Getting Back What Was Theirs? The Reparation Mechanisms for the Land Rights Claims of the Maori and the Navajo

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I. Introduction

The Maori people of New Zealand and the Navajo tribe of the southwestern United States were both subjugated by powerful expansionist nations during the nineteenth century. Great Britain gained control of the islands of New Zealand from the Maori in 1840, while the United States defeated the Navajo during the 1860s. Both Great Britain and the United States destroyed the autonomy of these indigenous groups, confiscated their lands, and imposed European-style land title systems that were far removed from the traditional modes of land use and occupancy practiced by the Maori and the Navajo.

During the twentieth century, each indigenous culture has tried to regain some of the sovereignty it has lost by attempting to reclaim traditional tribal lands that were unfairly purchased or outrightly stolen. The legal mechanisms through which the Maori

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1. In 1838, the British government decided upon partial annexation of New Zealand. 13 ENCyclopedia BRITANNICA 51 (1981). It appointed William Hobson as lieutenant governor and consul to the Maori chiefs in 1839. Id. He then went about annexing the whole country; the North Island by the right of cession from the Maori chiefs, and the South Island by the right of discovery. Id.

2. After years of conflict, the Navajos were driven into exile at Fort Sumner in eastern New Mexico by United States government troops under the command of Kit Carson. DAVID M. BRUGGE, THE NAVAJO-HOPI LAND DISPUTE 22-23 (1994). They lived there in misery until the negotiation of their final treaty in 1868. Id. The Navajo Nation, as the largest American Indian nation in the United States, is being presented as an example of the United States' treatment of native cultures. In no way is the selection of the Navajo Nation as an illustrative example meant to belittle the experiences of other American Indian cultures with the dominance of the United States. The Navajo Nation is employed because of its extensive tribal government and judiciary, which affords a clear picture of how American Indian tribal governments function.

3. See infra Part II for a discussion of Great Britain's transformation of land rights in New Zealand, and the United States' subjugation of the Navajo and subsequent grants of land through the reservation system.
and the Navajo assert their traditional land rights offer insights into the effectiveness of each country's attempts at reparation for the misdeeds of the nineteenth century. In an era in which the rights of indigenous peoples are being increasingly recognized, these systems offer insight into the current attitudes of two of the leading expansionist powers of the nineteenth century toward the cultures they subjugated.

This Comment will examine the reparation mechanisms afforded to the Maori in New Zealand and the Navajo in the United States for their respective land rights claims and will address the effectiveness of each system in attempting to resolve these claims. Part II will detail the historical background of each system and the creation of the institutions which have jurisdiction to hear the land rights claims of each culture. Part III will employ a comparative analysis of the reparation mechanisms, using the legal frameworks of each system. Part IV will compare and contrast results from each system in terms of case decisions and claim settlements. Finally, Part V will address the question of which system is more effective in making reparations to its indigenous peoples for the wrongful takings of land during the nineteenth century.

II. Historical Background: Evolution of the Mechanisms for the Land Rights Claims of the Maori and Navajo

Both the Maori and the Navajo came under forced external rule during the middle of the nineteenth century. The British Empire was experiencing worldwide expansion, and in New Zealand this came at the expense of the Maori. At the same

4. Native groups around the world have been increasingly moving to establish rights to natural resources and sovereignty. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 7 (1993). Within the past twenty years, concern for indigenous groups has assumed a prominent place on the international human rights agenda. S. James Anaya, Indigenous Rights Norms in Contemporary International Law, 8(2) ARIZ. J. INT’L & COMP. L. 1, 4 (1991). During the 1970s, indigenous peoples organized and extended their efforts to secure legal protection for their continued survival as distinct communities. Id.

5. Before the annexation of New Zealand had been proclaimed, the first organized settlement of an English colony was underway. 13 ENCYCLOPEDIA BRITANNICA 51 (1981). The New Zealand Association, a private company, was formed in 1837 to effect the colonization effort. Id. A survey ship was sent to the islands in 1839, with agents on board instructed to buy land privately before British annexation and the subsequent government monopoly on land sales became effective. Id. The Association, through skillful propaganda and outright trickery and brutality, enforced its land claims created by these "purchases" from the
time, in North America, there was continuing westward movement by the United States under the rubric of "Manifest Destiny" as the nation outgrew the confines of the eastern part of the continent. In each case, expansion came at the expense of the indigenous cultures because the dominating powers would not allow them to coexist as sovereign entities.

A. The Maori under the Treaty of Waitangi

The 1840 Treaty of Waitangi, between the British Crown and the indigenous Maori chiefs of New Zealand, remains a source of controversy. The Crown's representative and the Chiefs of the Maori Tribes signed the Treaty on February 6, 1840. In the Treaty, the Maori chiefs ceded their sovereignty over New Zealand to the British and gave the Crown the exclusive right to purchase Maori land in return for British subjecthood and a guarantee from the Crown to respect Maori ownership of tribal lands, fisheries, and other resources. The Treaty is the cornerstone of New Zealand law, since the state derives its authority over the Maori from the sovereignty of the Crown, which flows from the consent ceded by the Treaty. The Treaty created a form of protectorate; the Crown is bound to protect the property rights of the Maori, while in turn exercising external sovereignty over them. An example Maori against all rivals, whether British or Maori. Id.

6. In 1845 a New York editor wrote in the Democratic Review that it was America's "manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the great experiment of liberty and federated self-government entrusted to us." John M. Blum et al., The National Experience 276 (1981). This Doctrine of Manifest Destiny was in part the kind of rationalization that expansionists everywhere have used to justify territorial expansion. Id. This involves proclaiming the superiority of their own culture and insisting that their conquests merely fulfill a divine mission and are impelled by forces beyond human control. Id.


8. New Zealand is part of the British Commonwealth, so the King or Queen of England (the "Crown") is recognized as the nominal head of state. See generally Paul McHugh, Maori Magna Carta 48-49 (1991).

9. Treaty of Waitangi, supra note 7. The Treaty was signed by the Chiefs of the Confederation of the United Tribes of New Zealand, as well as separate and individual Maori Chiefs who were not members of the Confederation. Id. William Hobson, Lieutenant Governor of New Zealand, was empowered to sign for the Crown. Id.


11. McHugh, supra note 8, at 2.

12. Id. at 5.
of such external sovereignty is the ability of the Crown to represent all of New Zealand in foreign affairs.

Although the text of the Treaty is written in both English and Maori, there is a basic discrepancy concerning a key term of the compact. In the Treaty, the English word “sovereignty” was translated into the word kawanatanga, which in Maori means “governorship.” Thus, the Maori believed that they did not cede actual sovereignty; rather, they understood the Treaty to give the British governorship of the islands. Many claims that the Maori have lodged against the Crown stem from this problem of interpretation of whether the Maori ceded their lands or merely the governorship of their lands.

The Treaty of Waitangi contains three articles, each delineating the specific rights and responsibilities of each party. Article One states that the Maori Chiefs cede to the Queen of England “absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess . . . .” Article Two confirms and guarantees to the Maori the full, exclusive and undisturbed possession of their lands and fisheries; however, the Maori agree to yield to the Crown the “exclusive right of preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon . . . .” Finally, Article Three extends to the Maori the protection of the Crown and grants them all of the rights and privileges of British subjects. Following the Treaty, vast tracts of tribal land began to pass out of Maori hands as the Crown purchased land cheaply and unabatedly from Maori Chiefs unaccustomed to the concept of European property title. This is one example of how the Maori were unwittingly led into inequitable land sales to the Crown.

