrytoday.com/news/interior-department-makes-land-into-trust-easier___[https://perma.cc/7YCD-RLXT]; Valerie Volcovici, *U.S. Interior Dept. Moves to Restore Native American Land*, REUTERS (Apr. 27, 2021), https://www.reuters.com/world/us/us-interior-dept-moves-restore-native-

What role, if any, litigation should play in Land Back efforts remains unclear, given that the United States has reneged on its legal obligations to American Indians since the Revolution.[11] Alongside systemic racism, forced assimilation, and violent removal,[12] American Indians have faced an additional challenge: judicial nonenforcement of their lawful land claims. And whereas harms against other identity groups in the United States were often legal when perpetrated, many federal seizures of American Indian land never were.[13] As historian and law professor Stuart Banner has emphasized, protecting American Indian land rights has often required "persuad[ing] government officials . . . to enforce" their own rules "as written" rather than to change legal doctrine.[14]

In *McGirt v. Oklahoma*,[15] the Supreme Court cleared a new path for Land Back litigation. It did so by enforcing a long-standing legal rule: only unambiguous proof of congressional intent can extinguish American Indian tribes' land

american-land-2021-04-27 [https://perma.cc/5CFC-EUMK]; Rob Chaney, *Montana's National Bison Range Transferred to Tribes*, ASSOCIATED PRESS (Jan. 18, 2021), https://apnews.com/article/mountains-wildlife-david-bernhardt-missoula-environment-9b033948e6acc5f166ca070487af19f5 [https://perma.cc/67CU-NXA3] (describing how the Department of Interior (DOI) implemented a congressional statute returning Montana's National Bison Range to the Confederated Salish and Kootenai Tribes of the Flathead Reservation).

11. The first treaty between the United States and American Indians was a 1778 treaty with the Lenape Tribe, also known as the Delaware Tribe of Indians. *See Frequently Asked Questions*, DELAWARE TRIBE OF INDIANS (June 26, 2013), https://delawaretribe.org/blog/2013/06/26/faqs [https://perma.cc/H2UX-ZDVH] (explaining that the tribe's Indigenous name is "Lenape"); Ryan P. Smith, *Why the Very First Treaty Between the United States and a Native People Still Resonates Today*, SMITHSONIAN MAG. (May 24, 2018), https://www.smithsonianmag.com/smithsonian-institution/why-very-first-treaty-between-us-and-native-people-still-resonates-today-180969157 [https://perma.cc/9P8F-YU82] (describing the treaty). The Continentals contacted the Lenape because they needed passage through the tribe's territory. Smith, *supra*. But after the Lenape guided the Continental troops through their land as promised, the Continental Army purportedly assassinated the Lenape's leader. Smith, *supra*; *see also* Hansi Lo Wang, *Broken Promises on Display at Native American Treaties Exhibit*, NPR (Jan. 18, 2015), https://www.npr.org/sections/codeswitch/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit [https://perma.cc/J7HW-ZPRR] (describing an exhibit displaying ratified treaties later broken by the United States).

12. *See generally* DEE ALEXANDER BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1970) (documenting the systematic genocide of American Indian peoples through the nineteenth century).

13. STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 292 (2005).

14. *Id.* at 293.

15. 140 S. Ct. 2452 (2020).

rights.[16] Enforcing the congressional-intent requirement may clear two jurisdictional roadblocks that have historically barred American Indians from litigating certain land claims' merits: sovereign immunity and preclusion. Admittedly, *McGirt*'s holding addressed a narrow circumstance. It established only that land promised in federal treaties remains Indian reservation land for the purposes of a federal criminal statute.[17] But the Court's forceful reaffirmation of the rule that Congress alone has the constitutional authority to extinguish certain tribal property rights—and that courts may not "lightly infer such" extinguishment—has far broader implications.[18] The decision is explicit. If Congress intends to terminate such rights, "it must say so" clearly.[19] "[S]aving the political branches the embarrassment" of breaking the law's guarantees to tribes "is not one of [the Court's] constitutionally assigned prerogatives . . . no matter how many other promises . . . the federal government has already broken."[20]

McGirt relies on the doctrine of "Indian title." Indian title is a common-law theory that colonizing European sovereigns, and their successors by war or purchase, acquired "absolute ultimate title" to North America's land through the "doctrine of discovery" at first contact.[21] According to the doctrine, American Indians retained only "Indian title"—the right of occupancy and use[22]—even though they were on the land first. Courts justified this distinction through explicit reference to the racist attitudes of the time: as Chief Justice Marshall would

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16. *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1698 (2019) ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.' 'There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."'" (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202-03 (1999))); United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) (stating that, with regard to "[e]xtinguishment of Indian title based on aboriginal possession[,] . . . [t]he power of Congress . . . is supreme").

17. *McGirt*, 140 S. Ct. at 2459.

18. *Id.* at 2462 (first citing Lone Wolf v. Hitchcock, 187 U.S. 553, 566-68 (1903); and then citing Solem v. Bartlett, 465 U.S. 463, 470 (1984)).

19. *Id.* at 2462, 2482.

20. *Id.* at 2462.

21. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592-93 (1823) (describing the doctrine of discovery's history and application in the United States); *see* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.06[1] (2012) (describing the history of "Indian title" and the federal government's right of preemption).

22. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21.

later write, Indian title was legitimate because American Indians were "fierce savages."[23]

Despite its origins, the doctrine continues to have vast ramifications for tribes. Because the sovereign retains ultimate title, Indian-title land cannot be sold without the sovereign's involvement.[24] The sovereign's authority over such land exchanges is known as the "right of preemption," because the sovereign—today, the United States government—can block or preempt any Indian-title land transfer.[25] As a result, some have described Indian title as "split title" because it confers an incomplete bundle of rights.[26]

The terms "original Indian title" or, today, "aboriginal title"[27] refer to American Indians' default rights under the Indian-title doctrine to occupy and use

23. *Johnson*, 21 U.S. (8 Wheat.) at 590. The racism inherent to Indian-title doctrine and the concept of split title—the ideas that, today, form the basis of the Federal Indian law trust system—is inescapable. *See infra* Section I.B (discussing Chief Justice Marshall's racist justification for aboriginal title in *Johnson v. M'Intosh*). While this Note's scope is limited to litigation strategies within the existing Federal Indian law system, other scholars have explored how the federal trust system could be improved. *See* Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317 (2006); *see also* Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 533 (2021) (arguing that lawyers should reject the federal trust system by refusing to cite the racist cases that established it); Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984) (examining the weaknesses of the normative underpinnings of the federal trust system, though focusing more on the current system's inconsistencies and ambiguities than on race specifically).

24. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21; *id.* § 15.03 (noting that today, Federal Indian law uses trust concepts to describe the federal-tribal relationship); 25 U.S.C. § 177 (2018) (restricting the transfer of tribal land, regardless of the form in which it is held); *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.04[1] ("Land acquired by various methods may be treated similarly for many purposes, such as application of restrictions against alienation [or transfer]."); *id.* § 15.06[2] ("In general, lands guaranteed to tribes in fee are subject to the restraint on alienation."). *But see infra* note 38 (discussing examples of tribes owning land not subject to the right of federal preemption).

25. BANNER, *supra* note 13, at 135 (describing preemption rights as "not a right to buy land from the Indians *before* other purchasers, but instead a denial of the ability of other purchasers to purchase at all, without the consent of the United States").

26. Today, the United States's right of preemption is more frequently described in terms of trust law, where the United States is the trustee of American Indian land. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.03 (citing *Johnson*, 21 U.S. (8 Wheat) at 543, and describing how trust law concepts have influenced modern Federal Indian law's conception of the federal-tribal relationship). But this Note uses common-law terms to reflect its focus on the common-law doctrine of aboriginal title.

27. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.04[2].

land as their ancestors did.[28] These rights stem from exclusive, continuous occupancy and use since "time immemorial."[29] Aboriginal title is not to be confused with "recognized Indian title" or "recognized title,"[30] which describe land to which the United States has formally acknowledged American Indians' claim. Recognized title derives from federal action, and what rights it confers depend on the scope of its establishing treaty, statute, or executive order.[31]

Despite any clarity these definitions suggest, use of these terms has not always been consistent.[32] Even the distinction between aboriginal and recognized

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28. *See, e.g.*, Pueblo of Jemez v. United States, 790 F.3d 1143, 1166 (10th Cir. 2015) (discussing the Jemez Pueblo's "traditional uses" of the Valles Caldera); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 713 (1835) ("Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected . . . .").

29. *See, e.g.*, United States v. Santa Fe Pac. R.R., 314 U.S. 339, 360 (1941) (citing occupation from "time immemorial" as establishing aboriginal title); *Pueblo of Jemez*, 790 F.3d at 1155-56 (quoting *Mitchel*, 34 U.S. (9 Pet.) at 745); Sac & Fox Tribe of Indians v. United States, 315 F.2d 896, 903 (Ct. Cl. 1963) (stating that, for purposes of the Indian Claims Commission Act (ICCA), aboriginal title "must rest on actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property" (quoting The Snake or Piute Indians v. United States, 112 F. Supp. 543, 551 (Ct. Cl. 1953))).

30. *See, e.g.*, Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 339 (1945) (distinguishing "recognized" Indian title from "aboriginal usage without definite recognition of the right by the United States" or aboriginal "Indian title"). *See generally* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.04[3][a] (discussing the relatively recent development of "recognized Indian title" as a term of art, as well as how it differs from aboriginal Indian title).

31. Congress ended the treaty-making era in 1871, but earlier treaties continue to define many American Indian land rights today. *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2018)) (declaring that "no Indian nation or tribe" would thereafter "be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty"). Since 1871, Congress has implemented agreements between the executive branch and tribes through legislation. These statutes have "the same legal standing as treaties" and, likewise, preempt state law under the Constitution's Supremacy Clause. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 5.01[2]; Antoine v. Washington, 420 U.S. 194, 197-98, 204 (1975) (holding that a congressionally approved agreement with the Confederated Tribes of the Colville Reservation guaranteeing the right to hunt and fish on ceded land had the same status as a treaty, preempting state licensing and criminal laws). For further discussion of the scope of recognized title, see 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.04[3]; and *infra* notes 90-105 and accompanying text.

32. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.04[2] (discussing the use of "misleading" terminology in aboriginal-title doctrine and the Supreme Court's evolving treatment of its terms); *id.* § 15.04[3][a] ("The language used to define the character of the

titles is recent.[33] Still, Federal Indian property law has unfailingly assumed that, by default, the federal government possesses the right of preemption over American Indian land.[34] *McGirt* relied on the interrelated concepts of split Indian title and the right of preemption for its premise that the United States defines the scope of "Indian country,"[35] as well as to analyze the Muscogee Nation's[36]

estate guarantee to an Indian tribe by treaty varied so considerably that any detailed classification would not be useful."); McGirt v. Oklahoma, 140 S. Ct. 2452, 2461 (2020) (noting that the early United States-Muscogee Nation treaties did not use the word "reservation" because "that word had not yet acquired such distinctive significance in federal Indian law"). Use of "fee" or "fee patent" to refer to tribal land to which the federal government still holds the right of preemption has been especially confusing. *Compare* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, §§ 15.04[3][a], 15.06[4] (describing treaties that granted land patents "in fee" to tribes, while stating that the federal government retained the right of preemption; and then noting that cases are mixed regarding whether the right of preemption applies to fee lands purchased by American Indian tribes), *with id.* § 5.04[3][a] (noting that the Supreme Court has used "fee," "absolute title," and "absolute ultimate title" interchangeably to refer to the federal government's right of preemption), *and* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985) ("The 'doctrine of discovery' provided, however, that discovering nations held fee title to these lands . . . .").

33. In fact, the distinction between the two was only recognized in the mid-twentieth century—and then, to clarify that the United States did not have to compensate tribes under the Fifth Amendment for confiscating their aboriginal-title land. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-79 (1955); *see also Nw. Bands of Shoshone Indians*, 324 U.S. at 338-39 (distinguishing the two types of title); 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.04[3] (same).

34. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.06[1]; *id.* § 15.03 (noting that, today, Federal Indian law uses trust concepts to describe the federal-tribal relationship); 25 U.S.C. § 177 (2018) (restricting the transfer of tribal land, regardless of the form in which it is held). Even in some cases where courts determined that tribes held their land in "fee," the Supreme Court has concluded that the United States retained the right of preemption. *See, e.g.*, United States v. Candelaria, 271 U.S. 432, 443 (1926) (determining that, even though the New Mexico Pueblos hold their land in fee simple, they are still "wards of the United States" and cannot sell their land "without its consent"); *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, §§ 15.04[1], 15.06[2] ("Land acquired by various methods may be treated similarly for many purposes, such as application of restrictions against alienation" or transfer; "In general, lands guaranteed to tribes in fee are subject to the restraint on alienation."). *But see infra* note 38 (discussing examples of tribal fee-simple ownership where the federal government did not hold the right of preemption).

35. *See, e.g.*, *McGirt*, 140 S. Ct. at 2475 (discussing whether "Indian Country" encompasses land "reserved from sale" by the federal government).

36. The official name is "Muscogee (Creek) Nation." But as of 2021, the Nation's leadership rebranded as simply "Muscogee Nation." *See* Keegan Williams, *Muscogee Nation Drops Colonial Era Name in Rebranding*, CRONKITE NEWS (May 6, 2021), https://cronkitenews.azpbs.org/2021/05/06/muscogee-nation-drops-colonial-era-name-in-branding [https://perma.cc/5YX2-WFVK]. I use "Muscogee Nation" because "Creek" was the British name, and the Tribe has always called itself Muscogee. *See* Michael Overall, *The Muscogee Nation Is Dropping 'Creek'*

recognized title claims.[37] But the decision's reasoning and implications extend beyond its specific facts.

For the first time, this Note analyzes *McGirt*'s ramifications in another context: tribal aboriginal-title claims to federal land.[38] The decision has urgent implications for tribes that would litigate such claims against the United States.

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from Its Name. Here's Why, TULSA WORLD (June 12, 2021), https://tulsaworld.com/news/local/the-muscogee-nation-is-dropping-creek-from-its-name-heres-why/article_3bf78738-adcc-11eb-823d-438cbdefaf21.html [https://perma.cc/X6DH-GCCX]. Where treaties, statutes, or opinions refer to the "Creek Nation," I have substituted "[Muscogee] Nation" for consistency and clarity, except when used in source titles.

37. *McGirt* analyzes several treaties and congressional statutes. First, an 1832 treaty that guaranteed "[t]he [Muscogee] country west of the Mississippi" to the Muscogee Nation. *McGirt*, 140 S. Ct. at 2459 (quoting Treaty with the Creeks, Mar. 24, 1832, art. XIV, 7 Stat. 366, 368). Second, an 1833 treaty with "the whole [Muscogee] Nation of Indians" that promised the United States would "grant a patent, in fee simple, to the [Muscogee] nation of Indians for the [assigned] land" to continue "so long as they shall exist as a nation, and continue to occupy the country hereby assigned them." Articles of Agreement with the Creeks, Feb. 14, 1833, pmbl., art. III, 7 Stat. 417, 418, 419; *see McGirt*, 140 S. Ct. at 2459. Third, an 1856 treaty that promised "no portion" of Muscogee lands would "ever be embraced or included within, or annexed to, any Territory or State" and that the Muscogee Nation would have the "unrestricted right of self-government" with "full jurisdiction" over their members and property. *McGirt*, 140 S. Ct. at 2461 (quoting Treaty with Creeks and Seminoles, Aug. 7, 1856, arts. IV, XV, 11 Stat. 699, 700, 704). Fourth, an 1866 treaty that sold the Muscogee Nation's land to the United States at thirty cents per acre. *McGirt*, 140 S. Ct. at 2461 (citing Treaty Between the United States of America and the Creek Nation of Indians, June 14, 1866, art. III, 14 Stat. 785, 786). The decision also cites congressional statutes or statements referring to the "[Muscogee] reservation." *See, e.g.*, *id* (citing Act of Mar. 3, 1873, ch. 322, 17 Stat. 626; 11 CONG. REC. 2351 (1881); and Act of Feb. 13, 1891, 26 Stat. 750).

38. Accordingly, issues relating to individual aboriginal title or individual American Indian land ownership are beyond this Note's scope. For more discussion of individual aboriginal title, see *Cramer v. United States*, 261 U.S. 219, 229-30 (1923). Because this Note focuses on land where Congress *can* extinguish a tribe's claim, instances of tribal fee-simple ownership and direct transfer of land not subject to the right of preemption are also beyond its scope. *See, e.g.*, Mark Walker, *Flooding and Nuclear Waste Eat Away At a Tribe's Ancestral Home*, N.Y. TIMES (Nov. 13, 2021), https://www.nytimes.com/2021/11/13/us/politics/tribal-lands-flooding-nuclear-waste.html [https://perma.cc/M4ZR-4NL7] (detailing the Prairie Island Indian Community's efforts to put land it purchased in fee-simple into federal trust in Michigan); Monica Whitepigeon, *Illinois House Resolution Supports the Return of Lands to Prairie Band Potawatomi Nation*, NATIVE NEWS ONLINE (Oct. 21, 2021), https://nativenewsonline.net/sovereignty/proposed-to-return-of-illinois-lands-to-prairie-band-potawatomi-nation [https://perma.cc/RM36-Z8D3] (describing how, since 2006, the Prairie Band Potawatomi Nation has purchased 128 acres of its ancestral land and, and since 2014, has been trying to place that land in federal trust); Richard Read, *Washington Tribe Saves Snoqualmie Falls Land, Held Sacred, From Development*, L.A. TIMES (Nov. 2, 2019, 4:01 PM PT), https://www.latimes.com/world-nation/story/2019-11-02/snoqualmie-tribe-sacred-falls [https://perma.cc/6WGH-3PMB] (describing how the Snoqualmie Tribe purchased sacred land directly from the Muckleshoot Indian Tribe in Washington state). Finally, while this Note discusses tribes that have been

Like the recognized title at issue in *McGirt*, aboriginal-title claims are subject to the right of preemption and, therefore, may only be extinguished by a "clear and plain indication" of congressional intent or Congress's "plain and unambiguous action."[39] But in the past, federal tribunals have been especially willing to infer that aboriginal title was extinguished when land claimed by the United States government was at stake,[40] despite only vague or ambiguous evidence of Congress's intent, such as "scatter[ed]" non-American Indian settlement.[41] *McGirt* rejects such equivocal evidence and requires reversing that practice.

This Note proposes how lower federal courts can and should implement *McGirt* in the aboriginal-title context. The Supreme Court's decision in *McGirt*

federally recognized, "Indian tribe" has had a broader meaning historically. Accordingly, this Note's adjectival use of "tribe" or "tribal" to describe certain legal claims does not automatically connote federal recognition. Rather, it references a group of American Indians who identify as a legal unit, in recognition of Federal Indian law's evolving descriptive conventions. *See, e.g.*, *Candelaria*, 271 U.S. at 442 (noting that "Indian tribe" was used during the nineteenth century "in the sense of a body of Indians of the same or a similar race, united in a community under one leadership or government" (internal quotation marks and citation omitted)); *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 5.02[3] (describing the scope of federal power to recognize tribes and how the judiciary has determined that groups are tribes for the purpose of interpreting federal statutes).

39. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 353, 346 (1941). For discussion of extinguishment and the congressional-intent requirement for recognized-title claims, see 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.06[1] ("Only the United States can extinguish original Indian title."); and *McGirt*, 140 S. Ct. at 2462 ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. But that power . . . belongs to Congress alone." (citation omitted)).

40. Except where voluntarily waived, sovereign immunity has largely insulated the federal government from legal accountability for its encroachments on American Indian aboriginal-title land. By contrast, tribes' assertions of title to privately or state-held lands have been more successful. In some cases, the United States has even intervened on tribes' behalf—although not necessarily with the outcome that the tribes wanted. *See, e.g.*, *Santa Fe Pac. R.R.*, 314 U.S. 339 (suing on behalf of the Hualapai Tribe to enjoin the Santa Fe Pacific Railroad Company from encroaching on their aboriginal title); United States v. Platt, 730 F. Supp. 318 (D. Ariz. 1990) (asserting a prescriptive easement over private land on behalf of the Pueblo of Zuni); United States v. Atl. Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977) (suing the State of Alaska and over 140 corporations and private parties on behalf of Alaskan American Indians of the Arctic Slope to argue that a congressional statute did not extinguish aboriginal title, though the Inupiat Community of the Arctic Slope intervened to claim broader damages).

41. United States v. Pueblo de Zia, 474 F.2d 639, 641 (Ct. Cl. 1973) (affirming the Indian Claims Commission's (ICC) conclusion that the Taylor Grazing Act's implementation and "a scattering of 114 homesteads" had extinguished aboriginal title).

renewed the relevance of an overlooked Tenth Circuit decision,[42] *Pueblo of Jemez v. United States*.[43] Although it predated *McGirt*, the 2015 *Jemez* decision anticipated its reasoning and demonstrated how courts can implement *McGirt*'s command to "hold the government to its word"[44]—or to its silence—when the United States encroaches on aboriginal-title land. In *Jemez*, the Tenth Circuit presciently enforced the congressional-intent requirement strictly and on a tract-by-tract basis. As a result, *Jemez* was one of the few—if not the first—aboriginal-title suits seeking to affirm a tribe's use and occupancy rights to federal land that has advanced to merits litigation before an Article III court.[45]

If applied broadly, the *Jemez* court's insistence that the United States provide unambiguous proof of Congress's intent to extinguish aboriginal title for each disputed tract would have momentous effects. It would not only implement the Supreme Court's message in *McGirt*, but could also revive aboriginal-title claims to millions of acres of land. The fact that the Tenth Circuit merely enforced long-standing precedent makes its approach even more relevant and scalable. Requiring unambiguous proof of Congress's intent to extinguish title is not radical. It is what the law already requires. Federal judges need only enforce the standard

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42. Only two articles do more than reference the case in a footnote. The first includes it in an analysis of the Valles Caldera National Preserve and public land-management policy. *See* Melinda Harm Benson, *Shifting Public Land Paradigms: Lessons from the Valles Caldera National Preserve*, 34 VA. ENV'T L.J. 1 (2016). The second discusses it to argue that "aboriginal rights" promote sustainable communities, compared to fee-simple ownership. *See* John W. Ragsdale Jr., *Time Immemorial: Aboriginal Rights in the Valles Caldera, the Public Trust, and the Quest for Constitutional Sustainability*, 86 UMKC L. REV. 869, 878 (2018). Only one case has engaged with *Pueblo of Jemez* substantively rather than merely citing it for the legal standards it recites. United States v. Abouselman, 976 F.3d 1146 (10th Cir. 2020) (holding that Spain's passive administration of a water system had not extinguished three Pueblos' aboriginal water title).

43. 790 F.3d 1143 (10th Cir. 2015). Since *Pueblo of Jemez*, the Tenth Circuit has affirmed that, to extinguish aboriginal title, Congress must act both affirmatively and unambiguously. *See Abouselman*, 976 F.3d 1146. In *Abouselman*, the Tenth Circuit held that Jemez Pueblo's aboriginal water rights were unextinguished. *Id.* at 1159 (concluding that where Congress acted affirmatively, but its intent to extinguish was not "clear and plain," aboriginal title was not extinguished).

44. *McGirt*, 140 S. Ct. at 2459 ("Because Congress has not said [that land promised in treaties is no longer Indian country], we hold the government to its word.").

45. *Abouselman* had a three-day evidentiary hearing before a magistrate judge but involved aboriginal water title, not aboriginal *land* title. *See Abouselman*, 976 F.3d at 1150. The litigation involving the Alabama-Coushatta Tribe of Texas against the United States is also distinguishable. Alabama-Coushatta Tribe of Texas v. United States, No. 3-83, 2000 WL 1013532 (Ct. Cl. June 19, 2000) (concluding that the Tribe had established aboriginal title, albeit to a smaller portion of the disputed land). Though the Court of Claims found that the Tribe's aboriginal title was not extinguished by the Spanish, Mexican, or Texan governments, *see id.* at *44-53, it concluded that the United States had breached its fiduciary duty to the Tribe and awarded damages rather than considering the Tribe's continued occupancy and use rights, *id.* at *78.

and presumptions that have long governed aboriginal-title law.[46] Ultimately, the fate of any aboriginal-title suit will still depend on a claim's unique history. But for the first time, tribes that *can* satisfy the doctrine's standards at merits litigation would have an opportunity to pursue their claims against the federal government for nonmonetary restitution: land back.

Part I of this Note examines *McGirt*'s relevance to aboriginal title, while contrasting its enforcement of the congressional-intent requirement in the recognized-title context with courts' dilution of that requirement in aboriginal-title suits. In Part II, this Note turns to the Tenth Circuit's decision in *Jemez*, which unknowingly demonstrated how *McGirt*'s insistence on clearer proof of Congress's intent to extinguish could revise the extinguishment dates for many aboriginal-title claims, bring them within the Quiet Title Act's (QTA) statute of limitations, and provide a new path past sovereign immunity. Part III likewise examines the *Jemez* decision—but, this time, as a model for applying *McGirt*'s statute-by-statute search for congressional intent in aboriginal-title cases to avoid doctrinal confusion about the preclusive power of Indian Claims Commission (ICC) claims awards. Finally, this Note's conclusion explores the possible Land Back opportunities, in the Tenth Circuit and beyond, that *McGirt* creates when applied to aboriginal-title claims.

I. APPLYING *MCGIRT* TO ABORIGINAL TITLE

McGirt applies equally to aboriginal title—a common-law doctrine—and to American Indian treaty or statute-based land rights. Congress legislates against a background of common law and, absent abrogation, the common law's promises remain just as enforceable as any congressional treaty or statute.[47] Aboriginal

46. *See* United States v. Santa Fe Pac. R.R., 314 U.S. 339, 354 (1941) (stating that "doubtful expressions [of congressional intent], instead of being resolved in favor of the United States, are to be resolved in favor" of the claimants (quoting Choate v. Trapp, 224 U.S. 665, 675 (1912))).

47. *McGirt* begins: "On the far end of the Trail of Tears was a promise." *McGirt*, 140 S. Ct. at 2459. Restoring the law's promise is a repeated theme throughout the majority's opinion. *See, e.g.*, *id.* ("By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the [Muscogee] that they would be free to govern themselves. But this particular incursion has its limits . . . ."); *id.* at 2460 (stating that Congress's treaties with the Muscogee Nation "weren't made gratuitously . . . nor were [they] meant to be delusory"); *id.* at 2462 ("[I]t's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so."); *id.* at 2475 (criticizing Oklahoma for "[s]eeking to sow doubt around express treaty promises" to the Muscogee Nation); *id.* at 2476 ("[T]he most authoritative evidence of the [Muscogee Nation's] relationship to the land . . . lies in the treaties and statutes that promised the land to the Tribe in the first place."); *id.* at 2480 (stating that "the threat

title's doctrinal development reinforces that the Supreme Court's reasoning applies to such land claims, as well as why lower courts should reorient their approach to such claims after *McGirt*.

Section I.A situates *McGirt* in its legal and historical contexts and, in so doing, reveals the decision's reliance on and relevance to aboriginal title. Section I.B traces the doctrinal development of aboriginal title and its corollary concept—the federal right of preemption—to expand upon *McGirt* and aboriginal title's connection. Finally, Section I.C describes the historic dilution of the congressional-intent requirement for aboriginal-title claims against the United States and *McGirt*'s potential for helping such claims succeed.

A. Restoring the Promise: Reading McGirt *in Its Legal and Historical Contexts*

On its face, *McGirt* analyzed only whether land reserved to the Muscogee Nation in the nineteenth century remains "Indian country" and is subject to federal jurisdiction under the Major Crimes Act.[48] But its reasoning addressed a question fundamental to all Indian-title land claims, whether recognized or aboriginal title. At its core, the decision asked whether the congressional-intent requirement—that Congress must unambiguously indicate its intent to extinguish Indian title—retains meaning. *McGirt*'s answer was unequivocal: "If Congress wishes to break the promise of a reservation" made by treaty or statute, "it must

of unsettling convictions . . . cannot force us to ignore a statutory promise when no precedent stands before us at all"); *id.* at 2482 ("The federal government promised the [Muscogee Nation] a reservation in perpetuity . . . . If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough . . . are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law . . . ."); *cf.* United States v. Texas, 507 U.S. 529, 534 (1993) (stating that "to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law" (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978))).

48. In relevant part, the Major Crimes Act states that "[a]ny Indian who commits against the person or property of another Indian or other person [certain conducts] shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a) (2018). "Indian country" is defined, in turn, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." *Id.* § 1151(a); *see McGirt*, 140 S. Ct. at 2459 (quoting the same). "Indian country" may also include "all dependent Indian communities," *see* 18 U.S.C. § 1151(b) (2018), "Indian allotments," *id.* § 1151(c), and "Indian titles to which have not been extinguished," *id.* The final category references aboriginal-title land. *See McGirt*, 140 S. Ct. at 2474.

say so."[49] "[N]o matter how many other promises to a tribe the federal government has already broken,"[50] courts may not infer congressional extinguishment of such title from ambiguous evidence like non-American Indian settlement and states' past practices,[51] or from related, but inexplicit, allotment legislation authorizing the sale of American Indian land.[52] The property rights of American Indians persist "until Congress explicitly indicates otherwise" and, where that property right is clear, "extratextual sources" may not undermine it.[53]

McGirt's reasoning drew on two interrelated legal concepts: Indian title and the federal right of preemption. Under the Major Crimes Act, "Indian country" encompasses "all land within the limits of any Indian reservation" which, in turn, covers all land "reserved from sale."[54] But what, exactly, "reserved from sale" meant was unclear. Oklahoma's argument assumed that "reserved from sale" implicitly meant reserved from sale *by the United States*.[55] Oklahoma conceptualized "Indian country" as land over which the federal government had the right of preemption. And because the Muscogee Nation retained the right to transfer its land under earlier treaties, Oklahoma reasoned, the federal government lacked the right of preemption.[56] Thus, it concluded, the disputed land had not been "reserved from sale" within the meaning of the Major Crimes Act.[57] The Court rejected Oklahoma's premise. To be "reserved from sale" for purposes of the Act

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49. *McGirt*, 140 S. Ct. at 2462.

50. *Id.*; *see also id.* at 2463-65 (holding that the Allotment Era did not terminate the Muscogee Nation's land rights because no "statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands" was passed by Congress).

51. *Id.* at 2468-74.

52. *Id.* at 2463-64 (discussing both the Allotment Era generally, as well as Congress's specific allotment agreements with the Muscogee Nation). Although subsequent legislation would authorize the sale of their land, *see id.*, the Muscogee Nation was explicitly excluded from the General Allotment Act of 1887's scope, *see* Act of Feb. 8, 1887, ch. 119, § 8, 24 Stat. 388, 391.

53. *McGirt*, 140 S. Ct. at 2469.

54. *See id.* at 2459 (defining "Indian country" as reservation land); *id.* at 2475 (acknowledging that reservation land must be "reserved from sale" and explaining why the Muscogee land fit that description).

55. *Id.* at 2475.

56. *Id.* Earlier in the opinion, the Court discusses an agreement from the Allotment Era—when the United States pursued forced assimilation and land acquisition by "allotting" tracts to individual American Indians—that gave tribal members authority to sell their parcels "to Indians and non-Indians alike" without federal involvement. *Id.* at 2463. Although this would also support Oklahoma's "reserved from sale" argument, it is not referenced in that part of the opinion. *See id.* at 2474-76. Instead, it is only cited as evidence of Congress's intent to extinguish or disestablish the Muscogee reservation. *See id.* at 2463-65. *See generally* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 1.04 (discussing the Allotment Era, which began in 1887 with the passage of the General Allotment Act).

57. *McGirt*, 140 S. Ct. at 2475.

did not require that the Muscogee Nation's land be subject to the federal right of preemption, but only that in a "very real sense" its land "could not [be] give[n] . . . to others" or "appropriat[ed] . . . without engaging in an act of confiscation."[58]

Although *McGirt* discussed only recognized title explicitly, its conceptual foundations implicate aboriginal title. As a threshold matter, aboriginal title and recognized title are linked by their shared roots in the concept of split title.[59] Still more profoundly, *McGirt*'s reserved-from-sale analysis assumes that, absent congressional action, the United States holds the right of preemption to American Indian land—a default where tribes retain aboriginal title.[60] The Supreme Court refused to penalize the Muscogee Nation for departing from this default and rejected the implication that it was "easier to divest" them of their land because they had "ask[ed] for" the "additional protection" of "fee title."[61] In doing so, *McGirt* reinforced that, where Congress holds the right of preemption, it retains exclusive authority to extinguish American Indian land title—regardless of that title's form.

At the same time, *McGirt* continued the line of Supreme Court decisions that, alongside treaties and statutes, have explicitly and iteratively enforced federal supremacy in American Indian property law.[62] In this way, *McGirt* implicated aboriginal title historically, as much as it did legally. "To determine whether a tribe

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58. *Id.* (internal quotation marks omitted).

59. *See supra* note 26.

60. *See supra* notes 30-31 (explaining how recognized title is predicated on federal action).

61. *McGirt*, 140 S. Ct. at 2475.

62. While the idea that a white sovereign held the right of preemption to American Indian land was long-standing, *see infra* note 73, both the states and the federal government claimed that power in the Republic's early days, *see* TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 16 (2002). *But see* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.04[2] (describing how, before the ratification of the Constitution, states had the preemptive right to purchase tribal land and extinguish Indian title). In 1790, Congress passed the first of a series of statutes that limited transfers of American Indian land to federal treaties and explicitly abrogated states' authority to enter land-transfer agreements, regardless of their prior right of preemption. *See* Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138; Act of Mar. 1, 1793, ch. 19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469, 472; Act of Mar. 3, 1799, ch. 46, § 12, 1 Stat. 743, 746; Act of Mar. 30, 1802, ch. 13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730. The statutes all reiterated the following, with minor variations: "No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (2018). But despite the Acts' obvious intent, states interpreted them as applying only to terri-

continues to hold a reservation," the majority states, "there is only one place we may look: the Acts of Congress."[63] Whatever their pretentions, "[s]tates have no authority to reduce federal reservations lying within their borders,"[64] and the United States's power over land subject to its right of preemption remains supreme. "Oklahoma's long historical prosecutorial practice of asserting jurisdiction over Indians in state court" could not substitute for unequivocal congressional action.[65] Nor could ambiguous evidence—such as Congress's authorization of non-American Indian settlement during the Allotment Era and "the happenstance of shifting demographics"—replace a clear statement of congressional intent to extinguish.[66] Disestablishment "has never required any particular form of words."[67] But *McGirt* affirmed that disestablishment "does require that Congress clearly express its intent to do so" through "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests."[68] Having concluded that a specific congressional statement

tories and states that had joined the Union after the Constitution's creation. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 15.06[3] (describing how, for many years after the Acts' passage, both the Bureau of Indian Affairs and eastern state governments treated federal trusteeship as inapplicable in the original thirteen states under the theory that the Treaty and Nonintercourse Acts were of limited application); GARRISON, *supra*, at 16 (describing how Southern states claimed that they had only ceded control over Indian trade in ratifying the Constitution and that they retained exclusive authority over transfers of American Indian land within their borders). Beginning in this period, the Supreme Court emphasized Congress's exclusive power to extinguish aboriginal title, which helped reinforce federal supremacy in the United States's nascent federalist system. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142-43 (1810) (stating that "Indian title," another name for aboriginal title, survived "until . . . legitimately extinguished" and was not extinguished by state land grants); BANNER, *supra* note 13, at 173-74 (discussing how, though Chief Justice Marshall did not say affirmatively how aboriginal title could be extinguished in *Fletcher*, his opinion's final lines clarified that the State of Georgia lacked such power); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586 (1823). *McGirt* continues that legal legacy and, in affirming federal supremacy in Federal Indian law, the decision reinforces its historical connection to aboriginal-title precedents.

63. *McGirt*, 140 S. Ct. at 2462.

64. *Id.*

65. *Id.* at 2470.

66. *Id.* at 2463-65, 2474.

67. *Id.* at 2463 (quoting Hagen v. Utah, 510 U.S. 399, 411 (1944) (internal quotation marks omitted)).

68. *Id.* (quoting Nebraska v. Parker, 136 S. Ct. 1072, 1079 (2016)).

was required to disestablish the Muscogee Nation's reservation, the Court conducted an exegesis of the federal treaties and statutes involving the disputed Muscogee land.[69] None of them satisfied the standard.[70]

McGirt exemplified what Banner once observed: Federal Indian land law "[has] not change[d], nor [has] the nature of the Indians' claims."[71] The same interdependent legal concepts and federal-state tension shape all Indian-title land rights today. *McGirt*'s insistence on enforcement applies with equal force to aboriginal and recognized title. And particularly after courts' erosion of the congressional-intent standard, *McGirt* opened new possibilities for Land Back litigation involving aboriginal-title claims, as Parts II and III discuss.

B. The Origins of the Promise: Aboriginal Title's Development Before McGirt

In a foundational 1823 decision, *Johnson v. M'Intosh*, Chief Justice Marshall first addressed aboriginal title squarely.[72] In doing so, he acknowledged the concept of split title: if the United States had the right of preemption, aboriginal title necessarily lacked authority over land transfers, also known as the right of alienation.[73] Like other seminal Federal Indian law

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69. *See supra* note 37.

70. *McGirt*, 140 S. Ct. at 2468 (stating, after reviewing various treaties and statutes, "in all this history there simply arrived no moment when any Act of Congress dissolved the [Muscogee Nation] or disestablished its reservation").

71. BANNER, *supra* note 13, at 292. Because recognized title did not yet exist as a distinct concept, *see supra* note 33, *Johnson* references only Indian title generically—but its content clarifies that its topic, in modern terms, is aboriginal title.

72. 21 U.S. (8 Wheat.) 543, 574 (1823).