To regulate this mass transfer of native land into British-style alienated land titles, the Crown promulgated the Native Lands Act of 1862, which established the Native Land Court, the precursor to the modern Maori Land Court. The preamble to the Act gave

13. Id. at 3.
14. Id. at 4.
16. Id.
17. Id.
19. Id. at 122.
four reasons why the Court was necessary: (1) to honor the guarantee in the Treaty of Waitangi which recognized the exclusive possession of Maori lands;\(^\text{20}\) (2) to preserve the Crown’s exclusive right of preemption over lands that the Maori wished to alienate;\(^\text{21}\) (3) to promote the joint advancement of European settlement and the civilization of the Maori by way of assimilating Native lands into the British law of land ownership;\(^\text{22}\) and (4) to establish courts to ascertain and define Maori rights to land.\(^\text{23}\) This final reason signifies to many Maori the Crown’s colonialistic view of the Maori—the British property title system is inherently more civilized and therefore preferable to the traditional modes of land ownership practiced by the Maori.

The Native Lands Act of 1865 created and activated the Native Land Court, with the underlying purpose of extinguishing the proprietary rights of traditional land owners and converting their rights into a type of title which could be recognized and handled by the British-style legal system.\(^\text{24}\) Further legislation, such as the Native Land Act of 1873, which required the recording of all tribal owners of land and a listing of all those who possessed an interest in the land, implemented this conversion of land title.\(^\text{25}\) The introduction of English rules of title descent, with equitable division of title among heirs, was in direct contrast with traditional Maori allocation, which depended on status and the actual use and habitation of the land in question.\(^\text{26}\) After the establishment of the Native Land Court, fragmentation of traditional Maori titles and alienation of indigenous land continued methodically throughout the 1800s and into the twentieth century.\(^\text{27}\)

The Native Appellate Court was created in 1894 to hear appeals from the Land Court.\(^\text{28}\) From the Native Appellate Court there was no direct right of appeal, but questions of law, such as statutory interpretation, could be stated to the High Court.\(^\text{29}\) In

\(^{20}\) Id.  
^{21}\) Id. at 123.  
^{22}\) Id.  
^{23}\) Gilling, supra note 18, at 123.  
^{24}\) Id. at 135.  
^{25}\) Id. at 131.  
^{26}\) Id. at 135.  
^{27}\) See generally id. at 131-32.  
^{28}\) Gilling, supra note 18, at 135.  
^{29}\) Id. at 136. The High Court is a superior court of original jurisdiction and, subject to its inability to strike down acts of Parliament, is of unlimited jurisdiction. 2 MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.5(A)(4) (1991). The Court of Appeal is the final appellate court in the New Zealand legal system. Id.
1953, the Maori Affairs Act renamed the Courts the Maori Land Court and Maori Appellate Court, and shifted the Courts' emphasis to the retention and more effective utilization of Maori land because the largest blocks of land had already passed out of Maori hands. The 1993 Maori Land Act, the first major piece of legislation affecting Maori land in forty-five years, confirmed the Maori Land Court and strengthened the recent shift toward retention rather than alienation of Maori land. The 1993 Act bans the alienation of existing Maori customary land and makes the process of alienation of Maori freehold land more stringent. Since its beginnings, the Maori Land Court has shifted in purpose from stridently aiming to alienate Maori land in the past to retaining the traditional rights of Maori over their lands in the modern era. This has been due partly to the growing concern worldwide over indigenous peoples' rights, as well as to the shift in focus of the Land Court to determining partition and succession within remaining Maori lands.

The other institution involved in Maori land rights claims is the Waitangi Tribunal, created in 1975 by the Treaty of Waitangi Act. The Tribunal investigates and reviews Maori claims of grievance against the Crown; however, its role is not strictly related to claims concerning land. Its purpose also includes extending review of claims back to 1840, thus opening the operations of the Native/Maori Land Court to historical and legal scrutiny in the face of the growing pressure from the Maori to redress the wrongs

§ 1.5(A)(5). It hears appeals dealing only with matters of law, and thus, does not normally hear evidence. Id. The decision of the High Court on any case transferred to it under section 72(1) of the Maori Land Act of 1993 may be appealed to the Court of Appeal. Jeremy McGuire, The Status and Functions of the Maori Land Court, 8 OTAGO L. REV. 125, 132 (1993). The issue may also be removed to the Court of Appeal by the Chief Judge of the Maori Land Court under section 77(2). Id. However, it "is not clear whether the decision of the High Court or Court of Appeal on any case stated under section 77(3) is binding and final on the Land Court and Appellate Court, or whether there is still a residual right of appeal to the [Judicial Committee of the] Privy Council." Id. The Judicial Committee of the Privy Council is the final forum for appeal in New Zealand, and appeals to it are usually exercised only in the most important and difficult cases. 2 MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.5(A)(5) (1991).

30. See Gilling, supra note 18, at 136-137.
32. Gilling, supra note 18, at 137.
33. Id. See infra note 65 for a discussion of land classification in New Zealand.
34. See supra note 4.
35. See Treaty of Waitangi Act, 1975 (N.Z.). The Waitangi Tribunal will be referred to as the "Tribunal" throughout this Comment.
committed by the Crown.\textsuperscript{37} The decisions of the Tribunal are advisory, but as the major forum for Maori to assert land rights issues, they carry tremendous weight with the courts and the government.\textsuperscript{38} The Tribunal is the primary institution for redressing wrongs committed against the Maori in the past,\textsuperscript{39} and thus, is essential to the reclamation of traditional Maori property rights.

B. The Navajo Under the United States Federal Government

The Navajo Nation is the largest federally recognized American Indian Nation in the United States, providing essential government services within a territory of more than 25,000 square miles located within the states of Arizona, New Mexico, and Utah.\textsuperscript{40} Treaties signed in 1849 and 1868 establish and govern the relationship between the Navajo Nation and the United States.\textsuperscript{41} The 1849 Treaty placed the Navajo Tribe under the jurisdiction of the United States.\textsuperscript{42} This Treaty was signed pursuant to the Treaty of Guadalupe Hidalgo of 1848 that ended the Mexican War, in which the United States acquired much of the modern-day Southwest, including the Navajo territory that had been previously claimed by Mexico.\textsuperscript{43}