73. In so doing, Marshall cited heavily to the British Crown's Proclamation of 1763. *See id.* at 594-97. Among its other legal effects, the Proclamation ended private land sales between individual English buyers and American Indian sellers. BANNER, *supra* note 13, at 93. After 1763, all exchanges of American Indian land were conducted by treaties with the British Crown, through its colonial governments. *Id.* Though it would prove practically and diplomatically ineffectual, *id.* at 85, 100, the Proclamation formalized the concept that American Indian tribes may only possess incomplete or split title—an idea that still defines Federal Indian law—and recognized white sovereigns as having the power to block any American Indian land transfer or, the right of preemption, *id.* at 135. Before the Proclamation, British colonists had regularly purchased land through sales that acknowledged the undivided nature of American Indian land title—that is, private sales predicated on American Indians' authority to transfer title to their land directly. *See id.* at 24-27 (citing as evidence specific examples, as well as the "sheer number of surviving deeds," "the ubiquity of colonial statutes regulating the purchasing process" and the fact that "colonial officials often enforced Indian property rights against the competing claims of colonists"). But coercion and fraud by non-American Indian settlers were rampant, *id.* at 63-68, and sales that were not overt deceptions still frequently and dramatically undervalued American Indian land, *id.* at 78-79—and, afterward, were only enforced to the benefit of white

cases,[74] *Johnson* resolved a dispute between two white litigants and was decided without the benefit of any American Indian representation.[75]

While this Note focuses on *McGirt*'s possibilities for Land Back litigation rather than on critiquing current law, the racism at the root of *Johnson* and the concept of split title cannot be overlooked. Chief Justice Marshall's unanimous opinion enshrined a bigoted justification for aboriginal title and for the categorical diminishment of American Indian property rights.[76] Typically, he admitted, "the rights of the conquered to property should remain unimpaired," even when title was "acquired and maintained by force" as the British and, subsequently, American claims to American Indian land were.[77] But because American Indians were "impossible to mix" with non-American Indian settlers,[78] Marshall argued, the "law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application."[79] "The resort to some new and different rule" — aboriginal title — "was unavoidable."[80]

Chief Justice Marshall cited the "character and habits" of American Indians as "some excuse, if not justification" for "wrest[ing]" away their full ownership rights and departing from precedent.[81] Federal acknowledgement of tribes' full

purchasers, *id.* at 82-84. Many colonists took advantage of the collective confusion about *who*, exactly, had the authority to sell land on behalf of an entire tribe. *Id.* at 69 ("[S]ettlers deliberately exploit[ed] [this] collective action problem, by offering to pay individual Indians for their signatures on deeds to land the settlers knew was owned by many people other than the sellers."). When American Indians, tired of the colonists' deceit, began to fight and beat the British around North America in the early 1760s, the Crown issued the Proclamation of 1763 in an effort to improve relations with American Indians. *Id.* at 93-94.

74. *See, e.g.*, BANNER, *supra* note 13, at 171-72 (discussing the total absence of American Indian perspectives or voices in *Fletcher*).

75. GARRISON, *supra* note 62, at 87.

76. In this regard, Chief Justice Marshall's reasoning was distinguishable from that of the Proclamation of 1763, *see supra* note 73, which was not argued for exclusively in racist terms — however imperialistic and damaging its implications, *see* BANNER, *supra* note 13, at 88-92 (describing the evolution of the idea of banning private land sales as a self-interested attempt by the Crown to improve Anglo-American Indian relations); *id.* at 92 (quoting the Proclamation's internal justification that "[it] is . . . essential to Our Interest and the Security of Our Colonies" that the American Indians "should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them").

77. *Johnson*, 21 U.S. (8 Wheat.) at 589.

78. *Id.* at 590.

79. *Id.* at 591.

80. *Id.*

81. *Id.* at 589.

ownership rights was an impossible outcome to Marshall. "[T]he tribes of Indians inhabiting this country were fierce savages," he wrote, and "[t]o leave them in possession of their country, was to leave the country a wilderness."[82]

Johnson announced that American Indians retained "impaired" aboriginal title, once the United States siphoned off the right of preemption.[83] The decision affirmed that aboriginal title included only American Indian occupancy and use rights—and excluded the "power to dispose of the soil" directly.[84] Moreover, *Johnson* also marked the Supreme Court's first explicit affirmation of federal supremacy in American Indian property law in stating that the federal government had the "exclusive right . . . to extinguish" aboriginal title and "to grant the soil."[85]

Since *Johnson*, courts have clarified aboriginal-title doctrine and distinguished it from recognized title. Because aboriginal title exists independent of federal action, [86] it does not require congressional recognition to be enforceable.[87] But because aboriginal-title rights are not recognized rights under statute or treaty,[88] Congress may extinguish them without compensation at any time.[89]

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82. *Id.* at 590.

83. *Id.* at 574.

84. *Id.*

85. *Id.* at 586.

86. *See, e.g.*, United States v. Santa Fe Pac. R.R., 314 U.S. 339, 360 (1941) (citing occupation from "time immemorial" as establishing aboriginal title).

87. Cramer v. United States, 261 U.S. 219, 229-30 (1923) (holding that aboriginal title survives federal land grants to private parties, such as railroad companies, even if "such right of occupancy finds no recognition in any statute or other formal governmental action").

88. *See supra* note 30.

89. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955) (stating that aboriginal title is "not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which . . . may be terminated . . . by the sovereign itself without any legally enforceable obligation to compensate the Indians"). Congress's power to extinguish aboriginal title without compensation distinguishes it from recognized Indian title, which is established by congressional statute or treaty and enjoys the Fifth Amendment's property protections. *Id.* at 285.

Aboriginal title attaches to either a tribe[90] or an individual,[91] whereas the reach of recognized title depends on the text of the treaty, statute, or executive order that created it. Though comparatively fixed, aboriginal-title rights may still vary across groups and regions because the doctrine defines occupancy and use in terms of American Indians' traditional relationships with the land.[92] Treaties[93] and statutes[94] may enshrine similar rights, but these are customizable when created. Some treaties have only guaranteed exclusive hunting and fishing rights on tribal land,[95] while others have enshrined off-reservation hunting rights.[96] Still others have guaranteed land subject to federal easements through tribal territory,[97] or even promised the right to sue for damages in federal court.[98] Statutory

90. How a tribe is defined, though, varies. As the experiences of the Western Shoshone exemplify, federal tribunals have ignored how or whether American Indians self-identify as a single political group, with devastating results. *See* Thomas E. Luebben, *The United States Indian Claims Commission: A Remedy for Ancient Wrongs, A Source of New Wrongs*, *in* REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES 151, 170-75 (Int'l Bureau of the Permanent Ct. of Arb. ed., 2006) (describing how, even though the "'Western Shoshone Identifiable Group' did not exist as an entity, and the Temoak Bands was but one of seven federally recognized Western Shoshone tribal governments," federal courts treated the distinct governments as a single tribal entity for purposes of extinguishing their aboriginal title).

91. *See* United States v. Dann, 470 U.S. 39, 50 & n.14 (1985) (stating individuals can possess aboriginal rights and citing cases recognizing this proposition); Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 53-54 (1947).

92. *See supra* note 29.

93. *See supra* note 31; *infra* notes 95-98.

94. *See infra* notes 99-101.

95. *See* United States v. Dion, 476 U.S. 734, 736-38 (1986) (acknowledging that the Treaty with Yancton Tribe of Sioux, Apr. 19, 1858, 11 Stat. 743, guaranteed the Yankton Sioux Tribe's exclusive right to hunt and fish on their land, though concluding that Congress had later abrogated these rights through the passage of the Eagle Protection Act).

96. *See, e.g.*, Antoine v. Washington, 420 U.S 194, 196, 196-97 n.4 (1975) (noting that the 1891 agreement with the Confederated Tribes of the Colville Reservation that was ratified by Congress "stipulated . . . that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and . . . the right to hunt and fish in common with all other persons on lands not allotted . . . shall not be taken away or in anywise abridged").

97. *See, e.g.*, Treaty with the Ottawas, Chippewas, and Pottawatamies, Aug. 29, 1821, art. 6, 7 Stat. 218, 220 ("The United States shall have the privilege of making and using a road through the Indian country, from Detroit and Fort Wayne, respectively, to Chicago."); Treaty with the Wyandots et al., Aug. 3, 1795, art. 3, 7 Stat. 49, 50-51 (guaranteeing "free passage" for "the people of the United States" along a specific route).

98. *See, e.g.*, Elk v. United States, 87 Fed. Cl. 70, 72 (2009) (holding that the Fort Laramie Treaty of 1868 allowed a member of the Oglala Sioux Tribe to sue the United States for damages under the Treaty's "bad men" clause after an Army recruiting officer sexually assaulted her);

rights are equally variable; some have returned land to tribal ownership,[99] while others have supported tribes' access to traditional fishing grounds[100] or repaid tribes for federal construction on their land.[101]

Despite their differences, aboriginal and recognized title's legal and historical similarities predominate. But *McGirt* applies to both because of their shared path to termination, as much as their shared origins. Only Congress can extinguish treaty or statutory land rights[102] and, generally, it must do so through explicit statutory or treaty text.[103] Similarly, only Congress may extinguish aboriginal title, but it may do so "by treaty, by the sword, by purchase, [or] by the exercise

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see also Fort Laramie Treaty of April 29, 1868, art. 1, 15 Stat. 635, 635 (proclaimed Feb. 24, 1869) ("If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will . . . reimburse the injured person for the loss sustained.").

99. *See, e.g.*, Leech Lake Band of Ojibwe Reservation Restoration Act, Pub. L. No. 116-255, 134 Stat. 1139 (2020) (returning illegally taken land to the Leech Lake Band of Ojibwe, subject to the tribe's promise to respect the easements, rights-of-way, and flowage and reservoir rights on the relevant federal land).

100. *See, e.g.*, Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act, Pub. L. No. 116-99, §§ 2-3, 133 Stat. 3254, 3254-55 (2019) (authorizing appropriations for improvements to structures to support the Nez Perce Tribe, the Confederated Tribes of Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation's access to traditional fishing sites).

101. *See, e.g.*, Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act, Pub. L. No. 116-100, §§ 2-3, 133 Stat. 3256, 3257-58 (2019) (compensating the Spokane Tribe of Indians for federal use of its land for the Grand Coulee Dam and discussing how its past ICC action had, until this legislation, prevented it from pursuing compensation for federal use of the Grand Coulee).

102. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. But that power, this Court has cautioned, *belongs to Congress alone*." (emphasis added) (citations omitted)). Although only Congress may extinguish either aboriginal or recognized Indian title, it may do so without providing compensation for aboriginal title. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955) (stating that aboriginal title is "not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which . . . may be terminated . . . by the sovereign itself without any legally enforceable obligation to compensate the Indians").

103. *McGirt* emphasizes the supremacy of text in evaluating whether Congress extinguished recognized-title rights. *See* 140 S. Ct. at 2469. ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms."). Extratextual evidence may be considered in limited cases, only to "clear up . . . ambiguity about a statute's original meaning," not to prove extinguishment. *Id.* (internal quotation marks omitted). Even so, "Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result." *Id.* at 2470.

of complete dominion adverse to the right of occupancy," as well as by statutory text.[104] *McGirt*'s insistence on unambiguous proof of Congress's intent to extinguish implicates the quality of the evidence, not its textual or extratextual source. Even—and arguably, especially—when Congress has not extinguished aboriginal title in writing, its action must make its intent to extinguish "plain and unambiguous"[105] and, where the implementation of congressional action does not foreclose traditional use and occupancy, ambiguity as to Congress's intent remains.

C. The Breaking of the Promise: The Indian Claims Commission

Despite the law's written protection, nonenforcement of the congressional-intent requirement has been endemic. For aboriginal title specifically, the outcome of such litigation has depended largely on a tribe's opponent. In some cases, courts required clear proof of congressional intent to infer extinguishment. Tribal claimants enforced their aboriginal-title rights against states, localities, or private parties infringing on their ancestral lands.[106] And the federal government intervened in some instances on claimants' behalf[107]—though not always to tribes' advantage.[108] Separately, the Supreme Court confirmed that both tribal[109] and individual aboriginal title survive federal land grants to private parties, such as railroad companies, even if "such right of occupancy finds no recognition in statute or other formal governmental action."[110] Establishing aboriginal title on the merits remains often prohibitively challenging; claimants must prove that their ancestral occupancy was actual, continuous, and exclusive

104. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941).

105. *Id.* at 346.

106. For examples of such claims, see *infra* note 180.

107. For examples of federal intervention to protect aboriginal title against state, local, or private claims to tribal land, see *supra* note 40.

108. *See, e.g.*, Maine v. Johnson, 498 F.3d 37, 45, 47-48 (1st Cir. 2007) (upholding the U.S. Environmental Protection Agency's (EPA) decision to give the State of Maine permitting authority over the discharge of pollutants into the territorial waters of the Penobscot Nation and the Passamaquoddy Tribe, and finding the court lacked jurisdiction to decide whether, by granting Maine that authority, the EPA had abdicated its trustee role entirely).

109. *See, e.g.*, *Santa Fe Pac. R.R.*, 314 U.S at 345 (noting that if the Hualapai Tribe "had 'Indian title,'" then that title "survived" a "railroad grant" unless otherwise "extinguished" by the United States).

110. Cramer v. United States, 261 U.S. 219, 229-30 (1923).

of other American Indians.[111] But if tribes establish unextinguished aboriginal title, as Felix Cohen quipped, "[n]ot even the [f]ederal [g]overnment can grant what it does not have,"[112] and, absent congressional extinguishment, federal land grants to third parties are made subject to tribes' occupancy and use rights.[113]

Nevertheless, where suits involved the United States's encroachment on aboriginal-title land, federal tribunals diluted the doctrine's protections and inferred extinguishment without any "clear and plain indication" of congressional intent.[114] Professor Nell Jessup Newton attributes courts' reluctance to enforce aboriginal-title rights to "[c]oncerns that there may be some three million acres of unextinguished aboriginal title in the Southwest" alone.[115] "[A]t least unconsciously," Newton posits, judges interpreted the law to avoid "upsetting settled expectations of non-Indians and long-range plans of the Department of the Interior for public lands."[116] Regardless of the reason, the result was the same: judges inferred that Congress extinguished aboriginal title long ago from ambiguous evidence and, accordingly, that sovereign immunity and preclusion

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111. Pueblo of Jemez v. United States, 790 F.3d 1143, 1165-66 (10th Cir. 2015); *see also* Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1181 (D.N.M. 2019) (requiring the tribe to prove their "immemorial occupancy" was "to the exclusion of other Indians" (quoting Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 338 (1945))), *appeal docketed*, No. 20-2145 (10th Cir. Oct. 16, 2020); LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 15-23 (1989) (detailing how American Indians' land tenure systems differed from each other and did not always rely on conceptions of exclusivity).

112. Cohen, *supra* note 91, at 28.

113. *See id.*

114. Supreme Court precedent requires a "clear and plain indication that Congress" intended to extinguish aboriginal title and prohibits "extinguishment [from being] lightly implied." *Santa Fe Pac. R.R.*, 314 U.S. at 353-54. Still, federal courts have refused to enforce the "clear and plain" requirement meaningfully. In one case, the Court of Claims admitted that there "was no express indication by Congress . . . of a purpose to extinguish" aboriginal title, but still affirmed the ICC's "discretion to choose" when title was extinguished if it could not identify a date in the historical record. Gila River Pima-Maricopa Indian Cmty. v. United States, 494 F.2d 1386, 1392-93 (Ct. Cl. 1974). As one judge noted in a concurrence, "[W]e know the Indians once had their 3,751,000 acres and by 1946, by common understanding, had them no longer, but when they lost them defies determination." *Id.* at 1394 (Nichols, J., concurring). The judge hints at the inconsistency between the idea that "expropriation was never entertained [by the United States], yet in a fit of absentmindedness the deed was somehow done." *Id.* Still, he accepted the ICC's extinguishment date of 1883, even though "nothing happened [then] that could have constituted a taking." *Id.*

115. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 830 (1992).

116. *Id.*

barred tribes' claims.[117] As a result, claimants were barred from litigating their rights against the federal government—from realizing aboriginal title's legal promise—before they could begin.[118]

Sovereign immunity shields the federal government from all aboriginal-title actions involving land that the United States has claimed. Congressional sovereign-immunity waivers created three historic periods of aboriginal-title claims against the United States: first, from the ratification of the Constitution until 1946, tribes needed specific congressional authorization to sue the federal government[119] for claims arising under treaties;[120] second, from 1946 to 1978,[121] a limited congressional waiver gave the Indian Claims Commission exclusive jurisdiction to resolve aboriginal-title claims that "ar[ose] from [a] taking by the

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117. *See, e.g.*, *Gila River Pima-Maricopa Indian Cmty.*, 494 F.2d at 1393 (rejecting the tribes' argument that "short of an uncontroverted and unmistakable sign from Congress," extinguishment had not occurred and, instead, holding that the ICC had "discretion" to choose a date because "[a]t some point . . . the Government must have concluded, for itself, that" extinguishment occurred, based on the award area's history); *id.* at 1394 (Nichols, J., concurring) (accepting an ICC extinguishment date determination as a "necessity," even though the date "defie[d] determination" and "nothing happened in 1883 that could have constituted a taking"); United States v. Pueblo de Zia, 474 F.2d 639, 641 (Ct. Cl. 1973) (determining extinguishment based on "a scattering of 114 homesteads" and the creation of a grazing district under the Taylor Grazing Act).

118. *See infra* note 126 (discussing tribes' struggles to litigate under the Quiet Title Act (QTA)); *infra* notes 260-261 (discussing courts' expansive interpretations of ICC claims awards' preclusive power in the context of subsequent aboriginal-title suits).

119. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 7.05[3][b]; Oglala Sioux Tribe of Pine Ridge Indian Rsrv. v. U.S. Army Corps of Eng'rs, 570 F.3d 327, 331 (D.C. Cir. 2009) ("Before 1946, tribes were unable to pursue claims against the federal government without express congressional authorization."). For examples of special jurisdictional acts, see Act of Mar. 3, 1881, ch. 139, 21 Stat. 504, 504-05, which authorized the Choctaw Nation to sue the United States for inadequate compensation under various treaties; and Act of June 3, 1920, ch. 222, 41 Stat. 738, 738-39, which authorized the Mdewakanton and Wahpekute Bands of the Dakota People to sue the United States. "In total . . . almost 200 claims were filed with the Court of Claims" under the special jurisdictional acts regime, "but only 29 received awards, while the bulk of the rest were dismissed on technicalities . . . ." U.S. INDIAN CLAIMS COMM'N, AUGUST 13, 1946, SEPTEMBER 30, 1978: FINAL REPORT 3 (1979).

120. *See* MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES 52-53 (1997) (detailing how, from 1863 until 1946, Congress prevented American Indians or tribes from bringing treaty-based claims to the Court of Claims, which, "as a practical matter, . . . barred judicial consideration of every Indian claim against" the United States); *see also* Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 411 n.56 (1988) (suggesting that, though treaty-based claims could only proceed against the United States through special jurisdictional acts, that may not have been the case for non-treaty-based claims—but that "the practice became so ingrained" that many contemporary attorneys assumed otherwise).

121. In 1978, Congress terminated the ICC and any ongoing cases were transferred to the Court of Claims for resolution. *See* Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990, 1990.

United States" prior to 1946 and that were filed by 1951;[122] and finally, a 1972 congressional waiver, the QTA, authorized Article III courts to adjudicate land claims against the federal government that accrued after 1946.[123] The QTA waives sovereign immunity for suits, aboriginal-title or otherwise, that dispute federal land title.[124] But to sue under the statute, the claim must have accrued within the last twelve years, beginning when the plaintiff or his predecessor in interest "knew or should have known" of the government's claim.[125] Until the Tenth Circuit's decision in *Jemez*, the status quo was that courts would rely on vague evidence to conclude that tribes' aboriginal title was extinguished long ago and, therefore, that the tribe retained no rights to litigate under the QTA.[126]

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122. Indian Claims Commission Act, Pub. L. No. 79-726, §§ 2(4), 12, 60 Stat. 1049, 1050, 1052 (1946); *see*, *e.g.*, Sokaogon Chippewa Cmty. v. Wisconsin, 879 F.2d 300, 302 (7th Cir. 1989) ("This [suit] was too late . . . because the [ICCA] . . . expressly created an *exclusive* remedy against the U.S. for tribal claims accruing before [1946] and established a five-year statute of limitations."); Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1470 (10th Cir. 1987) ("By sleeping on its claim, the Tribe simply lost its forum to litigate the pre-1946 actions of the Government that were inconsistent with its alleged title."); Oglala Sioux Tribe of Pine Ridge Indian Rsrv. v. United States, 650 F.2d 140, 142 (8th Cir. 1981) ("Congress . . . deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy for the alleged wrongful taking through the enactment of the [ICCA].").

123. *See* Quiet Title Act, Pub. L. No. 92-562, 86 Stat. 1176 (1972) (codified as amended at 28 U.S.C. § 2409a (2018)). *See generally* United States v. Mottaz, 476 U.S. 834, 842-43 (1986) (explaining that, "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the [QTA] does not waive" federal government immunity, but that when a tribe or Indian plaintiff challenges a federal assertion of title on its own behalf, the QTA's sovereign immunity waiver and statute of limitations apply).

124. 28 U.S.C. § 2409a(a) (2018).

125. *Id.* § 2409(a)(g). Multiple circuits have clarified that, whereas other statutes of limitations act as affirmative defenses, the QTA's time limit is jurisdictional. *See, e.g.*, Wilkins v. United States, 13 F.4th 791, 793-95 (9th Cir. 2021) (citing Block v. North Dakota *ex rel*. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 292 (1983)); Rio Grande Silvery Minnow (Hybognathus Amarus) v. Bureau of Reclamation, 599 F.3d 1165, 1175-76 (10th Cir. 2010).

126. Perhaps because courts have been so willing to infer extinguishment of aboriginal title, few tribes have tried to litigate aboriginal-title claims against the United States under the QTA. For those that have, courts treated vague evidence or past ICC awards as substitutes for "plain and unambiguous" congressional intent to extinguish title and dismissed the tribe's claim as time-barred under the QTA's twelve-year statute of limitations. *See, e.g.*, W. Shoshone Nat. Council v. United States, 415 F. Supp. 2d 1201, 1203-04, 1206 (D. Nev. 2006) (dismissing the Western Shoshone National Council and others' QTA claims as time-barred because the ICC had previously "ruled that the Shoshone title to the land had been extinguished by encroachment of American settlers and awarded approximately $26 million in compensation"); *see also* Alabama-Coushatta Tribe of Texas v. United States, 757 F.3d 484, 490 n.7 (5th Cir. 2014) (dismissing for lack of subject-matter jurisdiction on alternate grounds and, therefore, declining to reach the tribe's claim under the QTA of unextinguished aboriginal title). More QTA claims

Before 1946, sovereign immunity required tribes to lobby Congress for case-by-case jurisdictional acts to allow them to sue the federal government.[127] Inefficiency and inconsistency resulted.[128] "Congress was pressured by the growing number of petitions for jurisdictional acts," recalled contemporary scholar Sandra Danforth, "and [was] unable to study each case adequately."[129] The legislative history of the statute that created the ICC—the Indian Claims Commission Act (ICCA)—reflects Congress's frustration. "[T]he very purpose of this act," then-Chairman of the House Committee on Indian Affairs Henry Jackson stated, was to funnel to the ICC the legislative requests that "harassed" Congress "constantly."[130]

After 1946, the ICC accelerated the dilution of aboriginal title's congressional-intent requirement. The ICC was an Article I tribunal[131] established to adjudicate certain tribal money-damages claims within its jurisdiction—namely, takings of American Indian land—that was adjourned in 1978.[132] That any forum would exist for tribal suits against the United States was not a foregone conclusion. When it created the ICC, Congress's partial waiver of sovereign immunity was fleeting, as was the ICC's jurisdiction.[133] Tribes had to file any claim that

have litigated recognized title—but there, too, courts have cited weak evidence of congressional intent to conclude claims are time-barred. *See, e.g.*, *Sokaogon Chippewa Cmty.*, 879 F.2d at 301-02 (affirming that, independent of its other claims, the Sokaogon Chippewa Community's QTA claim against the United States involving treaty rights had accrued decades earlier and, thus, was properly dismissed); Grosz v. Andrus, 556 F.2d 972, 974-75 (9th Cir. 1977) (determining that the American Indian appellants' QTA claim was time-barred because their predecessors in interest had agreed to the United States's construction of a right-of-way through their land in 1939); *Navajo Tribe of Indians*, 809 F.2d at 1469 (holding that because "[t]he Tribe . . . had notice of the United States'[s] claim more than twelve years prior," it "[was] barred from bringing a suit to quiet title" under the QTA).

127. Oglala Sioux Tribe of Pine Ridge Indian Rsrv. v. U.S. Army Corps of Eng'rs, 570 F.3d 327, 331 (D.C. Cir. 2009); *see supra* note 119 (citing examples of such special jurisdictional acts).

128. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 5.06[2] & n.8; *id.* § 5.06[3].

129. Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359, 362 (1973).

130. *Hearings on H.R. 1198 and H.R. 1341 Before the H. Comm. on Indian Affairs*, 79th Cong. 68 (1945) (statement of Rep. Henry M. Jackson, Chairman, H. Comm. on Indian Affairs).

131. Newton, *supra* note 115, at 769, 771-73 (explaining the history of the ICC as an Article I tribunal).

132. *See* Pueblo of Jemez v. United States, 790 F.3d 1143, 1147 & n.3 (10th Cir. 2015) (noting the ICC's authority to arbitrate pre-1946 aboriginal-title claims against the federal government but noting that the ICC "terminated on September 30, 1978"); *see also* Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990, 1990 (terminating the ICC at the close of fiscal year 1978).

133. *Pueblo of Jemez*, 790 F.3d at 1147 (citing Indian Claims Commission Act, Pub. L. No. 79-726, § 12, 60 Stat. 1049, 1052 (1946)).

had accrued before August 13, 1946 by the August 13, 1951 deadline.[134] Claims filed after that date were outside the ICC's jurisdiction and foreclosed by the United States's sovereign immunity. In other words, if a tribe missed the filing window, its pre-1946 claim was barred permanently. The ICC's design intentionally prioritized finality over claims' merits. It existed to resolve (at least, nominally) centuries of claims in one brief burst and thereby free the United States to forget its past failures.

Some proponents of the ICC perceived it as serving a second, morally restorative role in addition to its claims-clearing function.[135] At his signing statement, President Truman admitted—albeit, in circuitous and defensive language—that the United States's claims to American Indian land had not always been lawful. "[I]t would be a miracle," said Truman, if the United States "had not made some mistakes and occasionally failed to live up to the precise terms" of its treaties and laws throughout "the largest real estate transaction in history."[136] The ICC, Truman explained, was the federal government's effort "to correct any mistakes [it had] made."[137] Cohen notes that, at the time, the ICC had "broad-based support" and "most Indians and their supporters viewed [its] establishment . . . as a sign of the government's good faith."[138] Still, whatever corrective role its creators envisioned, the ICC's "chief purpose" remained "to dispose of the Indian claims problem with finality."[139]

Once established, the ICC frequently concluded that tribes' aboriginal title to federal land had been extinguished, conveniently, at some early-but-indeterminate date. After finding a "taking" or extinguishment, the ICC compensated

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134. *Id.* at 1152 (citing Oglala Sioux Tribe of Pine Ridge Indian Rsrv. v. U.S. Army Corps of Eng'rs, 570 F.3d 327, 331-32 (D.C. Cir. 2009)).

135. *See* Otoe & Missouria Tribe of Indians v. United States, 131 F. Supp. 265, 275 (Ct. Cl.) (stating Congress intended the ICCA "to settle" both "meritorious claims . . . of a legal or equitable nature . . . cognizable by a court of the United States," as well as "those claims [that] were of a purely moral nature not cognizable" under "law or equity"); Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1469 (10th Cir. 1987) (describing the ICC as "provid[ing] the long-overdue opportunity to litigate the *validity* of [aboriginal Indian] titles and to be recompensed for Government actions inconsistent with those titles").

136. President Harry S. Truman, *Statement by the President Upon Signing Bill Creating the Indian Claims Commission*, NAT'L ARCHIVES (Aug. 13, 1946), https://www.trumanlibrary.gov/library/public-papers/204/statement-president-upon-signing-bill-creating-indian-claims-commission [https://perma.cc/SM33-E4GE].

137. *Id.*

138. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 1.06.

139. H.R. REP. NO. 79-1466, at 10 (1945); *accord* United States v. Dann, 470 U.S. 39, 45 (1985).

claimants for the permanent loss of their ancestral lands and foreclosed any future claims from that group.[140] Land restoration was not an available remedy.[141] When the ICC could not identify proof of congressional intent to extinguish in the historical record, it cited ambiguous evidence as a substitute.[142]

The ICC's willingness to determine that congressional land grants had extinguished aboriginal title was particularly subversive. Article III courts had consistently held that Congress's land grants to private parties and states were subject to unextinguished aboriginal title.[143] Similarly, Congress had prohibited its acknowledgement of Spanish and Mexican land grants in fulfillment of the Treaty of Guadalupe-Hidalgo—which included the land at issue in *Jemez*—from "interfer[ing] with . . . any . . . unextinguished Indian title."[144] During the ICC's jurisdiction, an internal memorandum from DOI had also recognized that "neither the Taylor Grazing Act nor its implementation can operate to extinguish Indian title."[145] But with federal property rights implicated, the ICC contravened all three authorities. Instead, it treated the implementation of public-land laws

140. *See infra* note 254 (quoting section 22 of the ICCA, which stated that the payment of any claim "full[y] discharge[d]" the United States from related claims); *see infra* Section III.A (discussing variable judicial interpretations of the preclusive scope of ICC claims awards).

141. *See* Arizona v. California, 530 U.S. 392, 402 n.1 (2000) ("The [ICCA] conferred exclusive jurisdiction on the Commission to resolve Indian claims *solely by* the payment of compensation." (emphasis added)); Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1467 n.19 (10th Cir. 1987) ("We conclude that the ICCA [like the QTA] similarly consigned the choice of remedy to the Government, and the Government chose money damages as the exclusive remedy."); *see also* Danforth, *supra* note 129, at 390-91 (noting that "[a]lthough nowhere in the Act is it explicitly stated that recoveries were to be monetary, the wording of the Act indicated that this was the legislative intent," and the ICC limited its remedies accordingly).

142. Tlingit & Haida Indians of Alaska v. United States, 177 F. Supp. 452, 468 (Ct. Cl. 1959) (holding that gradual failure to enforce the Tlingit and Haida tribes' aboriginal title against white miners and fishermen amounted to extinguishment); Pueblo of Nambe v. United States, 16 Ind. Cl. Comm. 393, 407 (1965) (holding that the creation of forest reserves extinguished aboriginal title); Pueblo of Taos v. United States, 15 Ind. Cl. Comm. 666 (1965) (same).

143. *See infra* note 180.

144. Act of Mar. 3, 1891, ch. 539, § 13, 26 Stat. 854, 860 (establishing the Court of Private Land Claims to evaluate the validity of Spanish and Mexican government-era land grants in fulfillment of the Treaty of Guadalupe-Hidalgo's provision promising to protect former Mexican citizens' property).

145. Memorandum from Frederick N. Ferguson, Deputy Solic., Dep't of Interior, to Daniel Beard, Deputy Assistant Sec'y for Land & Water Res., Dep't of Interior 6 (Jan. 6, 1978) (on file with author).

authorizing the designation of national forests,[146] the creation of Taylor Act grazing districts,[147] homesteads,[148] and even disputed mining rights[149] as sufficient circumstantial evidence of extinguishment.[150]

In a series of cases appealing ICC extinguishment-date determinations, the Court of Claims approved the ICC's erosion of aboriginal title's "plain and unambiguous" congressional-intent requirement.[151] The appellate court insisted that when "[c]ongressional purpose is not so plainly exhibited" or "the record is devoid of any single occurrence . . . [where the United States] grasped a tribe's aboriginal ownership rights in their entirety," historical context could still empower the ICC to "*choose* a single date."[152] In an unusually forthright concurrence, one Court of Claims judge admitted that a claim's extinguishment date "defie[d] determination," but "an extinguishment date we must have."[153] The

146. United States v. Gemmill, 535 F.2d 1145, 1149 (9th Cir. 1976) ("The Court of Claims has recently held that the designation of land as a forest reserve is itself effective to extinguish Indian title.").

147. United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1391-92 (Ct. Cl. 1975) (approving the ICC's finding that conveyances of land to homesteads under public-land laws, and the inclusion of American Indians' land in the 1891 Forest Reserve and Taylor Grazing Acts, showed extinguishment); United States v. Pueblo de Zia, 474 F.2d 639, 641, 643 (Ct. Cl. 1973) (affirming the ICC's conclusion that the Taylor Grazing Act's implementation and "a scattering of 114 homesteads" had extinguished aboriginal title).

148. *Pueblo of San Ildefonso*, 513 F.2d at 1391-92 (Ct. Cl. 1975) (citing the inclusion of the Pueblo's land in a forest reserve as proof of extinguishment, in part). *But see id.* at 1389 (stating that Congress's authorization of non-American Indian settlement under public-land laws was not sufficient to extinguish title until homesteaders made "actual entries" onto the land).

149. United States v. N. Paiute Nation, 393 F.2d 786, 797 (Ct. Cl. 1968) ("In 1865 and 1866 the Congress retroactively validated the rules of such [mining] districts as evidence of title to mining claims . . . [and] [b]y allowing the prosecution of the claim before us, the United States adopts the miners' acts and assumes responsibility for them. . . ." (citations omitted)).

150. *See, e.g.*, *Pueblo of San Ildefonso*, 513 F.2d at 1390-92.

151. *See, e.g.*, *id.* at 1391 (stating that as a procedure within the ICC's power, "[averaging] has received the sanction . . . of this court"); Gila River Pima-Maricopa Indian Cmty. v. United States, 494 F.2d 1386, 1395 (Ct. Cl. 1974) (Nichols, J., concurring) ("The use of average, composite, or jury verdict taking dates is an accepted example of the powers the Commission has."); United States v. N. Paiute Nation, 490 F.2d 954, 957 (Ct. Cl. 1974) (affirming an "average date" finding even though "[t]he record was void of any single clearcut extinguishment").

152. *Pueblo of San Ildefonso*, 513 F.2d at 1391 (emphasis added). Ironically, in *Pueblo of San Ildefonso*, the government disputed the ICC's averaging method. The government advocated a "comple[te] extinguishment" finding over the ICC's "piecemeal" valuation. *Id.* at 1391-92 ("The Government attacks the method by which the Commission has determined when Indian title to the pueblo lands was extinguished. Specifically, the Government objects to the selection of the 'multitude of scattered dates' when entries were made onto areas under the public land laws.").

153. *Gila River*, 494 F.2d at 1394 (Nichols, J., concurring).

judge noted the conflicting assumptions supporting the ICC date: that the United States acted with "undeviating benevolence" toward tribes and never "entertained" extinguishment, but still "in a fit of absentmindedness, the deed was somehow done."[154] Across such decisions, the Court of Claims argued that finality justified the ICC's degradation of the "plain and unambiguous" intent standard: "Such a legal shortcut is often necessary in Indian claims litigation, if it is ever to be concluded."[155]

The ICC's design exacerbated its failures to enforce aboriginal-title precedent. As Danforth notes, the ICC's adversarial structure undermined its ability to investigate historical records and evaluate extinguishment.[156] Moreover, both government lawyers and claims attorneys were unfamiliar with the types of evidence—anthropological, archaeological, and ethnographic—essential to aboriginal-title merits claims.[157] Federal Indian law attorney and scholar Thomas Luebben details how, at the same time, the ICC's financing scheme incentivized claims attorneys to "prove the loss of as much Indian property as possible" without regard for the payments' implications.[158] Section 15 of the ICCA specified that attorneys representing tribal claimants were to be paid contingency fees based on the claims awards they procured.[159] While claims attorneys secured significant commissions,[160] even comparatively large awards grossly undervalued American Indians' land and were "too small to provide more than short-run economic gains" once distributed.[161] In one case, a court paid claimants fewer

154. *Id.*

155. *N. Paiute Nation*, 490 F.2d at 957, 959 (approving the use of such average date determinations, but subsequently stating that such average date determinations should not have binding preclusive effect for the entire land parcel).

156. Danforth, *supra* note 129, at 377; *see also* John D. O'Connell, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle—1861 to 1991*, 42 NAT. RES. J. 765, 770 n.18 (2002) (noting that, rather than establishing an investigation division as Congress had mandated, the ICC relied on adversarial proceedings to gather information).

157. Danforth, *supra* note 129, at 377-78.

158. Luebben, *supra* note 90, at 166.

159. Indian Claims Commission Act, Pub. L. No. 79-726, § 15, 60 Stat. 1049, 1053 (1946) (stating attorneys' fees "shall not exceed 10 per centum of the amount recovered in any case"); *see also* Newton, *supra* note 115, at 850-51 (discussing how the contingency-fee structure created damaging incentives for tribal advocates); Danforth, *supra* note 129, at 391 ("Lawyers who were instrumental in preparing claims for filing thus concentrated with the tribes on those claims with the greatest previously indicated potential for large monetary returns.").

160. *See generally* Klamanth & Modoc Tribes v. United States, 1 Ct. Cl. 378, 380 (1983) (awarding $1,485,000, or 9 percent of the $16,500,000 judgement, to the tribes' attorneys); Navajo Tribe v. United States, 2 Ct. Cl. 42, 44 (1982) (holding that an attorneys' fee award of $2,200,000 was reasonable).

161. Danforth, *supra* note 129, at 364.

than two cents per acre after determining that their aboriginal title to more than twenty-four million acres had been extinguished.[162]

Contemporary federal policy illuminates why the ICC was so quick to accept negligible evidence of congressional intent to extinguish. Professor Bethany R. Berger explains the government's goal of "terminat[ing]" the special status of American Indians in response to "claims that reservations, immunity from state taxation, and everything else that made tribal members legally distinct was inconsistent with their status as citizens."[163] Termination's proponents had "little sympathy for, or interest in, preserving a native land base," and the ICC manifested their approach.[164] "Rapid assimilation through termination [of special status]" remained the federal policy, informally and formally, for much of the ICC's existence.[165] As President Truman proclaimed, the ICC would "ensure [that] Indians can take their place without special handicap or special advantage in the economic life of our nation" by closing claims that had accrued over centuries of mistreatment.[166] Modern commentators like Luebben have since described termination policy and the ICC more bluntly, as implementing "cultural genocide."[167]

Whatever its premeditated purpose, the ICC's legal effect on aboriginal title was both vast and vastly damaging. The ICC legitimized federal payment of "fine[s]"[168] in exchange for absolution and permanent, total rights to aboriginal-title land. If the federal-tribal dealings that predated the ICC were, as President Truman said, "the largest real estate transaction in history," then "the proceedings of the commission itself were the second largest."[169] According to Luebben, "ICC judgments themselves extinguished otherwise valid Indian title to well

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162. Temoak Band of W. Shoshone Indians v. United States, 593 F.2d 994 (Ct. Cl. 1979); Luebben, *supra* note 90, at 172 n.111 (noting that, when adjusted for inflation as of 2006, the claim award for all Western Shoshone tribes' land amounted to 1.9 cents per acre).

163. Bethany R. Berger, *The Anomaly of Citizenship for Indigenous Rights*, *in* HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 217, 225 (Shareen Hertel & Kathryn Libal eds., 2011).

164. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 1.06.

165. *Id.* (citing termination as the dominant federal policy from 1943 to 1961).