The 1868 Treaty, signed after escalating tension and outright conflict due to increasing expansion into Navajo land, confirmed the jurisdiction of the United States over the Navajo granted in the

\begin{itemize}
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} Id. There is no follow-up mechanism allowing the Tribunal to check the response of the Crown to its recommendations or the state of any pursuant negotiations between the Crown and the Maori. MCHUGH, supra note 8, at 316. Clearly, any display of bad faith by the Crown itself would be a breach of Treaty principles. Id. However, since the general idea of the Treaty is a continuing, inseverable partnership between the parties requiring consensus and harmony through agreed and negotiated patterns of conduct, decisions of the Tribunal have the practical effect of being legally binding. Id.
  \item \textsuperscript{39} See Gilling, supra note 18, at 138.
  \item \textsuperscript{40} Tribal Rights in Private Property Cases: Hearings Before the Senate Committee on Indian Affairs, 104\textsuperscript{th} Cong., available in 1996 WL 10831410 at \*1 (statement of Herb Yazzie, Attorney General of Navajo Nation) [hereinafter Yazzie].
  \item \textsuperscript{41} Id.
  \item \textsuperscript{42} Treaty with the Navajo, Sept. 9, 1849, U.S.-Navajo Indian Tribe, 9 Stat. 974. The Treaty guaranteed that "perpetual peace and friendship shall exist" between the Navajo and the United States. Id. In addition, the Treaty allowed the United States to build military posts and agencies on Navajo land, and provided for the United States to adjust the territory of the Navajo so as to "remove every possible cause that might disturb their peace and quiet." Id.
  \item \textsuperscript{43} See Treaty of Guadalupe Hidalgo, 1848, U.S.-Mexico, 9 Stat. 922.
\end{itemize}
1849 Treaty. In addition, it set the boundaries of the Navajo reservation and provided that “[t]he United States may pass such laws on the subject of alienation of property between the Indians and their descendants as may be thought proper.” The Treaty further provided that no cession of reservation land is valid unless three-fourths of the adult male population occupying the land agrees to the sale or transfer. These two Treaties laid the foundation for the modern land rights system on the Navajo reservation.

The Treaties brought the Navajo under the auspices of the Bureau of Indian Affairs of the United States Department of the Interior. Administration of the Navajo reservation continued under the delegated authority of the Bureau of Indian Affairs until 1934, when growing reform sentiment culminated in the Indian Reorganization Act (IRA). Under the IRA, tribes were to draft their own constitutions, adopt their own laws, and set up their own court systems. Therefore, the IRA was a major step towards the recognition of the limited sovereignty of Native American tribes over their lands.

Pursuant to the IRA, the Navajo Tribal Council created a constitution for the Navajo Nation and passed resolutions establishing the Navajo Nation government and the Tribal Courts. The Navajo Nation Council, consisting of eighty-eight elected members that serve four-year terms, governs the Navajo Nation. Executive power is wielded by the President of the Navajo Nation, who is popularly elected from the eligible voters of the Navajo Nation and represents the tribe in its dealings with external governmental bodies. The President has the full authority to conduct, supervise and coordinate personnel and programs of the Navajo Nation. The President has the power to appoint boards, com-

44. Treaty with the Navajo, June 1, 1868, U.S.-Navajo Indian Tribe, 15 Stat. 667.
45. Id.
46. Id.
47. See generally GETCHES, supra note 4, at 415-18.
48. Id. at 495.
51. 2 N.N.C. §§ 102, 105 (Navajo Nation Government 1995).
52. See 11 N.N.C. § 1 et seq. (Elections 1995).
53. 2 N.N.C. § 1005 (Navajo Nation Government 1995). The President and Vice-President serves four year terms, with two-term limitations in office. Id. § 1002.
missions and other entities, to negotiate and execute contracts, and to veto Nation Council legislation. Finally, the President has the duty to represent the tribe in negotiations with governmental and private agencies and to meet with many off-reservation organizations and groups in order to create a favorable opinion of and goodwill toward the Navajo Nation.

The Navajo have their own tribal judicial system, which includes seven District Courts throughout the Navajo Nation and the Navajo Nation Supreme Court. The courts were created by Title Seven of the Navajo Nation Code, pursuant to the IRA. Land claims are handled primarily by federal courts and, until 1978, the Indian Claims Commission because the tribal courts do not have jurisdiction to hear federal claims. The Indian Claims Commission (ICC) was created in 1946 to hear suits brought by tribes, bands, or other identifiable groups of Indians against the United States for unlawful takings of land. As such, the ICC was the major forum for the lands rights claims of the Navajo against the United States. Finally, the property rights of the Navajo are asserted by the Navajo Nation Bill of Rights of 1967 and the Indian Civil Rights Act of 1968. Thus, the Navajo have

54. Id. § 1005.  
55. Id.  
56. Yazzie, supra note 40, at **2-3. The District Courts are located at Window Rock, Kayenta, Chinle, and Tuba City, Navajo Nation (Arizona) and at Crownpoint, Shiprock, and Ramah, Navajo Nation (New Mexico). Id. at *3 & n.5. The Supreme Court is located at Window Rock, Navajo Nation (Arizona). Id. at **2-3.  
57. See 7 N.N.C. § 201 et seq. (Courts and Procedure 1995).  
60. Yazzie, supra note 40, at *4. See also Navajo Nation Bill of Rights of 1967, 1 N.N.C. § 1 et seq. (General Provisions 1995); Indian Civil Rights Act of 1968, 25 U.S.C.A. § 1301 et seq. (West 1996). The Navajo Bill of Rights is more expansive and protective of individual rights than the Bill of Rights within the United States Constitution. Yazzie, supra note 40, at *4. It extends to the basic civil rights under the Constitution, but also mandates that private property shall not be taken nor its lawful private use be impaired for public or governmental use without just compensation. Id. The Indian Civil Rights Act (ICRA) imposed requirements on the tribes similar to the constitutional restraints on the states and the federal government. GETCHES, supra note 4, at 499. The ICRA was enacted because Indian tribes are not subject to the Bill of Rights and other Constitutional guarantees limiting the federal and state governments. Id. The Supreme Court has held that the powers of local self-government enjoyed by the Indian tribes existed prior to the Constitution, and, thus, are not operated on by the Fifth Amendment. See Talton v. Mayes, 163 U.S. 376 (1896).
a narrowly structured system within which they may pursue claims against the United States for the unfair takings of land during the nineteenth century.

III. The Maori and Navajo Mechanisms: A Comparative Analysis

A. The Maori Courts in the Legal System of New Zealand

The Land Court, Appellate Court, and Waitangi Tribunal are all integral parts of the legal system of New Zealand. The Maori Land Act of 1993 continues the Maori Land Court and Appellate Court as Courts of record, meaning that each is an established court that has the power to fine or imprison for contempt or other substantive offenses. New Zealand law states that “[a] Land Court was first established by the Native Lands Act of 1862, but it was not effective until the Native Land Court was established as a Court of record by the Native Lands Act of 1865.” Likewise, the Maori Appellate Court was established as a Court of record by the Native Land Court Act in 1894. The Waitangi Tribunal is not a Court of record, and thus does not have all of the powers inherent in such a Court. Nevertheless, it plays an influential role in Maori affairs because it is the primary legal mechanism by which the Maori may reclaim land.