166. Truman, *supra* note 136.

167. Luebben, *supra* note 90, at 153.

168. Danforth, *supra* note 129, at 402.

169. Thomas E. Luebben, Book Review, 39 J. AM. SOC'Y FOR ETHNOHISTORY 194, 195 (1992) (reviewing H.D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION (1990)).

over 50 million acres."[170] That the ICC's only remedy was monetary compensation reflected an "underlying assumption . . . that the land itself would never be returned to its indigenous owners."[171]

Historian Angie Debo describes the ICC's tenure as "the most concerted drive against Indian property and Indian survival since the removals following the act of 1830 and the liquidation of tribes and reservations following 1887."[172] The ICC's official historian, Harvey D. Rosenthal, later admitted that the ICC "was really a government measure to enhance its own efficiency by disposing of the old claims and terminating the Indian tribes."[173] Rosenthal quoted Nevada Shoshone activist Josephine C. Mills's declaration that "[t]here is no longer any need to shoot down Indians in order to take away their rights and lands" because "three forces, our own attorneys, the Indian Claims Commission and the Indian Bureau, do[] the trick legally."[174]

The ICC's biased and cursory extinguishment findings shaped the third phase of aboriginal-title claims against the United States: the QTA period. Today, any tribe that challenges federal encroachment on its aboriginal title must establish before an Article III court that its title was never extinguished. But because Article III judges accepted the payment of ICC claims awards as proof of congressional intent to extinguish, many have concluded that claimants' aboriginal title was long-since extinguished and their suits barred.[175] For example, the Ninth Circuit and its district courts repeatedly held that Congress's payment of ICC claims awards "establish[ed] conclusively that a taking occurred" and extin-

170. *Id.*

171. Luebben, *supra* note 90, at 152.

172. ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 349 (1970).

173. Harvey D. Rosenthal, *Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission*, *in* IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 35, 63 (Imre Sutton ed., 1985).

174. *Id.*

175. *See* United States v. Dann, 470 U.S. 39, 45-50 (1985); United States v. Gemmill, 535 F.2d 1145, 1149 (9th Cir. 1976) (stating that, while it is "often difficult to determine" the exact date on which aboriginal title was extinguished, alongside other factors, "any ambiguity about" whether extinguishment occurred "has been decisively resolved by congressional payment of compensation" through an ICC claims award); W. Shoshone Nat. Council v. BNSF R.R. Co., 335 F. App'x 685, 686 (9th Cir. 2009) ("We conclude that the [ICC] award establishes conclusively that Shoshone title has been extinguished."); United States v. Washington, 18 F. Supp. 3d 1172, 1201-02 (W.D. Wash. 1991) (finding that the opening of aboriginal-title lands to non-American Indian settlement and payment of the ICC claims award extinguished all aboriginal-title rights, including aboriginal fishing rights); Havasupai Tribe v. United States, 752 F. Supp. 1471, 1478-79 (D. Ariz. 1990) (citing the creation of a national forest reserve and "the final judgment entered by the [ICC] and payment of the judgment by Congress" as "resolv[ing] any doubt that the aboriginal title of the Havasupai Tribe was extinguished").

guished aboriginal title, even while acknowledging that the ICC "had no jurisdiction to extinguish title on its own authority."[176] Such courts interpreted the Supreme Court's 1985 decision in *United States v. Dann* as sanctioning this legal leap,[177] even though the decision only determined what constituted "payment" for precluding future claims under the ICCA and did not address extinguishment directly.[178] Still, appellate courts treated ICC awards as "decisively resolv[ing]" any "ambiguity about extinguishment" for decades after.[179]

As a result, the defunct ICC has remained tribes' exclusive remedy in fact, if not in law.[180] Whatever aboriginal-title doctrine and the QTA promised, no aboriginal-title claim had advanced past the jurisdictional phase—and no Article

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176. United States. v. Dann, 873 F.2d 1189, 1198-99 (9th Cir. 1989); *see supra* note 175 (listing cases where judges determined that the payment of an ICC claims award extinguished aboriginal title).

177. *See, e.g.*, *Dann*, 873 F.2d at 1199 n.6 (stating that, while the Ninth Circuit had previously held that the passage of the Taylor Grazing Act did not extinguish aboriginal title, the Supreme Court's 1985 *United States v. Dann* decision meant that the payment of claims awards extinguished aboriginal title).

178. *Dann*, 470 U.S. at 44 (assuming, without addressing or deciding, the district court's premise that Congress's payment of the ICC claims award had extinguished aboriginal title).

179. *See, e.g.*, *Gemmill*, 535 F.2d at 1149; *Dann*, 873 F.2d at 1194 (citing *Gemmill* to conclude that payment for the taking of aboriginal title establishes that title has been extinguished).

180. To be sure, Article III courts have decided other tribal-land disputes. A line of decisions evaluated whether the federal government must compensate tribes under the Fifth Amendment for taking their aboriginal-title lands. The Supreme Court said no compensation was required. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955); United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951); United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946). But, in these cases, the ICC, rather than a federal district court, had still made the initial factual findings and determination that the disputed property was, in fact, subject to aboriginal title. *See, e.g.*, *Alcea Band of Tillamooks*, 329 U.S. at 44-48 (discussing the ICC's determinations). Separately, Article III courts have enforced aboriginal title to the detriment of absolute property rights asserted by lesser sovereigns or private parties. For discussion of claims against lesser sovereigns, see *Oneida Indian Nation v. Oneida County*, 414 U.S. 661 (1974), which held that tribes could proceed in action to recover from New York state counties because the counties' land grants were subject to aboriginal title; *Minnesota v. United States*, 305 U.S. 382, 387 (1939), which found that Minnesota could not condemn tribal lands that remained subject to Indian title without federal approval; and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which held that the State of Georgia could not exercise jurisdiction over aboriginal-title lands. For discussion of claims against private parties, see *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941), which blocked the Santa Fe Pacific Railroad from interfering with the Hualapai Tribe's aboriginal-title lands; *Cramer v. United States*, 261 U.S. 219 (1923), which found that congressional land patents to the Central Pacific Railway Company excluded aboriginal-title lands; *Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55 (1886), which blocked the Northern Pacific Railroad Company from building through lands subject to unextinguished aboriginal title; *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872), which found Holden's land claim invalid because aboriginal title was a proper subject of federal treaty-making; and *Johnson v.*

III court had made the initial determination on the merits of a tribe's aboriginal title — until the Tenth Circuit's *Jemez* decision in 2015.[181]

II. *MCGIRT* OPENS A PATH PAST SOVEREIGN IMMUNITY FOR MORE ABORIGINAL-TITLE SUITS

Situated in its broader legal and historical contexts, *McGirt*'s application to and potential for aboriginal-title land claims are inescapable. Its demand for clearer proof of Congress's intent applies to all American Indian land where the United States holds the right of preemption and Congress has the exclusive power to extinguish title.[182] Still, how the decision could change Land Back litigation for tribes and federal judges remains unexamined. After all, as Banner observed about Federal Indian law generally: "[T]he law, as words on paper," remains unchanged and was "already on [the tribes'] side."[183]

Respectively, Parts II and III discuss how *McGirt*'s insistence that federal courts enforce the congressional-intent requirement clears the jurisdictional bars that have stymied past aboriginal-title litigation: sovereign immunity and preclusion. To do so, Part II analyzes Jemez Pueblo's aboriginal-title litigation. As discussed in Section II.A, the nature of Jemez Pueblo's claims and its experience before the district court exemplified how sovereign immunity has blocked other tribes from enforcing their aboriginal title. And, as Section II.B details, the Tenth Circuit's reasoning in reversing the district court also anticipated how *McGirt* could and should change the litigation landscape.

M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), which invalidated private parties' land purchase because the tribe's aboriginal title did not give them authority to sell their land without federal approval.

181. Other cases litigating federally claimed land are distinguishable. For example, when the Diné (Navajo) Nation sued over federally held lands, its title claim stemmed from executive order, not aboriginal title. *See* Pueblo of Jemez v. United States, 790 F.3d 1143, 1169-70 (10th Cir. 2015) (citing Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987)). Moreover, unlike Jemez Pueblo's, the Diné claim was extinguished before 1946 and, as a result, federal courts had no jurisdiction. *Navajo*, 809 F.2d at 1464-65.

182. McGirt v. Oklahoma, 140 S. Ct. 2452, 2463 (2020) (stating that Congress must "clearly express its intent to [disestablish reservations]" with "an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests" (internal alterations, quotation marks, and citation omitted)).

183. BANNER, *supra* note 13, at 293. The plain meaning of Banner's claim is clearly questionable. As Felix Cohen underscored, aboriginal title treats "Indians [as] less than human" and "their relation to their lands" as "similar to the relation that animals bear to the areas in which they may be temporarily confined." Cohen, *supra* note 91, at 58. Any analytical framework so dehumanizing and diminishing could hardly be described, in the words' full meaning, as "on [the tribes'] side." Still, Banner's observation is apt in that established law *should* have protected tribes' aboriginal title better than it has, however limited the rights under the doctrine.

*A. The Pre-*McGirt *Landscape: Erroneous Extinguishment Findings Foreclose Litigation*

Without a path past sovereign immunity, aboriginal-title suits against the United States automatically fail. Article III courts lack subject-matter jurisdiction, and the cases are not within their adjudicatory power as a matter of federal law.[184] Today, the QTA is the single relevant sovereign-immunity waiver that remains—and, therefore, the sole way for federal courts to adjudicate and tribal litigants to assert aboriginal-title claims against the United States. But the QTA only waives sovereign immunity for suits that accrued within the preceding twelve years.[185] Restoring aboriginal title's promise therefore depends on a narrow threshold issue: when a tribe's aboriginal-title claim accrued.[186]

As Jemez Pueblo's experience underscores, claimants' ability to prove an accrual date within the preceding twelve years depends on the caliber of evidence courts accept as proof of Congress's "plain and unambiguous action" to extinguish.[187] Congressional-extinguishment and claim-accrual dates are distinct.[188] But whether Congress terminated a tribe's aboriginal title in the past decides whether that tribe has a legal basis to challenge federal encroachments that accrue under the QTA today. Because courts have accepted ambiguous evidence and demographic shifts as proof of congressional intent to extinguish, they have consistently concluded that tribes' aboriginal title was extinguished long ago, often decades or centuries before federal encroachments implicated the QTA at all.[189]

Such was the case with Jemez Pueblo. In 1973, the first appellate court from the ICC, the Court of Claims, affirmed that Jemez Pueblo's and two neighboring tribes' aboriginal title was extinguished.[190] For evidence of Congress's intent, the ICC cited the creation of Grazing District No. 2 under the Taylor Grazing Act and "a scattering of 114 homesteads" on the disputed land.[191] Yet, as with other

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184. *Pueblo of Jemez*, 790 F.3d at 1147; Wilkins v. United States, No. 20-35745, 2021 WL 4187861, at *4 (9th Cir. Sept. 15, 2021) ("[T]he QTA's statute of limitations is jurisdictional.").

185. 28 U.S.C. § 2409a(g) (2018).

186. *Pueblo of Jemez*, 790 F.3d at 1151.

187. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 346 (1941).

188. Claims "accru[e] on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g) (2018).

189. *See supra* notes 146-150 and accompanying text (discussing acceptance of ambiguous evidence); *infra* note 261 and accompanying text (discussing how courts have treated past extinguishment findings as broadly extinguishing all aboriginal-title rights, even if those rights were not specifically at issue in the prior litigation).

190. United States v. Pueblo de Zia, 474 F.2d 639, 641-42 (Ct. Cl. 1973).

191. *Id.*

aboriginal-title claims, the ICC's reliance on ambiguous evidence meant that it could not identify a specific moment when Congress manifested its intent to extinguish.[192] At the same time, the ICC needed an extinguishment date to appraise the land's value at the time of taking, calculate the claim award, and resolve the case permanently. As in other cases, its solution was to push claimants to "agree upon an 'average' valuation date."[193] Jemez Pueblo, like many other claimants, consented because compensation was its only prospective remedy.[194]

Decades later, in 2012, Jemez Pueblo filed a new suit.[195] Like other tribes in the Southwest and beyond, its litigation implicated Spanish and Mexican colonization, prejudiced federal surveys and statutes, private-land inheritance, public-land use, and 800-year-old tribal traditions—here, all emanating from a natural wonder: the Valles Caldera.[196] Nestled in New Mexico's Jemez Mountains, the collapsed volcano that is now the Valles Caldera National Preserve (the Preserve) features myriad water sources, abundant game and fishing, valuable grazing areas, mineral deposits, and extensive outdoor recreation opportunities.[197] The Valles Caldera's natural bounty has sustained Jemez Pueblo since the twelfth century.[198] The modern borders of the Preserve also contain multiple sites of religious significance to Jemez Pueblo and its tribal neighbors[199]—most notably,

192. *Id.* at 641 n.3 (noting that "[t]he Commission suggested" that the parties "agree upon an average date of entry for those homesteads" that would "serv[e] as the date when Indian title to these homestead lands collectively was extinguished"); *id.* at 641 n.4 (describing stipulations to extinguishment dates based on public-land laws).

193. United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1391 (Ct. Cl. 1975).

194. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21, § 1.06. Here, the Commission pushed the Pueblos to agree to an average date of entry to serve as a takings date for the "scattering of 114 homesteads" that, according to the ICC, extinguished their aboriginal title. *See Pueblo de Zia*, 474 F.2d at 641 n.3. The Pueblos stipulated to three different dates for three categories of land. The first two categories fell under stipulated takings dates based on the passage of public-land laws—1905 for the creation of the Jemez Forest Reserve and 1936 for the Taylor Grazing Act—and the third category was within an averaged 1920 date based on "various homestead or preemption entries." *See id.* at 641 n.4.

195. Complaint to Quiet Title to Aboriginal Indian Land, Pueblo of Jemez v. United States, 430 F. Supp. 3d 943 (D.N.M. 2019) (No. 12-cv-800), 2012 WL 4931966.

196. *Id.* ¶ 59.

197. *Id.* ¶¶ 58-64; *Valles Caldera: Things to Do*, NAT'L PARK SERV. (Jan. 21, 2022), https://www.nps.gov/vall/planyourvisit/things2do.htm [https://perma.cc/MVX4-UNGP] (describing recreation opportunities in the Preserve).

198. Complaint to Quiet Title to Aboriginal Indian Land, *supra* note 195, ¶ 1.

199. *Pueblo of Jemez*, 430 F. Supp. 3d at 962-63 (discussing the Zia, Cochiti, Kewa (formerly Santo Domingo), Nambe, Picuris, Pojoaque, San Felipe or Katishtya, San Ildefonso, Ohkay Owingeh (formerly San Juan), Sandia, Santa Ana, Santa Clara, and Tesuque Pueblo's pilgrimages to ceremonial sites within the modern Valles Caldera National Preserve).

Wav e ma ku kwa (Redondo Peak summit area), the most sacred site in the Jemez tradition.[200]

FIGURE 1: THE VALLES CALDERA NATIONAL PRESERVE (PHOTOGRAPH BY AUTHOR)

Over centuries, multiple sovereigns have claimed portions of the Preserve's almost 90,000 acres.[201] Beginning with first contact in 1541 C.E., Spanish colonizers spent time in portions of the Preserve.[202] When Mexico won independence from Spain in 1821, its government began granting land, including a grant to the Town of Las Vegas, New Mexico that unintentionally overlapped with a grant to Mexican aristocrat Luis María Cabeza de Baca.[203] When the Preserve

200. Complaint to Quiet Title to Aboriginal Indian Land, *supra* note 195, ¶¶ 41-48.

201. 16 U.S.C. § 698v-11(b)(2)(A) (2018) (establishing the boundaries of the Preserve).

202. Between 1598 and 1621, Spanish colonizers forcibly removed Jemez Pueblo from their ancestral lands in the Caldera. The Pueblo resisted, and their opposition culminated in a joint Pueblo uprising, the 1696 Pueblo Revolt, after which Jemez Pueblo returned to the Caldera. For more, see *Pueblo of Jemez*, 430 F. Supp. 3d at 985, 992-94, 996-97.

203. Complaint to Quiet Title to Aboriginal Indian Land, *supra* note 195, ¶¶ 71-72.

came under the United States's control after the Mexican-American War in 1848, the federal government promised to honor valid Spanish and Mexican land grants under the Treaty of Guadalupe-Hidalgo.[204]

To resolve the Mexican government's conflicting conveyances, Congress authorized the Baca descendants to select almost 500,000 square acres of "vacant" land in New Mexico, as surveyed by the New Mexico Surveyor General.[205] In 1860, the Baca heirs chose Baca Location No. 1 — now, the Valles Caldera National Preserve[206] — and the Surveyor General confirmed the land's supposed vacancy.[207] After the Baca descendants sold Baca Location No. 1 in 1899, the land that would become the Preserve passed through private parties for a century.[208] Finally, in 2000, President Clinton authorized the purchase of Baca Location No. 1 and signed the Valles Caldera Preservation Act.[209]

This final transaction made the Preserve federal property and subject to the QTA's waiver of sovereign immunity. But when Jemez Pueblo asserted its aboriginal title to the Valles Caldera, the government responded with a motion to dismiss.[210] The government argued that the district court lacked subject-matter jurisdiction because Congress's 1860 approval of Baca Location No. 1 had extinguished Jemez Pueblo's aboriginal title to the Valles Caldera and, as a result, that the tribe's sole remedy would have been to bring its claim before the ICC —

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204. *Pueblo of Jemez*, 430 F. Supp. 3d at 1000.

205. For more on the mistake that defined the modern Preserve, see Robert Julyan's history:

> The sprawling Baca Location No. 1, which includes Redondo Peak[,] . . . resulted from a mistake. In 1835, Juan Maese and 25 other Las Vegas citizens were granted 500,000 acres in the Las Vegas [New Mexico] area. But then . . . another grant was given to Don Luis María Cabeza de Baca . . . . Unfortunately, the two grants seemed to overlap, creating problems. In 1860, the US Congress recognized the primacy of the earlier grant, but to compensate Baca's heirs for their loss Congress allowed them to select an equal amount of vacant, non-mineralized land, to be located in five square parcels anywhere in NM. The Bacas' first choice was the land in the Jemez Mountains, since known as Baca Location No. 1.

ROBERT JULYAN, THE PLACE NAMES OF NEW MEXICO 27 (1996), *quoted in Pueblo of Jemez*, 430 F. Supp. 3d at 959 n.11; *see also Pueblo of Jemez*, 430 F. Supp. 3d at 1003 (discussing the Surveyor General Land Office's approval of Baca Location No. 1).

206. Valles Caldera Preservation Act, Pub. L. No. 106-248, §§ 104-105, 114 Stat. 598, 600-02 (2000) (establishing the Preserve to "include all Federal lands . . . acquired under . . . 104(a)," which, in turn, details the sale of Baca Location No. 1).

207. *Pueblo of Jemez*, 430 F. Supp. 3d at 1211-12.

208. *Id.* at 959-60.

209. *Id.* at 960.

210. United States' Motion to Dismiss Plaintiff's Complaint and Memorandum of Points and Authorities, *Pueblo of Jemez*, 430 F. Supp. 3d 943 (No. 12-cv-800), 2013 WL 12435834.

which, of course, now no longer existed—by August 13, 1951.[211] The District Court of New Mexico agreed with the government and treated the ICC's 1973 claim award as proof of extinguishment, just as other federal courts have.[212] It reasoned that an earlier ICC extinguishment finding for analogous Jemez Pueblo lands—those "privately owned by virtue of Spanish and Mexican land grants"—applied to the tribe's current claim.[213] Based on the ICC's questionable congressional-intent finding, the district court held that Jemez Pueblo's claim to the Valles Caldera was extinguished before 1946 and dismissed the case for lack of subject-matter jurisdiction.[214] The district court noted accurately that other "[c]ourts have uniformly held that a tribe cannot obtain review of . . . historical land claim[s]" under the QTA because of its statute of limitations.[215] The tribe's ICC litigation was Jemez Pueblo's exclusive remedy, the court wrote, and "it lost its opportunity to litigate its dispute with the United States" when it failed to include the Valles Caldera in its ICC claim.[216] In dismissing Jemez Pueblo's case, the District Court of New Mexico positioned the Tenth Circuit to demonstrate how—with reasoning that foreshadowed *McGirt*—federal courts can enforce a stricter reading of congressional intent to extinguish.

*B. The Post-*McGirt *Landscape: Litigating Unextinguished Claims Under the Quiet Title Act*

On appeal, the Tenth Circuit held the government to its word, as *McGirt* has since directed all lower courts to do. And because Congress had not clearly spoken through text or deed, the Tenth Circuit reversed the district court's determination that Jemez Pueblo's aboriginal-title claim was extinguished long before 1946. For Land Back litigants, *Jemez* clarified that the ICC was not an exclusive remedy and that ICC claims awards did not extinguish aboriginal title to land not specifically before it. By insisting on specific, unambiguous proof of Congress's intent to extinguish, the Tenth Circuit determined that Jemez Pueblo's aboriginal title was not extinguished, need not have been brought before the ICC, and could support a claim against the United States that had accrued within the preceding twelve years.[217] The court's enforcement forecast how *McGirt*

211. *Id.* at 11-14.

212. Pueblo of Jemez v. United States, No. 12-cv-800, 2013 WL 11325229, at *4-5 (D.N.M. Sept. 24, 2013), *rev'd*, 790 F.3d 1143 (10th Cir. 2015).

213. *Id.* at *4.

214. *Id.* at *5.

215. *Id.* (citing cases dismissing QTA actions).

216. *Id.* at *4.

217. *Pueblo of Jemez*, 790 F.3d at 1164.

would open a jurisdictional window for aboriginal-title claims against the federal government, even where the ICC and earlier jurisprudence closed tribes' proverbial door. At the same time, the *Jemez* decision unknowingly demonstrated for other federal courts how to apply *McGirt*'s reasoning and, because it evaluated many possible sources of extinguishment, its guidance is broadly applicable.

The *Jemez* court affirmed that land transfers between sovereigns—whether pursuant to Spanish invasion, Mexican land grants, or the Treaty of Guadalupe-Hidalgo—did not extinguish the tribe's aboriginal title.[218] Citing decades-old Supreme Court precedent,[219] the Tenth Circuit stated that it was "no longer [an] open" legal question whether aboriginal rights survived sovereignty transitions.[220]

The decision also considered federal land grants to private citizens. Absent proof of specific "language or intent in the 1860 Act," the Tenth Circuit refused to infer that Congress had intended to extinguish Jemez Pueblo's aboriginal title by granting the Caldera to the Baca heirs.[221] The Act contained no such language. Equally significantly, the *Jemez* court also rejected the 1973 ICC judgment as an evidentiary substitute.[222] It wrote decisively that "Supreme Court decisions since 1823 make clear that the Baca grant at issue was subject to the Jemez Pueblo's aboriginal title."[223] Given the clear precedent that congressional land grants did not disrupt aboriginal title—let alone suggest a federal claim of absolute property rights—the tribe could hardly have "kn[o]w[n]" or have been expected to know of the government's claim to the Valles Caldera, as the QTA requires for accrual.[224] The Tenth Circuit insisted that to find otherwise, plain "language was required" that "clearly show[ed] Congress's intent to extinguish aboriginal title" to the Caldera.[225] Congress's grant, alone, had "not institute[d] 'a policy of non-recognition of Indian title,'" nor had its establishment of the

218. *Id.* at 1152-56.

219. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 346 (1941) (stating that "aboriginal possession would be respected in the Mexican Cession" by the United States as it had been under "the prior sovereignty of the various European nations, including Spain").

220. *Pueblo of Jemez*, 790 F.3d at 1160 (quoting *Santa Fe Pac. R.R.*, 314 U.S. at 346).

221. *Id.* at 1164.

222. *Id.* at 1170-71 (rejecting the government's argument that Jemez Pueblo's 1973 ICC action extinguished aboriginal title to any other land, including the Valles Caldera).

223. *Id.* at 1163.

224. 28 U.S.C. § 2409a(g) (2018); *see also* sources cited *supra* note 180 (citing examples of cases where courts determined that federal land grants to private parties had not extinguished tribes' aboriginal title).

225. *Pueblo of Jemez*, 790 F.3d at 1164.

Office of the Surveyor General "effected any extinguishment."[226] The Surveyor General's mistaken belief that Baca Location No. 1 was "vacant" was similarly meaningless because "[h]e had no authority to extinguish the Jemez Pueblo's aboriginal title."[227]

Finally, the Tenth Circuit considered indirectly the effect that public-land laws and resulting non-American Indian settlement had on extinguishment. Although these laws were not at issue in *Jemez*, the Tenth Circuit implicitly rejected their treatment as evidence of Congress's intent to extinguish when it required specific "language . . . in the [1860 Valles Caldera] grant."[228] The Tenth Circuit's conclusion that, alone, Congress's authorization of non-American Indian settlement or land use was not sufficient proof of its intent to extinguish has still-broader implications.[229] Referencing the Taylor Grazing and Forest Reserve Acts, the court emphasized that "simultaneous occupancy and use of land pursuant" to a federal grant or public-land law could occur without extinguishing aboriginal title because "the nature of Indian occupancy differed significantly from the occupancy of settlers."[230] Otherwise stated, Congress's public-land laws did not necessarily exercise "complete dominion adverse to the right of occupancy" and, as a result, were not so "plain and unambiguous" that they extinguished aboriginal-title rights on their own.[231] Whether congressionally authorized or not, non-American Indian settlement could not substitute for unambiguous congressional intent to extinguish as long as "[Jemez] Pueblo alleged that it was *also* using the land in traditional Indian ways" during the same period.[232]

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226. *Id.* at 1163 (quoting United States v. Santa Fe Pac. R.R., 314 U.S. 339, 348 (1941)).

227. *Id.* at 1164.

228. *Id.*

229. *Id.* at 1166-68. The Tenth Circuit also clarified that the requirement that Jemez Pueblo have used the Valles Caldera exclusively only existed vis-à-vis other American Indians — not vis-à-vis all non-American Indian settlers — and, regardless, was a question of fact for determining a claim's merits, not for evaluating its extinguishment. *See id.* at 1165-66 ("Whether the Jemez Pueblo can establish that it exercised its right of aboriginal occupancy to these lands in 1860 and thereafter is a fact question to be established on remand, where it will have the opportunity to present evidence to support its claim . . . . The government contends the Jemez Pueblo cannot prove 'exclusive' use because the Baca heirs used the land. But the 'exclusive' part of the [aboriginal-title] test meant only that in order to establish aboriginal title, a tribe 'must show that it used and occupied the land to the *exclusion of other Indian groups*.'" (quoting United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (Ct. Cl. 1975))).

230. *Id.* at 1165.

231. *Id.* at 1160 (quoting *Santa Fe Pac. R.R.*, 314 U.S. at 346-47).

232. *Id.* at 1172 (emphasis added).

The *Jemez* decision exemplified how, by looking to statutory language and a tribe's historic use of a given tract, other courts can pivot from the past assumption that public-land laws like the Forest Reserve Act, the Taylor Grazing Act, and the Homestead and Mining Acts necessarily extinguish aboriginal title. Under the earlier approach, the ICC had inverted the congressional-intent standard and found that, where public-land laws applied, "the history of the award area" automatically indicated extinguishment "short of an uncontroverted and unmistakable sign from Congress"—regardless of whether settlers' and tribes' actual land use conflicted.[233] Though such determinations contravened precedent that federal land grants were subject to aboriginal title,[234] Article III courts accepted them.[235] In Jemez Pueblo's 1973 ICC action, for example, the ICC and Court of Claims decisions had assumed that the Taylor Grazing Act disrupted tribal members' land use or occupancy and inferred extinguishment.[236] And like its peers, the district court adopted those earlier extinguishment judgments.[237]

But such reasoning failed the Tenth Circuit's stricter enforcement of the congressional-intent standard. Congress had not explicitly extinguished Jemez Pueblo's aboriginal title in the Baca land-grant text. Nor had it authorized action so incompatible with Jemez Pueblo's land use that its intent to extinguish was "plain and unambiguous."[238] By insisting on unambiguous proof that Congress intended non-American Indian settlement to displace traditional land uses completely, the Tenth Circuit modeled how courts should reject past treatment of public-land laws as generic proxies for congressional intent.[239] While its decision

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233. Gila River Pima-Maricopa Indian Cmty. v. United States, 494 F.2d 1386, 1392 (Ct. Cl. 1974); *see also Pueblo of San Ildefonso*, 513 F.2d at 1391 (holding that land's inclusion in the Jemez Forest Reserve and the New Mexico Grazing District No. 1, as created under the Taylor Grazing Act, extinguished aboriginal title).

234. *See supra* note 180 (listing decisions affirming the general principle that federal grants are subject to unextinguished aboriginal title).

235. *See, e.g.*, United States v. Dann, 873 F.2d 1189, 1198-99 (9th Cir. 1989) (stating that the payment of an ICC claim award by Congress "establishes conclusively that a taking occurred" and using the extinguishment date stipulated before the ICC); *id.* at 1199 n.6 (stating that, while the Ninth Circuit had previously assumed that the Taylor Grazing Act did not extinguish title, the Supreme Court's decision in *United States v. Dann*, 470 U.S. 39, 43-44 (1985), seemed to assume that payment of a claims award for "takings" as a result of the Act had extinguished aboriginal title).

236. *See Pueblo of Jemez*, 790 F.3d at 1167-68 (citing Pueblo of Zia v. United States, 19 Ind. Cl. Comm. 56, 64, 74 (1968)).

237. *See* Pueblo of Jemez v. United States, No. 12-cv-800, 2013 WL 11325229, at *4-5 (D.N.M. Sept. 24, 2013), *rev'd*, 790 F.3d 1143.

238. *Pueblo of Jemez*, 790 F.3d at 1162-68 (rejecting the government's argument that the Baca's use of the land is inconsistent with Jemez Pueblo's aboriginal title (internal quotation marks omitted)).

239. *See id.*

does not entirely preclude public-land laws from extinguishing aboriginal title, it restores the congressional-intent standard.

Just as "[h]istory shows that Congress knows how to withdraw a reservation when it can muster the will,"[240] history equally demonstrates that Congress knows how to extinguish aboriginal title unambiguously—and has done so repeatedly.[241] Courts must hold the government to its word and, when it fails to speak or act, enforce the rights unaffected by its silence.[242] As the Tenth Circuit did in *Jemez*, federal judges should revise presumed extinguishment dates where there is no clear, specific proof of congressional intent to extinguish. Under *McGirt*, such claims have survived past 1946. Other tribes might have unextinguished aboriginal title like Jemez Pueblo and viable claims under the QTA, if the United States began encroaching on their land within the past twelve years.

III. *MCGIRT* LIMITS THE PRECLUSIVE POWER OF PAST ICC CLAIMS AWARDS

By insisting that extinguishment requires congressional action evidencing a "total surrender of all tribal interests," *McGirt* provides a path past a second jurisdictional morass for Land Back litigants.[243] Judicial confusion about the scope of ICC extinguishment findings and which preclusion theory governs them has made the practice of assuming extinguishment from ambiguous congressional actions even more damaging.[244] As a result, some judges have read ICC claims awards as extinguishing tribes' aboriginal title categorically, even to land that was not before the ICC. Here, as for sovereign immunity, Jemez Pueblo exemplified how aboriginal-title litigants suffered. Before the Pueblo appealed to the Tenth Circuit, the district court held that section 22 of the ICCA precluded its litigation of *any* aboriginal-title claims because Jemez Pueblo had already

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240. McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).

241. *See, e.g.*, Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, § 10(f), 88 Stat. 2089, 2093 (1975) (stating that "Congress recognizes and declares that all right, title, and interest in any lands not otherwise declared to be held in trust for the Havasupai Tribe . . . is extinguished"); Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 4(a), 85 Stat. 688, 689 (1971) ("All prior conveyances of public land and water areas in Alaska . . . shall be regarded as an extinguishment of the aboriginal title thereto, if any.").

242. *McGirt*, 140 S. Ct. at 2459.

243. *Id.* at 2463 (internal quotation marks omitted).

244. As Professor Janet C. Neuman and attorney Michelle Smith note, "there is no clear consensus among courts" about the preclusive effect of past ICC extinguishment judgments. Michelle Smith & Janet C. Neuman, *Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive Effect of ICC Decisions in Litigation over Off-Reservation Treaty Fishing Rights*, 31 U. HAW. L. REV. 475, 490 (2009).

"sought compensation and received money" once for "aboriginal title to other lands" in its 1973 ICC action.[245]

As Section III.A describes, the preclusion problem exists across aboriginal-title case law. Section III.A traces the origins of courts' confusion and describes how, although judges agree that ICC claims awards bar some subsequent aboriginal-title claims,[246] they disagree over which claims and why.[247] Section III.B argues that the Tenth Circuit unknowingly resolved this question in *Jemez* by demonstrating how other federal courts should apply *McGirt* to sidestep the preclusion debate altogether. The Tenth Circuit's insistence on clear, specific proof of congressional intent to extinguish for each disputed tract naturally delineated Jemez Pueblo's past and present claims. By anticipating *McGirt*'s enforcement of a robust congressional-intent requirement, the Tenth Circuit not only avoided the preclusion quagmire, but also did so in a way that is readily replicable and holds the government to its word, as spoken through the ICCA's text.

*A. The Pre-*McGirt *Landscape: Courts Expand the Preclusive Power of Past ICC Claims Awards Beyond the ICCA's Text*

The District Court of New Mexico's dismissal of Jemez Pueblo's claim reflected the widespread confusion about the preclusive scope of ICC claims awards. Courts have overread claims awards' preclusive power because of a broader judicial departure from the ICCA's text. The ICCA gave the ICC jurisdiction to compensate tribes only for "claims arising from [a] taking by the United States."[248] It did not state that ICC payments extinguish aboriginal land and water titles, aboriginal hunting and fishing rights,[249] or otherwise manifest congressional intent to delegate the *entirety* of its "supreme" extinguishing power.[250] But even though judges within the Ninth Circuit, for example, acknowledged that the ICC "had no jurisdiction to extinguish title" based on the ICCA's text,[251] they assumed repeatedly that Congress's approval of ICC claims

245. Pueblo of Jemez v. United States, 790 F.3d 1143, 1150 (10th Cir. 2015). For the culmination of Jemez Pueblo's ICC claim, see *United States v. Pueblo de Zia*, 474 F.2d 639, 641 (Ct. Cl. 1973).

246. *See supra* note 122.

247. *See generally* Smith & Neuman, *supra* note 244, at 490-91 (detailing courts' confusion about which preclusion theory governs ICC decisions).

248. Indian Claims Commission Act, Pub. L. No. 79-726, § 2(4), 60 Stat. 1049, 1050 (1946).

249. *Id.* § 22(b) ("A final determination against a claimant . . . shall forever bar any further claim . . . against the United States arising *out of the matter involved in the controversy*." (emphasis added)).

250. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941).

251. United States v. Dann, 873 F.2d 1189, 1198 (9th Cir. 1989).

awards established extinguishment.[252] Having inferred extinguishment, these courts attributed expansive preclusive power to ICC claims awards.[253]

Federal courts have applied different preclusion theories to ICC claims awards and have reached a range of results. Whether common-law or statutory preclusion principles apply is more than a semantic distinction; the doctrinal source determines exactly which present-day claims are blocked by earlier ICC judgments. Courts variously cite three theories: (1) common-law issue preclusion; (2) common-law claim preclusion; or (3) section 22 of the ICCA.[254] Although an earlier judgment's finality is a requirement under all three theories, their other criteria differ, as do their effects. Issue preclusion bars only those specific questions that were *actually* litigated in an earlier proceeding.[255] Claim preclusion is broader: it also blocks any question that *could* have been litigated, even if it was not.[256] Separate from both common-law doctrines, section 22 of the ICCA's text bars relitigation of claims that accrued before 1946 and were specifically and finally adjudicated before the ICC.[257] Insidious as the ICC's questionable extinguishment findings were on their own, the doctrinal confusion about the scope of their preclusive effect has exacerbated their damage. As courts pingponged between these three preclusion theories, claimants faced greater uncertainty and retained fewer avenues for legal recourse.

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252. *See id.* at 1199 (stating that ICC payments "establish[ed] conclusively that a taking occurred"); *see also* United States v. Gemmill, 535 F.2d 1145, 1149 (9th Cir. 1976) ("Finally, any ambiguity about extinguishment that may have remained . . . has been decisively resolved by congressional payment of compensation to the Pit River Indians for these lands [by the ICC].").

253. *See, e.g.*, W. Shoshone Nat'l Council v. Molini, 951 F.2d 200, 202-03 (9th Cir. 1991) (concluding that a past claim award not only extinguished aboriginal-land title, but also extinguished both aboriginal *and* treaty-based hunting and fishing rights), *cert. denied*, 506 U.S. 822 (1992).

254. Indian Claims Commission Act § 22(a) ("The payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy."); *id.* § 22(b) ("A final determination against a claimant . . . shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.").

255. *See* 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4416 (rev. 2021) (3d ed. 1998).

256. *Id.* § 4406. Note that an "issue" may be defined broadly, so as to blur the line between issue and claim preclusion. The distinction between the two is better understood as one of emphasis and degree, rather than an absolute distinction.

257. *See* Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1460-61 (10th Cir. 1987) (noting that "[a]ny claim that accrued before August 13, 1946, and which was not filed with the Commission by August 13, 1951, could not 'thereafter be submitted to any court or administrative agency for consideration,'" nor could such a claim "thereafter be entertained by the Congress" (quoting Indian Claims Commission Act § 70(k))). *See generally supra* note 247.

Federal courts imbued ICC claims awards with increasing preclusive power over time. Initially, some courts cited issue preclusion to allow challenges to aboriginal-title extinguishment, reasoning that claimants had never "actually" litigated extinguishment in earlier ICC actions because they had only stipulated to an "average" takings date.[258] But this approach was soon abandoned.[259] Article III judges began to cite issue preclusion to bar tribes from litigating their hunting and fishing rights—even when those rights were never raised, let alone actually litigated, before the ICC.[260] In still other cases, courts found that ICC decisions bound tribes against states, even though the earlier action only involved the federal government and claim preclusion requires identity of parties.[261] Separately, judges debated what constituted a final ICC judgment in the contexts of both

258. *See, e.g.*, United States v. N. Paiute Nation, 490 F.2d 954, 957 (Ct. Cl. 1974) (holding that "a composite or average date is not res judicata or collateral estoppel that every parcel in [a certain geographic area] was taken on the composite or average date").

259. *See* United States v. Dann, 470 U.S. 39 (1985) (allowing assertions of aboriginal title because the issue was not actually litigated).