1. The Maori Land Court.—The stated objectives of the Land Court are the promotion and assistance in retention of Maori land and General land owned by Maori and “the effective use, management, and development, by or on behalf of the owners, of Maori

61. See Laws of New Zealand (L.N.Z.) Courts § 213 (Butterworths, LEXIS through 1997). The distinction between Courts of record and those not of record “was once important, affecting both the jurisdiction to fine or imprison and the conclusiveness of the Court’s decision.” Id. § 5. Currently, “the distinction is of little more than historical interest, for all Courts, other than the employment Tribunal and Coroners Court, are expressly declared by statute to be Courts of record.” Id. Without such a statutory declaration, the “test seems to be in general whether the Court has the power, by statute or otherwise, to fine or imprison for contempt or for other substantive offenses; if it has such power, it appears to be a Court of record.” Id.
62. Id. § 213.
63. Id. § 221.
64. See id. § 5 (The Tribunal is not listed in note 3 as being a Court of record).
In accomplishing these objectives, the Court

is directed to seek to achieve the further goals of ascertaining and giving effect to the wishes of landowners; of keeping them informed of and giving them opportunity to discuss proposals relating to their land; of resolving disputes between owners; of giving protection against oppressive majority interests or unreasonable minority interests; of ensuring fairness in dealings with the owners of land in multiple ownership; and of promoting practical solutions to problems arising in the use or management of land.66

These stated goals are reflected in the general and specific jurisdictions of the Land Court.

The Land Court "may hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in such land, or in the proceeds from the alienation of any such right, title, estate, or interest."67 The Court also "has jurisdiction to hear and

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65. L.N.Z. Courts § 218 (Butterworths, LEXIS through 1997). Land in New Zealand has one of six statuses under the Maori Land Act of 1993. Land is either (1) Maori customary land; (2) Maori freehold land; (3) General land owned by Maori; (4) General land; (5) Crown land; or (6) Crown land reserved for Maori. Maori Land Act, 1993, § 129(1). Maori customary land "is land held by Maori in accordance with tikanga Maori (Maori customary values and practices)." Id. § 129(2). Land that has been determined to be under beneficial ownership of Maori by freehold order of the Land Court is Maori freehold land. Id. The status of General land owned by Maori is conferred on land that "has been alienated from the Crown for a subsisting estate in fee simple and that is beneficially owned by more than four persons of whom a majority are Maori." Id. "Land (other than Maori freehold land and General land owned by Maori) that has been alienated from the Crown for a subsisting estate in fee simple [has] the status of General land." Id. Crown land is land vested in the Queen which is not for the time being set aside for any public purpose or held by any person in fee simple; essentially, it is land that has not been alienated from the Crown. L.N.Z. Crown Land § 27 (Butterworths, LEXIS through 1997). Finally, land that has not been alienated from the Crown but is set aside or reserved for the use or benefit of the Maori is Crown land reserved for Maori. Maori Land Act, 1993, § 129(2). Maori customary land is inalienable by anyone, regardless of interest in the land. Id. § 145. Under the Maori Land Act of 1993, the alienation of Maori freehold land is strictly regulated. Id. § 146. The Maori Land Court has jurisdiction to determine and declare the status of any tract of land, whether or not the matter involves a question of law. Id. § 131.


67. L.N.Z. Courts § 219 (Butterworths, LEXIS through 1997). The decisions of the Land Court and Appellate Court are not published or reported. Gilling, supra note 18, at 117. The decisions of each Court are only found in the registries
determine any claim for damages for trespass or other injury to Maori freehold land, and any proceeding founded on contract or tort where the debt, damage or demand relates to such land.”68 The jurisdiction of the Land Court “may be exercised upon the application of any person having an interest in the matter pending, or the Minister of Maori Affairs, or the chief executive of the Ministry of Maori Development . . . .”69 Additionally, the Court “may grant leave to any person, body, or association to apply to the Court for exercise of jurisdiction when the Court is satisfied that the issue is of great importance to the Maori people . . . .”70

Specifically, the “Land Court has exclusive jurisdiction to control the alienation of Maori freehold land, to determine the succession on intestacy to Maori freehold land, to constitute and control certain trusts of Maori land or General land owned by Maori, and to [issue] partition, amalgamation, and other orders in order to rationalize Maori land holdings and to provide access to land.”71 Further, concurrently with other Courts,72 the Land Court “has a limited jurisdiction to grant interim or final injunctions for the protection or preservation of Maori freehold land and of the subject matter of proceedings pending before the Land Court or Appellate Court.”73 The Waitangi Tribunal may refer to the Land Court “any question relating to the Maori or group of Maori to whom any land or interest in land vested in a [Crown] enterprise is to be returned pursuant to a recommendation of the

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68. L.N.Z. Courts § 219 (Butterworths, LEXIS through 1997).
69. Id. (referring to Maori Land Act, 1993, § 37(1)).
70. L.N.Z. Courts § 219 (Butterworths, LEXIS through 1997).
71. Id. § 220. See generally Maori Land Act, 1993, Parts IV, VII, VIII, XII, XIV (The Land Court does not handle issues concerning Maori customary land, because tikanga Maori (Maori customary values and practices) govern matters relating to Maori customary land).
72. See Grace v. Grace [1995] 1 N.Z.L.R. 1, 4 (CA). The Court of Appeal held that the Land Court does not have exclusive jurisdiction over Maori freehold land in relation to a trust affecting such land, because this involves the inherent jurisdiction of the High Court over trusts affecting land. Id.
While the parties retain the right of appeal, the decision of the Court is otherwise binding on the Tribunal.  

2. The Maori Appellate Court—The jurisdiction of the Maori Appellate Court is, by nature, more limited than that of the Land Court. The Appellate Court consists of any three Judges of the Land Court who, when sitting together, have the power to act as the Appellate Court. The Appellate Court has jurisdiction to hear and determine appeals from any final order of the Land Court, unless this jurisdiction is expressly waived. An appeal from an order “may be brought by or on behalf of any party to the proceedings in which the order was made, or by any other person bound by the order or affected by it.” This includes appeals against decisions of the Land Court on questions referred to it by the Waitangi Tribunal. An appeal may also be brought from a provisional or preliminary determination of the Land Court made in the course of any proceeding with leave from the Land Court. However, “when an appeal against a provisional or preliminary determination has been determined by the Maori Appellate Court, no further appeal may be brought from any final order made in the proceedings by the Land Court, so far as that order conforms with the decision of the Maori Appellate Court.” Additionally, the High Court may state a case to the Appellate Court on a matter relating to the rights or interests of Maori in land “or on any question of tikanga Maori (Maori customary values and practices).” Appeals are held by rehearing before the Court, with the evidence provided by the record of the Land Court; if additional evidence is needed, it may be allowed by leave of the Appellate

75. Id.
76. L.N.Z. Courts § 221 (Butterworths, LEXIS through 1997) (referring to Maori Land Act, 1993, §§ 51(1), (2)).
77. L.N.Z. Courts § 222 (Butterworths, LEXIS through 1997) (referring to Maori Land Act, 1993, § 58(1)).
78. L.N.Z. Courts § 222 (Butterworths, LEXIS through 1997); See also Maori Land Act, 1993, §§ 58(2), (3) (the time for appealing is two months after the date of the order appealed from, or such further period as the Appellate Court may allow).
81. L.N.Z. Courts § 222 (Butterworths, LEXIS through 1997).
82. Id. § 224.
The Appellate Court may affirm, annul, dismiss, revoke, or vary the order that is appealed. In addition, "[i]t may substitute another order or direct the Maori Land Court to make another or a different order." Decisions are made by a majority of the judges, with ties affirming the order. Successive appeals may be brought, but subject-matter preclusion exists as a barrier in such appeals.

3. The Waitangi Tribunal.—The Waitangi Tribunal consists of the Chief Judge of the Maori Land Court, who sits as the Chair, and up to sixteen additional members, in equal amounts Maori and non-Maori, appointed by the Crown for three-year terms. Its main function "is to inquire into and make recommendations to the Crown upon claims submitted to it by Maori." The claims that are submitted revolve around the idea "that Maori are prejudicially affected by legislation, policies, acts, or omissions of the Crown inconsistent with the principles of the Treaty of Waitangi." If the Tribunal finds that a claim is valid, it may "recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future." The Tribunal is not confined to providing monetary compensation; it may propose broad policies for the long-term restoration of land.

Claims made to the Tribunal fall under “three categories: historical (past Crown actions), contemporary (current Crown actions), and conceptual (ownership of natural resources).” Jurisdiction to hear historical claims, which include major claims of large tribal losses as well as specific claims of particular losses, was granted in 1985. Most claims are presented tribally, with

83. Id. § 223. See generally Maori Land Act, 1993, §§ 54-57 (discussing Maori Appellate Court jurisdiction).
84. L.N.Z. Courts § 223 (Butterworths, LEXIS through 1997).
85. Id.
86. Id.
87. Id.
89. Durie, supra note 88, at 97. See also Treaty of Waitangi Act, 1975, § 5(1).
90. Durie, supra note 88, at 97. See also Treaty of Waitangi Act, 1975, § 6(1).
91. Treaty of Waitangi Act, 1975, § 6(3).
92. Durie, supra note 88, at 97. Decisions of the Waitangi Tribunal are issued in “Reports.” Id. at 103.
93. Id. at 98.
94. Id.
individual claims attached to the larger tribal claims. Historical claims cover a broad range of areas, such as the confirmation of pre-treaty purchases, Crown purchases under the Native Land Court system, confiscations and expropriations, title arrangements and land development under the Native Land Court system, and tribal autonomy. Contemporary claims include resource management policies, land administration, alienation of State assets by the Crown, and other Crown actions. Conceptual claims usually deal with Maori interests in the use and development of rivers, lakes, minerals, and geothermal resources, or in the outputs from the development of these resources. A major problem in the resolution of claims is the issue of representation, such as determining exactly who has an interest in a particular area. To aid in the determination of claims, the Tribunal may refer a question of customary representation to the Maori Appellate Court, or a question of modern representation to the Land Court.

The Maori thus have two forums in which to pursue land rights claims: the Land Court system and the Waitangi Tribunal. To affirm rights in land that they already possess, the Maori may use the Land Court system. While the Land Court was once the primary institution by which the Crown divested the Maori of their lands, it now exists as an effective mechanism for the retention and development of Maori land. This is due to the fact that the Maori Land Act of 1993 specified the role of the Land Court as the mechanism through which Maori land would be retained and developed. With the Land Court, the Maori are assured of a forum that has expertise in dealing with the particular issues and concerns of the Maori over their lands.

If the Maori have a claim to land that involves dealings with the Crown, they may pursue the claim through the Waitangi Tribunal. The Tribunal is a powerful tool for the Maori because it allows them to reclaim traditional land that was stolen or deceptively purchased by the Crown. While the decisions of the Tribunal are not legally binding, disavowance of a decision by the Crown or the Maori is tantamount to repudiating the Treaty and its spirit of

95. Id.
96. Durie, supra note 88, at 98.
97. Id.
98. Id. at 98-99.
99. Id. at 102.
100. Id. at 102-103.
101. See supra Part II.A.
harmony and partnership. In this capacity the Tribunal is an extremely effective way in which claims of the Maori can be compensated and the misdeeds of the Crown can be exposed. Thus, in the Land Court system and the Waitangi Tribunal, the Maori have particularly effective mechanisms by which their land rights claims may be satisfied.

B. The Navajo Nation and Limited Sovereignty

The Navajo have few mechanisms through which they may pursue land rights claims. The only way the Navajo could pursue claims against the United States was through the Indian Claims Commission, which had a five-year limitation on the filing of claims from 1946-51, after which the claim would be forfeited. Otherwise, the only way the Navajo can assert their land rights is through the Navajo Nation Court System, which has a limited jurisdiction, or by a detailed method of land acquisition.

1. The Indian Claims Commission.—Until 1946, Indian tribes could not pursue claims against the United States unless special permission was granted by Congress. While the Court of Claims was created in 1863 to hear claims against the United States, Congress did not grant it jurisdiction to hear Indian claims based on treaties, and sovereign immunity barred non-treaty claims. In 1946, Congress created the ICC following the recommendation of the Meriam Report, which concluded that existing modes of Indian claims settlement were inadequate. The ICC was a quasi-judicial body designed to hear and determine all Indian claims against the United States accruing prior to 1946. Appeals from decisions of the ICC went to the Court of

102. Indian Claims Commission Act of 1946, 25 U.S.C.A. § 70k (West 1976). Any claim that accrued before August 13, 1946, and which was not filed with the ICC by August 13, 1951, could not thereafter be submitted to any court or administrative agency for consideration or be submitted to Congress. Id. Claims accruing after 1946 would be adjudicated by the Court of Claims, which was conferred jurisdiction by the Act. Id. § 70v-3. The Court of Claims is now the Court of Federal Claims, and it continues to hold this jurisdiction. 28 U.S.C.A. § 1505 (West 1996).
103. Navajo Tribe v. New Mexico, 809 F.2d 1455, 1460 (10th Cir. 1987).
104. Id.
105. Id. The 1928 Meriam Report, an independent study conducted by the Institute for Government Research, recommended the establishment of an independent fact-finding commission to facilitate the judicial solution of outstanding Indian claims against the United States. Id.
106. Navajo Tribe, 809 F.2d at 1460.
Claims and then, if necessary, by certiorari to the Supreme Court of the United States.\textsuperscript{107}

Claims filed with the ICC could be pursued over treaties that were signed under duress or fraud, or for unlawful land takings by the government.\textsuperscript{108} Specifically, the ICC was to hear the following claims arising against the United States on behalf of any Indian tribe or group within the territorial limits of the United States:

(1) claims in law or equity arising under the Constitution, laws, or treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those based in tort if the claimant would have been entitled to sue in a U.S. court; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the government were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.\textsuperscript{109}

Thus, the treaties and contracts signed by the United States with Indian tribes during the nineteenth century would be closely examined for any hint of unfair dealing.

Relief granted by the ICC was limited to monetary compensation;\textsuperscript{110} therefore, land could not be recovered unless it was purchased from the current owner. The ICC made it clear that payment of any claim was a full and complete discharge of the United States' liability.\textsuperscript{111} In addition, interest has generally not been awarded in ICC decisions, based on the "no-interest" rule against recovering interest in claims against the United States.\textsuperscript{112} While the theory of the ICC was appreciated, the practice of the Commission led to some dissatisfaction among Indian claim-

\textsuperscript{107} CANBY, supra note 58, at 265.
\textsuperscript{110} Navajo Tribe, 809 F.2d at 1461. According to a subcommittee report, the ICC Act reflected a congressional policy that tribes with valid claims would be paid in money and no lands would be returned to a tribe. \textit{id.}
\textsuperscript{112} See GETCHES, supra note 4, at 313.
Chief among the complaints was that just compensation should include land, since the loss of traditional land was the reason for filing the claim to begin with. Additionally, the inability of the ICC to hear and determine claims concerning individual allotments of land left a large number of potential claimants without a remedy for their losses. The ICC was a noble attempt at reparations to Native Americans, but was not a completely effective mechanism for addressing their claims against the United States.