260. Whether a tribe's hunting and fishing rights were treaty-based or aboriginal-title-based has been decisive. Applying issue preclusion's logic, courts have held that an ICC finding of aboriginal-title extinguishment necessarily litigated a tribe's aboriginal hunting and fishing rights as well. *See, e.g.*, W. Shoshone Nat'l Council v. Molini, 951 F.2d 200, 203 (9th Cir. 1991). By contrast, litigation of tribes' treaty-based hunting and fishing rights was not barred unless expressly discussed—and "actually litigated"—in the earlier ICC action. *See, e.g.*, Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 925-26 (8th Cir. 1997) (holding that the ICC action did not "extinguish[] an important body of rights . . . without any mention" and "do[es] not collaterally estop the Bands from bringing [hunting- and fishing-] rights claims here"); Ottawa Tribe of Okla. v. Speck, 447 F. Supp. 2d 835, 842 (N.D. Ohio 2006) (finding that the tribe's claim was not barred by issue preclusion because the ICC action "only discuss[ed] compensation for the general cession of land"). *But see* Smith & Neuman, *supra* note 244, at 476 (arguing that ICC holdings should not preclude subsequent litigation over off-reservation fishing rights).

261. *See*, *e.g.*, *Molini*, 951 F.2d at 203 (holding that an ICC claim award also barred relitigation against the state of Nevada); United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1508-09 (9th Cir. 1991) (holding that the ICC's past claim award also barred the tribe from asserting aboriginal title to submerged riverbeds against the state of Washington).

issue[262] and section-22[263] preclusion. Finally, a decisive Ninth Circuit decision relied on section 22 of the ICCA exclusively.[264]

As confusion mounted and courts read ICC awards ever more broadly, the pre-*McGirt* Supreme Court declined to clarify the scope of claims awards' extinguishment power or which preclusion theory governed them. In *United States v. Dann*, the Ninth Circuit threw down the gauntlet: it claimed that section 22's statutory bar replaced common-law res judicata principles entirely for ICC claims awards.[265] On appeal, the Supreme Court sidestepped the question. In an opinion that Newton called "most notable for what it did not say," the Court "treat[ed] the case as simply one of statutory construction" of the word "payment."[266] Instead of engaging with the preclusion debate, the Court reversed the Ninth Circuit on the narrowest grounds. It held only that the placement of claims-award funds into a U.S. Treasury account constituted "payment" under the meaning of section 22 of the ICCA.[267] On remand, the Ninth Circuit acknowledged that the Court had "reject[ed] [its] interpretation" of "payment" under the statute, but avoided the thornier question of whether section 22 had supplanted common-law preclusion entirely.[268]

As recently as 2000, the Supreme Court still declined to clarify the source or scope of ICC claims awards' preclusive power. In *Arizona v. California*, litigants reiterated the Ninth Circuit's unanswered assertion that section 22 replaced "common-law principles of issue preclusion . . . in the special context of Indian land claims."[269] Rather than ignoring the issue as in *Dann*, the Court addressed the question directly—but only to say that "[it] need not decide" the preclusion

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262. *See, e.g.*, United States v. Dann, 572 F.2d 222, 226 n.2 (9th Cir. 1978) (stating that collateral estoppel did not apply because an ICC opinion expressed in an order was not a "final" judgment).

263. *See*, *e.g.*, *id.* at 225-26; Seminole Indians of Fla. v. United States, 471 F.2d 614, 615 (Ct. Cl. 1973) ("The issue of what constitutes a final decision within the context of the Indian Claims Commission Act . . . is applicable to the issue in this case." (citing Caddo Tribe of Okla. v. United States, 155 F. Supp. 727 (Ct. Cl. 1957))).

264. United States v. Dann, 706 F.2d 919, 924 (9th Cir. 1983) ("We disagree with the government's contention that the bar provisions of the statute are not exclusive, and that an additional bar may arise from common law principles of res judicata.").

265. *Id.* The district court's decision in *Dann* reached the same conclusion that the Danns were precluded from asserting any tribal aboriginal title under section 22 of the ICCA. *See* United States v. Dann, 13 I.L.R. 3158, 3159 (D. Nev. 1986).

266. Newton, *supra* note 115, at 829.

267. United States v. Dann, 470 U.S. 39, 44-45 (1985).

268. United States v. Dann, 873 F.2d 1189, 1193 (9th Cir. 1989).

269. 530 U.S. 392, 416 (2000).

question and to refuse to comment on the correctness of the Ninth Circuit's interpretation.[270] As the Court dodged, confusion persisted among lower courts.

Scholarship has also left the preclusion debate unresolved—despite recognizing preclusion's power in other contexts and how, even under the same theory, different applications can drastically alter litigants' capacity to reach their cases' merits.[271] Scholars like Caroline Orlando[272] and Newton[273] came close to addressing the preclusion debate in their discussions of the due-process problems that result when past extinguishment findings are given broad preclusive power. But neither scholar has considered directly how the inconsistent application of preclusion principles to claims awards has exacerbated the ICC's damage to aboriginal title. Even Janet C. Neuman and Michelle Smith, whose analysis is the most relevant and who reference how courts apply ICC claims awards inconsistently,[274] focused on the preclusion problem's implications for off-reservation fishing rights, rather than for aboriginal-title land claims broadly.[275] Generally, judges and scholars continue to overlook the issue.[276]

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270. *Id.*; *see also id.* at 417 (noting "the Ninth Circuit cases . . . (the correctness of which we do not address)").

271. *See* Monica Renee Brownewell, *Rethinking the Restatement View (Again!): Multiple Independent Holdings and the Doctrine of Issue Preclusion*, 37 VAL. U. L. REV. 879, 895-913 (2003) (detailing a circuit split over how issue-preclusion doctrine applies to past decisions with multiple independent holdings).

272. *See generally* Caroline L. Orlando, *Aboriginal Title Claims and the Indian Claims Commission:* United States v. Dann *and Its Due Process Implications*, 13 B.C. ENV'T AFFS. L. REV. 241, 275 (1986) (detailing how the ICC regulations allowing any claimant to bring an action on behalf of a broader group violated procedural due process as defined in *Hansberry v. Lee*, 311 U.S. 32 (1940)).

273. Newton, *supra* note 115, at 829-30 (describing how the Supreme Court ignored due-process problems in *United States v. Dann*).

274. Smith & Neuman, *supra* note 244, at 490-91 ("Some courts are willing to apply principles of preclusion liberally to prior ICC judgments. Other courts have refused to give ICC judgments preclusive effect unless [a certain preclusion doctrine's tenets are satisfied]." (citations omitted)).

275. *Id.* at 476 (arguing that "courts should not give ICC holdings preclusive effect" in subsequent litigation involving off-reservation fishing rights because "usual and accustomed fishing sites were not limited to a tribe's exclusive aboriginal territory").

276. As of February 14, 2022, HeinOnline.org states that Smith and Neuman's article has only been cited five times, reflecting the scholarly failure to study aboriginal-title law, not the caliber of their contribution. *See Law Journal Library Search*, HEINONLINE, https://heinonline.org/HOL/LuceneSearch?terms=%28%28%2231%20U.%20Haw. %20L.%20Rev. %20475%22%20OR%20%2231%20U%20Haw%20L%20Rev%20475%22%20OR%20%2231%3A2%20U%20Haw%20L%20Rev%20475%22%20OR%20%2231%20Haw%20L%20Rev%20475%22%20OR%20%2231%20U.%20Hawaii%20L

ICC regulations made the preclusion confusion more damaging. Although not empowered to hear individual claims, the ICC could and did treat "identifiable groups" of American Indians as the exclusive representatives of entire language and geographical groups—even over separate tribal governments' and leaderships' objections.[277] Chasing the high contingency fees that large title extinguishments promised, claims attorneys urged tribal representatives to bring ICC actions and stipulate away large swaths of aboriginal-title land.[278] Both scholars and judges have recognized the "clear conflict of interest between attorneys and clients in those instances where the Indians were still in possession or still had an arguable claim to possession."[279] Even so, disapproving members had no opportunity to opt out of ICC proceedings, as they would have in a class action governed by Federal Rule of Civil Procedure 23.[280]

Additionally, federal courts ignored internal disagreement among tribal groups when enforcing ICC claims awards' preclusive power broadly. In an especially egregious instance, all Western Shoshone tribes were held to have lost their aboriginal title when the attorneys for one subgroup, the Te-Moak Tribal

.%20Rev.%20475%22%29%20AND%20NOT%20id%3Ahein.journals/uhawlr31.19%29&collection=journals&searchtype=advanced&submit=Go&sections=any&sections=external&other_cols=yes&cited_by=true&sortby=cited_by [https://perma.cc/7WJ4-FERM]. *See generally* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 678 (1989) (describing "why federal courts jurisprudence has not spoken much about Indian tribes" and "what that silence has to teach").

277. Indian Claims Commission Act, 25 U.S.C. § 70(a) (1976); *see also* Orlando, *supra* note 272, at 252 ("When . . . one tribal organization was authorized to represent a group, that organization was recognized as having an exclusive privilege to represent that group before the ICC.").

278. *See supra* Section I.C.

279. O'Connell, *supra* note 156, at 770-71; *see also* Pueblo of Santo Domingo v. United States, 647 F.2d 1087, 1091 (Ct. Cl. 1981) (Nichols, J., dissenting) ("One conflict long tacitly ignored in ICC cases is that the counsel's interest on the usual contingent fee basis turns only on the amount of award to be extracted from defendant; yet the tribe's interest is not only in the amount of the award, but also in minimizing what land title or claim thereto it has to give up, which may be substantial.").

280. *Compare* United States v. Dann, 706 F.2d 919, 924-25 (9th Cir. 1983) ("Indian claims proceedings . . . may be brought by any member of an identifiable group of Indians on behalf of all members. There is no provision for members to opt out of the proceedings, as there is in the case of class actions under Fed. R. Civ. Proc. 23(c)(2)."), *and* W. Shoshone Legal Def. & Educ. Ass'n v. United States, 531 F.2d 495 (Ct. Cl. 1976) ("An Indian claim under the Act is unlike a class suit in that there is no necessity that the position of each individual member of the group be represented; it is only the group claim which need be put forward."), *cert. denied*, 429 U.S. 885 (1976), *with* FED. R. CIV. P. 23(c)(2)(B)(v) ("For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice . . . [that] must clearly and concisely state in plain, easily understood language . . . that the court will exclude from the class any member who requests exclusion . . . .").

Council, stipulated extinguishment of aboriginal title on behalf of the entire language group.[281] The case had begun because the Bureau of Indian Affairs and claims attorneys recruited the Te-Moak Council to file a claim in 1951, presumably as part of the dash to file claims before the ICCA's deadline of August 13, 1951.[282] Even though, as Luebben notes, the "'Western Shoshone Identifiable Group' did not exist as a[] [legal or political] entity, and the Temoak Bands was but one of seven federally recognized Western Shoshone tribal governments," the ICC claim applied to and precluded future litigation for *all* Western Shoshone lands.[283] Eventually, the Court of Claims found that aboriginal title to approximately twenty-four million acres had been extinguished for all Western Shoshone in exchange for $26,145,190 — or 1.9 cents per acre.[284] As attorney John D. O'Connell details, the other Western Shoshone tribes spent decades unsuccessfully challenging the ICC claim that purportedly bound them — but to which they had neither been party nor consented.[285] Even the designated representative of the "Western Shoshone Identifiable Group," the Te-Moak Bands Council, had tried unsuccessfully to stop the claim.[286]

Those tribes that hoped to preserve their aboriginal title tried to differentiate their claims from earlier ICC actions. But the doctrinal confusion meant that they lacked clear guidance on how to avoid preclusion. In the Western Shoshone litigation, for example, the other Western Shoshone governments tried repeatedly to stay or intervene in the ICC proceeding out of concern that "a final judgment would adversely affect [their] unextinguished . . . aboriginal title."[287] None of their attempts succeeded. In another case, the government of the Six Nations or Haudenosaunee Confederacy tried to block the payment of an ICC claim

281. *See generally* O'Connell, *supra* note 156, at 770 (describing the Te-Moak Tribal Council's role as exclusive representative plaintiff for the Western Shoshone).

282. *See* Luebben, *supra* note 90, at 171 (discussing the history of the Western Shoshone claim); *see also* Orlando, *supra* note 272, at 252 n.100 ("Sixty-two percent of all claims before the ICC were filed in the last six weeks of the five-year period.").

283. Luebben, *supra* note 90, at 171-72. Today, there are nine federally recognized Western Shoshone governments. *See id.* at 171 n.100.

284. *Id.* at 172 & n.111.

285. *See* O'Connell, *supra* note 156, at 769-98.

286. Temoak Band of W. Shoshone Indians v. United States, 593 F.2d 994 (Ct. Cl. 1979) (blocking the Te-Moak Tribe of Western Shoshone's attempt to stay the proceedings to obtain a DOI decision regarding whether their aboriginal title was extinguished); *see also* O'Connell, *supra* note 156, at 776-80 (describing other Western Shoshone tribes' attempts to stop the ICC claim proceeding once it had begun); Luebben, *supra* note 90, at 169 (describing how the Court of Claims denied the motion to intervene in the ICC case, brought by independent Western Shoshone tribes concerned that "a final judgment would adversely affect unextinguished Western Shoshone aboriginal Indian title").

287. Luebben, *supra* note 90, at 169.

award out of "concer[n] that distribution of the award might preclude a subsequent claim . . . that it still retained title" to its land.[288] As it had in the Western Shoshone litigation, the initial ICC action in the Haudenosaunee Confederacy's case was instigated by "other groups and individuals claiming to represent" the collective over their leadership's objections.[289] Also like the Western Shoshone, the Haudenosaunee Confederacy could not forestall the preclusive ICC extinguishment finding and payment.

For decades, scholars have discussed the due-process damage that the ICC's rules inflicted, although they overlooked how the preclusion debate made such constitutional questions even more damaging and irreversible.[290] In the 1980s, Orlando argued that the ICC's willingness to let "any member of a formally organized group . . . bring a claim on behalf of the group, provid[ed] the claimant could prove that the group officers had refused to bring suit[,]" violated due process under *Hansberry v. Lee* and posed a fundamental "obstacle to the equitable resolution of claims."[291] Years later, Newton critiqued the Supreme Court's refusal to consider the Fifth Amendment implications of binding claimants "to a decision entered on behalf of a group" without their consent.[292] "Whether the method chosen might violate fundamental principles of fairness was simply not of interest to the Court," wrote Newton.[293] Instead, their "greatest concern . . . was to dispatch these claims cases once and for all."[294] More recently still, Luebben underscored how even attorney malpractice was not enough for the Court of Claims to allow a tribe to withdraw from a binding ICC stipulation.[295] Still, federal courts have not clarified which preclusive theory governs ICC judgments or that theory's scope, exacerbating the ICC's documented due-

288. Six Nations Confederacy v. Andrus, 610 F.2d 996, 997 n.1 (D.C. Cir. 1979). I use "Haudenosaunee" because that is what the Confederacy calls itself. *See Who We Are*, HAUDENOSAUNEE CONFEDERACY (2022), https://www.haudenosauneeconfederacy.com/who-we-are [https://perma.cc/2ESB-9TD9].

289. *Six Nations*, 610 F.2d at 997.

290. *But cf.* Orlando, *supra* note 272, at 265, 271 (describing the due-process concerns raised by *United States v. Dann*, 470 U.S. 39 (1985)).

291. *Id.* at 263.

292. Newton, *supra* note 115, at 829-30.

293. *Id.* at 830.

294. *Id.*

295. Luebben, *supra* note 90, at 166-67 (quoting Pueblo of Santo Domingo v. United States, 647 F.2d 1087, 1091 (Ct. Cl. 1981) (Nichols, J., dissenting) (denying as untimely a motion to set aside a stipulation of title extinguishment despite manifest malpractice)).

process problems. "In the final analysis," Luebben wrote, "the concern by Congress and the federal government for finality prevailed over any genuine concern for justice."[296]

*B. The Post-*McGirt *Landscape: Courts Return to the ICCA's Text, Distinguish Claims, and Narrow Preclusion as a Bar to Aboriginal-Title Claims*

Applying *McGirt* in the aboriginal-title context provides a path past the preclusion problem and its due-process implications. Rather than considering generalized evidence of Congress's desire to disestablish reservations,[297] the Supreme Court considered only Congress's affirmative actions regarding the Muscogee Nation reservation on a statute-by-statute basis. That Congress "may have passed allotment laws to create the conditions for disestablishment" did not alter the reality that it had not, in fact, expressed its intent to alter the Muscogee Nation's reservation unambiguously.[298] Because Congress "ha[d] not said otherwise,"[299] the events since allotment—the sale of Muscogee Reservation land,[300]

296. *Id.* at 170.

297. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2464-65 (2020) ("Oklahoma reminds us that allotment was often the first step in a plan ultimately aimed at disestablishment. . . . Still, just as wishes are not laws, future plans aren't either.").

298. *Id.* at 2465.

299. *Id.* at 2459.

300. *Id.* at 2463-65. *McGirt* was not the first case to suggest that congressional-allotment statutes did not automatically disestablish or diminish reservations. *See id.* at 2464 ("In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument."); Solem v. Bartlett, 465 U.S. 463 (1984) (determining that a 1908 statute authorizing the Secretary of the Interior to "sell and dispose" of portions of the Cheyenne River Sioux Reservation for homesteading had not disestablished or diminished the reservation); Mattz v. Arnett, 412 U.S. 481, 496-97 (1974) (determining the same regarding an 1892 statute providing for allotment on the Klamath Tribes' Reservation and stating the specific statute was "completely consistent with continued reservation status"); *see also* Murphy v. Royal, 875 F.3d 896, 919 (10th Cir. 2017) ("Allotment on its own does not disestablish or diminish a reservation. But Congress, in passing surplus land acts, has altered the boundaries of some reservations." (citation omitted)), *aff'd sub nom.* Sharp v. Murphy, 140 S. Ct. 2412 (2020). But in the context of the decision's rejection of extratextual evidence and affirmation of the congressional-intent requirement, the Supreme Court's allotment discussion had renewed force and expanded reach.

ensuing non-American Indian settlement,[301] Oklahoma's assertions of jurisdiction over the Muscogee land,[302] modern demographics,[303] and even the "transformative" effect of enforcing the Muscogee Nation's recognized title after decades of nonenforcement[304]—were immaterial.

In so stating, *McGirt* implicitly rejected federal tribunals' rationale for imbuing ICC claims awards with broad preclusive power—that such a reading was "consistent with" Congress's hope that the ICCA would "dispose of the Indian claims problem with finality."[305] Granted, such judicial extrapolation had always conflicted with Supreme Court precedent on congressional intent and the ICC's narrow mandate.[306] But *McGirt*'s firm insistence that, "just as wishes are not laws, [Congress's] future plans aren't either,"[307] rejects any lingering argument for overreading ICC claims awards. Whatever its aspirations, the Congress that established the ICC did not explicitly state that its claims awards extinguished aboriginal title to all land beyond reservation borders—let alone to all aboriginal hunting, fishing, gathering, and water rights. Continuing to treat the payment of claims awards for individual tracts as extinguishing *all* of a tribe's aboriginal-title rights would, contrary to *McGirt*, "confuse the first step of a march with arrival at its destination."[308]

Because it involved recognized title,[309] and only a congressional statute or treaty can extinguish such land rights,[310] *McGirt* rejected the use of extratextual evidence to infer Congress's intent to extinguish. By contrast, extratextual evidence is necessarily part of aboriginal title's extinguishment analysis; Congress may extinguish aboriginal title by treaty, sword, purchase, or "the exercise of complete dominion adverse to the right of occupancy."[311] Still, *McGirt*'s lesson applies. Whatever its source, evidence of extinguishment cannot be vague or

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301. *McGirt*, 140 S. Ct. at 2473.

302. *Id.* at 2470.

303. *Id.* at 2468.

304. *Id.* at 2478-79.

305. *See, e.g.*, United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1508 (9th Cir. 1991) (quoting United States v. Dann, 470 U.S. 39, 45 (1985)).