The ICC did solve many problems, however, as substantial relief was granted to many Indian tribes and groups. However, compared to the Waitangi Tribunal, the ICC pales in effectiveness because it could not return land as compensation. Now, of course, the Navajo may not pursue any claims regarding land against the United States, so clearly the Maori of New Zealand have superior mechanisms for the reclamation of traditional lands. Thus, while the ICC resolved many issues for Native Americans, its effectiveness is questionable when compared to the mechanisms in place in New Zealand that address similar claims against the government.

2. The Navajo Nation Courts.—The District Courts have original jurisdiction over all violations of Navajo Nation law committed within its territorial jurisdiction. The territorial jurisdiction of the Navajo Nation extends to Navajo Indian Country, which is defined as all land within the exterior boundaries of the Navajo Indian Reservation; this jurisdiction includes all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for,
owned in fee by, or leased by the United States to the Navajo tribe or any group of Navajos. Jurisdiction also extends to

all civil cases in which the defendant is a resident of Navajo Indian country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation; all cases involving the descent and distribution of deceased Indians' unrestricted property found within the territorial jurisdiction of the court; and all other matters initially vested in the Navajo Tribal Court of Indian Offenses, or which may be placed within the jurisdiction of the District Court by the Navajo Nation Council.

The Navajo Nation has sovereign immunity similar to that of the United States government.

The Supreme Court consists of the Chief Justice of the Navajo Nation and two Associate Justices. The Supreme Court has jurisdiction "to hear appeals from final judgments and other final orders of the District Courts and such other final administrative orders as provided by Navajo law." The Supreme Court is the court of final resort under Navajo Nation jurisdiction. Land rights cases that do not fall under the jurisdiction of the Navajo Nation judicial system go into local state court or federal court.

As a judicial system with limited jurisdiction to hear land rights claims, the Navajo Nation Courts play a minor role in the reclamation of traditional tribal lands.

119. Id. "Dependent Indian communities" are Indian communities that are outside the established reservation, but are sufficiently similar to communities inside the reservation so as to be considered Indian country. Getches, supra note 4, at 477. Courts have looked at certain factors in deciding whether a dependent Indian community exists, such as "... the degree of federal and Indian land ownership in the area, the relationship of inhabitants to Indian tribes and to the federal government, established practices of government agencies in providing services to those in the area, and the extent of social cohesiveness among the area's inhabitants." Id.

120. 7 N.N.C. § 253 (Courts and Procedure 1995).

121. Id. § 257.

122. Id. § 301. Justices of the District Courts and the Supreme Court are appointed by the President of the Navajo Nation, with confirmation by the Council. Id. § 251.

123. Id. § 302.


125. Telephone Interview with Raymond C. Etcitty, Attorney, Navajo Nation Department of Justice, Natural Resources Unit (Nov. 12, 1996).
3. Land: Acquisition and Dispute Resolution.—The Navajo Nation Code provides a detailed program for land acquisition for the benefit of the Tribe. The Tribe’s purposes in acquiring new lands are to

(1) consolidate holdings in “checkerboard” areas wherever the best interests of the Navajos living in the area and the welfare of the Tribe are served thereby; (2) provide grazing lands for tribe members who do not have grazing permits; (3) provide additional or substitute lands for members of the Navajo Nation who reside in overcrowded areas of the reservation; (4) relieve reservation land resources from excessive use; and (5) to provide land necessary for approved Tribal enterprises. New lands may be acquired by exchange, gift, or purchase. The Resources Committee of the Navajo Nation Council is authorized and directed to formulate a land acquisition program, develop a code of use for land acquired, and to establish areas to be given priority of attention. The scope of land acquisition includes land for agriculture and grazing, and for business or industrial purposes. Acquisition of land follows a procedure whereby the potential property is appraised and approved by the Resources Committee. The appraisal report must be approved by the Bureau of Indian Affairs; afterwards, the Navajo Nation may enter into negotiations with the property owner. As is apparent, the Navajo have a defined system for the acquisition of land. This is due partially to the fact that the direct purchase of land is the only way for the Navajo to reclaim land.

The Navajo Reservation is land held in trust, with the United States holding title and the Navajo enjoying the beneficial interest. This arrangement results in communally held Tribal land, which has two advantages: first, the land base of the tribe is afforded maximum protection because of the continuity of ownership; second, the management of the land is relatively easy when decisions over leasing and development are made by a single

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126. 16 N.N.C. § 1 (Land 1995).
127. Id. § 2.
128. Id. § 3.
129. Id. § 6.
130. Id. § 10.
131. 16 N.N.C. § 10 (Land 1995).
132. Etcitty, supra note 125. See generally CANBY, supra note 58, at 256-60.
owner. Changes in the use or benefits from the use of land do not infringe on individual rights of Tribal members because there is no actual ownership of land. When land is communally held, individuals enjoy the private use of land by assignment to a particular tract of land, or by the use of grazing permits, as is often employed on the Navajo Reservation. The use of permits conveys customary rights akin to title.

Claims concerning customary land rights are settled within the Navajo Nation to the extent possible. However, because of the peculiar situation of the Navajo, all land rights claims over land outside the Navajo Reservation must be pursued in federal courts. The Navajo cannot pursue any further land rights claims against the United States because their claims were under the auspices of the ICC, which is now defunct. Even if the Navajo had further legitimate claims against the government, the settlement of the Tribe's ICC claim is a bar to further land claims. Thus, for the Navajo, there is no comparable system like that afforded the Maori through which continuous traditional land rights claims may be made. For all intents and purposes, the Navajo are locked into what land they already have unless they purchase it from other entities.

IV. Results: Case Decisions and Claim Settlements

A. The Maori: Reclaiming Traditional Tribal Lands

The Maori have recently been fortunate to have won major victories in their land rights claims, especially through the Waitangi Tribunal. In addition to the results from the Tribunal, the Maori have also reclaimed land through settlements and outright purchase. However, the Maori are not finished, as new claims are filed and decisions on them are consistently being litigated in New Zealand up to the present day.