306. *See* Smith & Neuman, *supra* note 244, at 502-05 (arguing that the ICCA's language on finality is cabined by the ICCA's statutory scheme, which limited the ICC's jurisdiction to monetary claims).

307. *McGirt*, 140 S. Ct. at 2465.

308. *Id.*

309. *Id.* at 2469.

310. *See supra* note 39 and accompanying text.

311. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941).

subject to dual interpretation—rather, it must reflect Congress's intent to extinguish "plain[ly] and unambiguous[ly]."[312]

Here, as in the sovereign-immunity context, the Tenth Circuit's *Jemez* decision anticipated *McGirt*'s evidentiary evaluation. Just as the Supreme Court would direct in *McGirt*, the Tenth Circuit rejected generalized, ambiguous evidence in its congressional-intent analysis. Its insistence on clearer proof of congressional intent to extinguish aboriginal title to the Valles Caldera tract *specifically* demonstrated a sound way to distinguish the present aboriginal-title case from past ICC claims awards.[313] Evaluating congressional action—or inaction—regarding individual parcels of land has multiple virtues. It allows courts to return to the ICCA's text, sidestep the preclusion debate, and minimize the due-process damage of ICC regulations, all while advancing aboriginal-title claims to merits litigation.

As discussed in Section II.B, the Tenth Circuit focused its textual analysis on the statutes and grants involving the Valles Caldera land—none of which expressly extinguished aboriginal title. And critically, the Tenth Circuit did not treat Jemez Pueblo's land as an indivisible unit when evaluating whether public-land laws had extinguished the tribe's aboriginal title.[314] Instead, it interrogated whether those laws and non-American Indian settlement had, in fact, conflicted with the Jemez Pueblo's distinct use and occupancy of the Valles Caldera parcel.[315] As long as non-American Indian settlement did not necessarily displace tribes' traditional land occupancy and use in that specific area, "simultaneous occupancy and use of land pursuant to fee title and aboriginal title could occur"[316]—as it did with Jemez Pueblo.[317]

With the congressional-intent analysis narrowed to evidence involving only the Valles Caldera, Jemez Pueblo's 2012 suit naturally separated from its 1973 ICC action.[318] After all, the Tenth Circuit reasoned, if "the Baca grant did not extinguish aboriginal title" prior to 1946, the Valles Caldera had never been eligible for an ICC action in the first place—so, it could hardly be barred by one.[319] Moreover, the Tenth Circuit's technique of assessing extinguishment for each disputed

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312. *Id.* at 346.

313. Pueblo of Jemez v. United States, 790 F.3d 1143, 1170 (10th Cir. 2015).

314. *Id.* at 1171 n.20.

315. *Id.* at 1165-68.

316. *Id.* at 1165.

317. *Id.*

318. *Id.* at 1170-71 (distinguishing between the 520,000 acres of land at issue in Jemez Pueblo's 1973 ICC litigation, *United States v. Pueblo de Zia*, 474 F.2d 639 (Ct. Cl. 1973), and the Valles Caldera land at issue in the present case).

319. *Id.* at 1171.

land tract would distinguish past ICC and present QTA claims under any of the three preclusion theories. Since the Jemez Pueblo's claim had not accrued before 1946 "with respect to the land involved in *this* action," the court emphasized, section 22 of the ICCA had no statutory preclusive effect.[320] Separately, the government's common-law preclusion argument failed because the Pueblo's current claim "[was] not a pre-1946 takings claim and involves *different land*."[321] As a result, it was "not identical to the prior action before the ICC," and common-law preclusion categorically could not apply.[322]

Without addressing the preclusion debate directly, the Tenth Circuit's evidentiary approach avoided its quagmire. By narrowing its congressional-intent analysis to the individual parcel at issue, the Tenth Circuit demonstrated an elegant, legally rigorous way to implement *McGirt*'s directive to hold the government to its word,[323] while providing a route around the preclusion and due-process debates that have plagued ICC claims awards. Tribes that litigated claims before the ICC may still have unextinguished aboriginal-title claims to distinct land parcels—including to land beyond their reservations' borders—if federal courts properly implement *McGirt*'s message through the Tenth Circuit's tract-by-tract analysis.

CONCLUSION

On remand after the Tenth Circuit's 2015 decision and after extensive trial evidence, the district court determined that Jemez Pueblo had not proven that its use and occupancy of the Valles Caldera had always excluded other American Indians from the land—and, therefore, that it had not established aboriginal title.[324] Almost seven years later, Jemez Pueblo now awaits another Tenth Circuit

320. *Id.* (emphasis added).

321. *Id.* at 1171 n.20 (emphasis added).

322. *Id.*

323. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

324. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1219-29 (D.N.M. 2019) (holding that Jemez Pueblo did not use the Valles Caldera exclusively and had not established aboriginal title to it), *appeal docketed*, No. 20-2145 (10th Cir. Oct. 16, 2020). Even for portions of the Valles Caldera where the district court subsequently reconsidered and determined that Jemez Pueblo had held aboriginal title between the 1400s and 1650, such as the Banco Bonito area, it held that the Pueblo lost that title by failing to drive other American Indians from the area. *See* Pueblo of Jemez v. United States, 483 F. Supp. 3d 1024, 1127-33 (D.N.M. 2020). In addition to its narrow, Anglo-American conception of ownership, the court's premise that Jemez Pueblo had to expel other American Indians by force to *preserve*, rather than to establish, its aboriginal title creates a new path to extinguishment independent of Congress. *See id.* at 1130

decision—this time, on the substance of its aboriginal-title claim.[325] While the doctrine's exclusivity prong is particularly problematic for land through which many parties passed, like the Valles Caldera, victory remains within the Pueblo's reach. Alongside the Land Back movement, its case has garnered wide support. Federal Indian law experts have filed an amicus brief with the Tenth Circuit arguing that Jemez Pueblo should be allowed to present oral-history evidence in support of its aboriginal-title claim.[326] Even more significantly, other Pueblos—whose presence in the Caldera might be most likely to defeat Jemez Pueblo's exclusivity claim[327]—have also filed a brief in support of Jemez Pueblo.[328]

Whatever the ultimate merits determination in *Jemez*, the case's earlier, jurisdictional phase demands renewed attention from scholars, courts, and potential claimants in *McGirt*'s wake. For lower federal courts, the Tenth Circuit's decision demonstrates how to implement the Supreme Court's message in *McGirt*, despite past case law. For Land Back supporters, *Jemez* forecasts how *McGirt* reanimates aboriginal-title claims to millions of acres in the Southwest.[329]

McGirt, in turn, revives and expands the *Jemez* decision's implications beyond the Tenth Circuit's jurisdiction. The ramifications of *McGirt*, as foreshadowed in *Jemez*, could be particularly powerful for California, given its distinctly extreme history regarding extinguishment of aboriginal-title rights. Scholars[330] and courts[331] have claimed that all aboriginal title in California was categorically extinguished by the Land Claims Act of 1851. The Act required all persons

n.88. Otherwise stated, on remand, the district court elided the questions of whether aboriginal title ever existed, which implicates exclusivity, and whether title has since been extinguished, which pivots on Congress's subsequent actions only. *Id.* at 1126 (stating "[i]f Jemez Pueblo only had to show that it possessed aboriginal title at one point and then never abandoned the land or had it extinguished, the Court would conclude that Jemez Pueblo has established aboriginal title to Banco Bonito" before 1650, but then concluding that Jemez Pueblo lacked aboriginal title because its use became nonexclusive in later centuries).

325. *Pueblo of Jemez*, No. 20-2145 (10th Cir. Oct. 16, 2020).

326. Brief of 9 Professors of Indian Law as *Amici Curiae* in Support of Appellant and Reversal, *Pueblo of Jemez*, No. 20-2145 (10th Cir. Feb. 15, 2021).

327. *See, e.g.*, *Pueblo of Jemez*, 430 F. Supp. 3d at 1219-29 (discussing expert testimony on other pueblos' use of the Valles Caldera—specifically, the Zia, Kewa (formerly Santo Domingo), Sandia, Cochiti, Tesuque, Pojoaque, San Ildefonso, Santa Clara, and Ohkay Owingeh (formerly San Juan) Pueblos—as substantially interfering with Jemez Pueblo's traditional use).

328. Brief of Amici Curiae Kewa Pueblo et al. in Support of Plaintiff-Appellant, *Pueblo of Jemez*, No. 20-2145 (10th Cir. Feb. 16, 2021).

329. *See* Newton, *supra* note 115, at 830.

330. *See, e.g.*, Bruce S. Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 PAC. L.J. 391, 458-60 (1986).

331. *See, e.g.*, Robinson v. Jewell, 790 F.3d 910, 918 (9th Cir. 2015) (noting that "[s]ubsequent case law established that the Act of 1851 fully extinguished any existing aboriginal title" in California (citing Barker v. Harvey, 181 U.S. 481, 491-92 (1901))).

"claiming lands in California by virtue of any right or title derived from the . . . Mexican government" to present their claims to a three-person Board of Land Commissioners (the Commission), appointed with the approval of the Senate, to decide the claims' validity.[332] The United States then issued confirmatory patents to those presenting valid title, while claims not presented by 1853 were regarded as abandoned and their land entered the public domain.[333] American Indians in California were not aware of the Act or its requirements, and did not bring claims before the Commission.[334] Because tribes failed to do so, courts have subsequently interpreted the Act as extinguishing all tribal aboriginal title to California's contiguous land,[335] islands,[336] and submerged lands.[337]

At minimum, *McGirt* complicates jurisprudence relating to aboriginal title in California. As the Ninth Circuit has noted, the Supreme Court has only stated that the Land Claims Act extinguished aboriginal title that stems from use or occupancy *before* 1851.[338] But *McGirt*'s focus on the specific tract at issue—as

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332. Act of Mar. 3, 1851, ch. 41, §§ 1, 8, 9 Stat. 631, 631-32.

333. *Id.* § 13.

334. Flushman & Barbieri, *supra* note 330, at 408 (citing Indians of Cal. *ex rel.* Webb v. United States, 98 Ct. Cl. 583, 592 (1942)).

335. Super v. Work, 3 F.2d 90, 91 (D.C. Cir. 1925) (extending the logic of *Barker v. Harvey*, 181 U.S. 481 (1901), to state that the Land Claims Act extinguished "roving band[s']" aboriginal title, as much as it extinguished "Mission Indians[']" aboriginal title), *aff'd per curiam*, 271 U.S. 643 (1926); United States v. Title Ins. & Tr. Co., 265 U.S. 472, 486-87 (1924) (concluding that title was extinguished because *Barker* had "affected many tracts of land in California . . . [and] [i]n the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers . . . [in] reliance on the decision"); *Barker*, 181 U.S. at 491 (concluding that "mission Indians[']" claim of permanent occupancy derived from the Mexican government was extinguished because they had not brought it before the Land Claims Act Commission by 1853); *see also* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198, 208-09 (1984) (clarifying that *Title Insurance* applied to aboriginal title).

336. United States *ex rel.* Chunie v. Ringrose, 788 F.2d 638, 646 (9th Cir. 1986) (holding that aboriginal title of the descendants of the Chumash peoples who occupied the Santa Barbara Islands was extinguished because the group had not presented its claim under the Land Claims Act).

337. *Id.*

338. *See id.* (suggesting that *Cramer v. United States*, 261 U.S. 219 (1923), indicates that aboriginal title might be unextinguished if it originated *after* 1851).

demonstrated in *Jemez*—indicates that aboriginal title may still exist for California land where that title stems from occupancy or use *after* 1851.[339] More profoundly, courts' and scholars'[340] conclusion that the Act extinguished all aboriginal title in California is in tension with *McGirt*'s insistence that "just as wishes are not laws, [Congress's] future plans aren't either."[341] The fact that the Act confirmed land patents previously granted by the Mexican and Spanish governments—and that non-American Indian settlement followed—does not necessarily mean that the resulting settlement was incompatible with traditional land use and occupancy. Nor did the Act's statement that unclaimed lands reverted to the "public domain of the United States" necessarily foreclose tribes' traditional land uses.[342] Absent clearer proof of congressional intent to extinguish *aboriginal-title* rights, inferring categorical extinguishment is, arguably, "confus[ing] the first step of a march with arrival at its destination."[343] Instead, as the Tenth Circuit demonstrated in *Jemez*, courts should implement *McGirt*'s insistence on unambiguous proof of congressional intent and narrow their evidentiary inquiry to the individual tracts at issue—considering whether non-American Indian settlement actually made traditional use impossible for the specific California parcel.[344]

McGirt's enforcement of the congressional-intent requirement may also revive aboriginal title across the American West. Western federal lands tend to be vast and sparsely developed, if developed at all. Once the congressional-intent inquiry is narrowed to evidence involving the specific tract at issue—as in

339. *See id. See also* Confederated Tribes of Warm Springs Rsrv. v. United States, 177 Ct. Cl. 184, 194 (1966) (observing that "[t]he time requirement [for establishing aboriginal title], as a general rule, cannot be fixed at a specific number of years"). In 1864, Congress passed "An Act to provide for the Better Organization of Indian Affairs in California," which superseded two prior congressional statutes authorizing the creation of five reservations in California. *See* Act of Apr. 8, 1864, ch. 48, 13 Stat. 39; Shermoen v. United States, 982 F.2d 1312, 1314-15 (9th Cir. 1992) ("[T]he Act of 1864 superseded the Act of 1853 by allowing only four reservations in California . . . ."). Since then, the Ninth Circuit has interpreted the 1864 Act as extinguishing any reservation rights established under the preceding two congressional statutes. *See* Robinson v. Jewell, 790 F.3d 910, 919 (9th Cir. 2015). But these statutes involved recognized-title, not aboriginal-title, rights. *See id.*

340. *See, e.g.*, *Barker*, 181 U.S. at 499; *Title Ins.*, 265 U.S. at 486-87; Flushman & Barbieri, *supra* note 330, at 419 (arguing that "a series of events and circumstances, rather than . . . a single, discrete 'plain and unambiguous' act"—including the Land Claims Act and a series of unratified federal treaties with only a handful of California tribes—extinguished all aboriginal title in the state of California).

341. McGirt v. Oklahoma, 140 S. Ct. 2452, 2465 (2020).

342. *See* Act of Mar. 3, 1851, ch. 41, § 13, 9 Stat. 631, 633.

343. *McGirt*, 140 S. Ct. at 2465.

344. *See supra* Sections II.B, III.B.

Jemez—it is "easy to see how a peaceful and private [tribe] might have used portions of [a] large area of land for its traditional purposes while one agreeable rancher was using portions of it for grazing livestock."[345] And where non-American Indian settlement and traditional land use coexisted and Congress has not spoken on extinguishment, courts cannot infer that it "exercise[d] . . . complete dominion adverse to the right of occupancy."[346] Among unextinguished claims, those involving land used for ceremonial purposes may be particularly successful at merits litigation, since tribes are most likely to have used ceremonial sites without interruption.[347]

Tribes with potentially live aboriginal title should monitor federal actions involving their ancestral land—particularly, executive orders—and be prepared to file claims before the QTA's twelve-year statute of limitations expires.[348] The statute's countdown begins once a federal encroachment occurs, even if clearly invalid,[349] and courts interpret the twelve-year limitation period in favor of the United States when ambiguous.[350] A centralized database for tracking federal land acquisitions or claims would avoid redundant efforts and, hopefully, decrease the burden on any one tribe.

As Land Back has already demonstrated in other contexts, creativity in *McGirt*'s application can accelerate American Indian land-restoration goals. The decision also holds promise for those who choose paths other than litigation. In reviving aboriginal-title claims, *McGirt* could pressure the Executive as much as it directs the judiciary. *McGirt* renews the relevance of aboriginal-title doctrine—whether through increased publicity or leverage derived from actual or potential

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345. Pueblo of Jemez v. United States, 790 F.3d 1143, 1165 (10th Cir. 2015).

346. United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1947).

347. *See Pueblo of Jemez*, 790 F.3d at 1165 (stating that, to establish aboriginal title, tribes must show "actual, exclusive, and continuous use and occupancy 'for a long time' of the claimed area" (quoting Native Vill. of Eyak v. Blank, 688 F.3d 619, 622 (9th Cir. 2012))).

348. In contrast to claims against the federal government under the QTA, no statute of limitations governs federal common-law actions against other parties—such as states or private individuals—although the applicable state's statute of limitations may be borrowed and applied to the federal claim. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240-41 (1985). Thus, claimants may have viable suits against other parties, even if their claims against the federal government are time-barred.

349. *See, e.g.*, Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 769 (4th Cir. 1991) ("The merits of a quiet title claim are irrelevant to the operation of the limitations bar. The interest claimed need not amount to full legal title in the United States. As long as the interest claimed is a 'cloud on title,' . . . it constitutes a 'claim' for purposes of triggering the twelve-year statute of limitations." (citations omitted)).

350. *See* Rio Grande Silvery Minnow (Hybognathus Amarus) v. Bureau of Reclamation, 599 F.3d 1165, 1176 (10th Cir. 2010) ("The twelve-year limitations period is strictly construed in favor of the United States.").

litigation. With aboriginal title figuring more prominently in legal and public discourse, tribes with possible claims would have more bargaining power in negotiations with the United States for joint management of public lands or other land-use or stewardship arrangements. Tribes can use existing joint-management partnerships in the United States[351] and abroad[352] as models. Federal courts should be prepared to execute such arrangements, given their experience implementing joint-management agreements in other contexts.[353] Similarly, renewed attention to unextinguished aboriginal-title land claims could support Land Back lobbying efforts for congressional land grants.[354]

McGirt marks a new era for aboriginal-title doctrine if courts implement—as they should—the Supreme Court's directive to hold the government to its word.[355] Federal courts must require unambiguous, specific proof that Congress intended to extinguish aboriginal title. To do otherwise would "elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."[356] By "for the first time in centuries . . . enforc[ing] [the law] as written," *McGirt* can restore aboriginal title's promise.[357]

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351. *See, e.g.*, Proclamation No. 10285, 86 Fed. Reg. 57,321 (Oct. 15, 2021) (reestablishing the Bears Ears Commission); Establishment of the Bears Ears National Monument, Proclamation No. 9558, 3 C.F.R. 9558 (2017) (establishing the Bears Ears Commission to "provide guidance and recommendations" on the Monument's management and stating the Commission would consist of one elected officer each from the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and Zuni Tribe).

352. *See, e.g.*, *Joint Management*, PARKS AUSTL., https://parksaustralia.gov.au/uluru/about/joint-management [https://perma.cc/8C4V-L82F] (describing how, since the Uluṟu-Kata Tjuṯa National Park was returned to its traditional owners in 1985, traditional Aṉangu law has guided decisions involving the park, and it has been jointly managed by Aṉangu and the Australian government through a board of management that includes eight aboriginal members nominated by Aṉangu, three members nominated by various Australian officials and approved by Aṉangu, and the Director of National Parks).

353. For example, interagency joint-management agreements, such as the Forest Service and the Bureau of Land Management (BLM), have existed for decades. Santa Rosa and San Jacinto Mountains National Monument in Southern California, the Browns Canyon National Monument in Colorado, the Berryessa Snow Mountain National Monument in Northern California, and, most recently, Bears Ears National Monument in Utah are all managed by the Forest Service and BLM in tandem. *See Bears Ears National Monument: Questions and Answers*, U.S. DEP'T AGRIC. FOREST SERV., https://www.fs.usda.gov/sites/default/files/bear-ears-fact-sheet.pdf [https://perma.cc/VH4L-FN8R].

354. *See supra* notes 9-10 and accompanying text.

355. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

356. *Id.* at 2482.

357. BANNER, *supra* note 13, at 293.