1. Claim Settlements.—At the end of September 1997, the Government of New Zealand offered Ngai Tahu, the main Maori

133. CANBY, supra note 58, at 268. In the case of the Navajo, decisions on land use must be run through the Nation Council for approval. See 16 N.N.C. § 601 et seq. (Land 1995).
134. CANBY, supra note 58, at 268-69.
135. Id. at 269.
136. Etcitty, supra note 125.
137. Id.
tribe of New Zealand's South Island, land, lakes, cash, and an apology in exchange for the tribes' setting aside its Waitangi Tribunal grievance with the Crown. This offer attempts to settle one of the longest running claims by a Maori tribe, one that reaches back 148 years. The claim involved land sold to the Crown by the Ngai Tahu tribe, and was based on breaches of legal contracts by the Crown. Between 1844 and 1864, Ngai Tahu sold almost half of New Zealand to the Crown for a total of £14,750. Highlights of the proposed settlement include compensation of up to $170 million N.Z. ($119 million U.S.), a full public apology acknowledging the grave injustices of the past, redress funds including the use of $80 million N.Z. of Ngai Tahu funds to buy properties in the Crown's landbank (properties still in use will be leased back to the Crown), the return of several lakes to Maori ownership, the return of the major mountain on the South Island, Mt. Cook, to the tribe, and the renaming of the mountain to Aoraki/Mt. Cook (the tribe will then return it to the Crown). Obviously, this is a major step at reparations by the Crown, one that signifies the seriousness of New Zealand's efforts at conciliation with its indigenous peoples.

Almost two years previously, the Tainui group of tribes in the central North Island signed a settlement with the government which gave the Tainui $110 million U.S. and handed back 38,981 acres of land in compensation for 163,020 acres seized by the colonial military in 1863. Included was also a formal apology in the name of the British Crown. The deal came at a time of growing friction between the government and Maori leaders concerning land and tribal sovereignty. The Ngai Tahu and Tainui settlements are examples of the growing trend of reparations by the Crown for its wrongful takings during the nineteenth century, and possibly, the fear of the Crown of going before the Waitangi

139. Id.
140. Id.
142. Williams and Gray, supra note 138.
144. Id.
145. Id.
Tribunal and having both its actions in the past exposed and paying even more dearly in order to compensate for them.

2. Waitangi Tribunal Decisions.—Often, settlements are not possible, so the claim is submitted to the Tribunal for an opinion concerning the rightful owners of the land in question, or the legality of the original contracts for the sale of land by the Maori to the Crown. For example, in June of 1996 the Tribunal ruled in an historical claim that New Zealand must “redress the horrendous injustices” caused by the pillage of a native Maori village by British colonial soldiers and the subsequent seizure of huge tracts of land. The Tribunal held that 1.92 million acres of land, now worth billions of dollars, were seized over four decades in the nineteenth century from the Maori of Taranaki on the west coast of the North Island. The Tribunal’s report said that the military attack on the village of Parihaka in November of 1881, and the rape of many of its inhabitants, ranked “with the most heinous action of any government, in any country, in the last century.”

The Tribunal Chairman, Chief Judge Eddie Durie, called the events the “Holocaust of Taranaki history,” while Justice Minister Doug Graham said the report was “[a] sobering account of our history everybody should read . . . [i]t provides further evidence that race relations in New Zealand are unlikely to settle as long as these matters remain unaddressed.” Unfortunately, “[h]undreds of white farmers, including former Prime Minister Jim Bolger, now occupy lands that the Tribunal has said were wrongly seized.”

The report has a profound significance, because it is the largest claim ruled upon by the Waitangi Tribunal. The government has stated repeatedly that no private lands will be used to settle claims with the Maori, so it is unclear how the Tribunal’s ruling can be effectuated.

Another historical claim is the 1990 Ngati Rangiteaorere Report in which the Ngati Rangiteaorere tribe challenged the Crown land grant given to the Church Missionary Society (CMS)

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147. Id.
148. Id.
149. Id.
150. Id.
151. Indictment, supra note 146.
152. Id.
in 1854 based on the 1839 purchase of land from the tribe.\textsuperscript{153} CMS required a confirmatory Crown grant after British sovereignty was declared, because CMS had acquired the land by direct purchase from the tribal owners.\textsuperscript{154} There was a problem in getting the grant, however, because CMS could not produce witnesses to certify the purchase.\textsuperscript{155} By 1854, the grant was issued, and CMS began leasing out the land in the form of a trust for the benefit of the Maori inhabitants of the area, using the money gained for general diocesan purposes.\textsuperscript{156} The Tribunal found that the legal validity of the grant was questionable, as the Acting Governor at the time did not have the legal authority to issue the grant.\textsuperscript{157} In addition, the leasing of the land for agricultural purposes was not a \textit{cy pres} administration of the trust.\textsuperscript{158} Therefore, the Tribunal found that the trust had failed and that the land should have reverted to the Ngati Rangiteaorere tribe.\textsuperscript{159}

An example of a contemporary claim is the 1985 \textit{Kaituna River} Report, in which the Ngati Pikioa tribe filed a claim against the Rotorua City Council’s proposed diversion of treated sewage from a lake to the Kaituna River.\textsuperscript{160} In Maori customs, rivers “have a spiritual and cultural value that would be offended by the discharge of human waste into the water.”\textsuperscript{161} The Maori objected on medical and social grounds as well, fearing the loss of food and water flora gathering rights which would result from the effluent outflow.\textsuperscript{162} The Tribunal recommended that alternative land-based schemes be investigated, which would be cheaper anyway.\textsuperscript{163} The Tribunal’s decision benefitted everyone from taxpayers to the Ngati Pikioa; it is a case in which the interests of the community and of the tribe could be easily harmonized.\textsuperscript{164} The city eventually developed a plan, pursuant to the Tribunal’s Report,

\textsuperscript{153} MCHUGH, \textit{supra} note 8, at 329.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 330.
\textsuperscript{158} MCHUGH, \textit{supra} note 8, at 330. The \textit{cy pres} doctrine applies where a trust specifies a clear charitable intent. \textit{Id.} Courts apply it to a situation where the original intent of the trust cannot be executed, and attempt to effectuate the original intent as closely as possible. \textit{Id.}
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 317.
\textsuperscript{161} MCHUGH, \textit{supra} note 8, at 317.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
by which treated effluent is to be sprayed over the Whakarewarewa State Forest.165

3. Direct Purchase.—Of course, using the specialized courts of New Zealand is not the only way to reclaim traditional land. In 1995, the Ngati Whatua tribe, with its joint venture partner Magellan Corporation, spent $26 million U.S. to buy a key area of central Auckland in order to avoid litigation over the land.166 The tribe had lodged a grievance with the Waitangi Tribunal, but decided to buy the land instead of litigating the claim because it feared that the state-owned land would disappear into private hands by the time a Tribunal decision was issued.167 The tribe, which is one of the city’s largest landowners, will use the site for hotels, apartments, and an entertainment center.168 As is apparent, the Maori are not limited to the legal system in pursuit of traditional land; they may simply buy it from the government if they feel that it is more advantageous to do so.

The mechanisms afforded to the Maori for land claims are therefore quite favorable in the reclamation of traditional tribal lands. The few examples cited previously attest to the effectiveness of these systems in the reclamation of traditional tribal lands. The progressive attitude of the New Zealand government in recognizing the Maoris’ traditional land rights has gone a long way towards harmonizing the injustices of the past with the contemporary claims of the Maori.169 Whether through settlement with the government, claims with the Waitangi Tribunal, or simply by purchase, the Maori have several effective ways by which they can reclaim and retain traditional tribal lands.

B. Locked Into the System: The Navajo and Compensation

Unlike the Maori, the Navajo seem to be effectively locked into the amount of land that they presently possess, due to the fact that they cannot recover land from the government. Thus, for the Navajo, retention and effective development of reservation land is paramount.

165. Id.
167. Id.
168. Id.
169. See Gilling, supra note 18, at 139.
I. Case Decisions.—The Navajo have pursued several claims, some of which are discussed herein, against the United States to affirm titles to land and to define mineral rights. In the Tenth Circuit case Navajo Tribe v. New Mexico, the Navajo Nation brought an action to affirm its title to unallotted lands within its reservation.\textsuperscript{170} The lands in question were added to the Navajo Reservation by Executive Orders 709 and 744, issued by President Theodore Roosevelt in 1908.\textsuperscript{171} Later that year, under pressure from Congress, Roosevelt issued Executive Order 1000, which returned the land to the public domain.\textsuperscript{172} Congress had adopted a joint resolution, introduced by a New Mexico Congressman who was lobbied by non-Navajo constituents, to change the lands into public domain and the President was compelled to sign the Resolution as law.\textsuperscript{173} In 1911, with Executive Order 1284, President Taft restored additional surplus lands within the reservation to the public domain.\textsuperscript{174}

Following the enactment of the ICC, the Navajo filed a claim seeking compensation for the cession of its lands.\textsuperscript{175} The Tribe claimed that it held title “to approximately forty million acres of land at the time of the 1868 Treaty and that the United States had paid an unconscionably low price for the land.”\textsuperscript{176} The ICC found that the Tribe did hold title to the lands and that the Navajo were entitled to compensation.\textsuperscript{177} It took until 1981 for the Court of Claims to enter final judgment, due to the tremendous caseload of the ICC and the close of the Commission, but the Navajo were awarded $14.8 million for the loss of the land.\textsuperscript{178}

After the monetary award, the Navajo filed this action in federal court to affirm its equitable title to the unallotted lands added to, and subsequently taken from, the Navajo Reservation.\textsuperscript{179} After the District Court held that the Navajos’ claim was cognizable exclusively under the ICC, that the claim was compensable only by money damages, and that the claim was time-barred

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\textsuperscript{170} Navajo Tribe, 809 F.2d at 1457.  \\
\textsuperscript{171} Id. at 1459.  \\
\textsuperscript{172} Id.  \\
\textsuperscript{173} Id. at 1459.  \\
\textsuperscript{174} Id.  \\
\textsuperscript{175} Navajo Tribe, 809 F.2d at 1461.  \\
\textsuperscript{176} Id.  \\
\textsuperscript{177} Id. at 1461-62.  \\
\textsuperscript{178} Id. at 1462.  \\
\textsuperscript{179} Id.  
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by the ICC Act, it dismissed the action. The Tenth Circuit Appeals Court affirmed, stating that under the ICC Act, the Navajo claim is barred by the five-year period for claim filing. Thus, for the Navajo, compensation for the loss of traditional land is no longer pursuable by claims against the government.

Since the boundaries of the Navajo Reservation are for the most part defined, the development and management of land held by the Navajo Nation assumes the utmost importance. In 1933, by Congressional Act, certain lands in Utah, known as the “Aneth Extension,” were withdrawn from the public domain and added to the Navajo Reservation. Congress specified that mineral rights royalties should be given to the Navajo, with 37.5% going to the State of Utah, provided that Utah spend them on the tuition of Indian children in white schools, in the building and maintenance of roads across the lands, or for the benefit of the Indians residing on the land. When Congress reallocated the spending allowable and expanded the pool of beneficiaries, individual Navajos sued, arguing that they had protected property rights in the Aneth Extension. The Supreme Court, in U.S. v. Jim, held that Congress did not create constitutionally protected property rights in the Navajo, stating that whatever title the Navajo have is in the Tribe and not in the individuals. The Court continued by asserting that while the 1933 Act established a pattern of distribution which benefitted the plaintiffs more than other Navajos on the reservation, it was within the discretionary power of Congress to alter that distributional scheme. Therefore, the Court concluded that the individual Navajos did not have protected title to the Aneth Extension lands. Since Congress gave the land to the Navajos, it follows that it may regulate some of the activity that occurs on the land, especially in the area of mineral rights. As is apparent from this case, the Navajo have only a limited sovereignty to their lands that may be intruded upon when Congress feels that it is necessary.

180. Navajo Tribe, 809 F.2d at 1462.
181. Id. at 1476.
183. Id. at 80-81. After the passage of the act that added the Aneth Extension to the Navajo Reservation, oil and gas were discovered in the Extension. Id. at 81.
184. Id. at 81.
185. Id. at 82.
186. Jim, 409 U.S. at 82.
187. Id. at 83.
The Navajo did pursue several ICC claims as well as contemporary litigation. In Navajo Tribe v. U.S., the Navajo brought an action with the ICC in 1950 and 1951, asserting that the government's mismanagement of certain of the Tribe's natural resources constituted a breach of the fiduciary duty and obligation owed the Tribe by the government arising from the trust relationship between the two entities. At issue were the Tribe's natural resources of vanadium, uranium, copper, rock, sand, and gravel. This was only one of the claims the Navajo lodged with the ICC; other claims concerned the misuse of Tribal forest lands and methods of accounting for Tribal land income. In this action, the United States Claims Court, pursuant to jurisdiction granted by the termination of the ICC, held that the government was not obligated to collect rent from private exploratory companies during the period when prospecting was being carried out; the Navajo were entitled to rental payments once mining began and failure to collect rent on behalf of the Tribe was a breach of the government's fiduciary duty; the government breached no duty by allowing a governmental agent to explore for uranium on the reservation without compensating the tribe; and the Navajo were not entitled to interest on funds that the government should have deposited in a trust. The Claims Court also held that it did not have jurisdiction to determine the claim that the government breached its fiduciary duty in failing to require that mines opened on the reservation under mining leases be filled in or sealed up. The Navajo were entitled to recover $6,022.38 on their claim.

The Navajo did not recover much for their efforts in this action, which is not indicative of their overall success with ICC claims. However, it is readily apparent that the United States can, and did, exploit Navajo resources with near impunity because it has ultimate sovereignty over Navajo lands.

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189. Id.
192. Id.
193. Id.
194. For the forest land claim, the Navajo received $925,000 in compensatory damages for its failure to cut, unpaid sumpage, logging waste, sawmill mismanagement and unaccounted-for sales claims. Navajo Tribe, 9 Cl. Ct. at 439 (1986).
2. Claim Settlements.—The Navajo have also used settlements as a method of affirming their land holdings. The federal government offered $50 million to the Hopi tribe if it would allow Navajo families located on Hopi land to remain there without relocating them in an attempt to mediate this long-standing feud without protracted litigation. The deal stemmed from the refusal of a group of Navajos to move when several thousand Navajos and a number of Hopis were relocated under a Congressional plan in 1974. A federal court subsequently ordered the tribes to enter into settlement negotiations. In 1996, President Clinton signed into federal law a final settlement that allows Navajos in the Hopi reservation to sign seventy-five-year leases with the Hopi in order to remain on their land. This settlement has been challenged by a group of Navajos living in the Hopi reservation, so clearly this issue has not been fully resolved by the federal settlement law. The relocation settlement is an example of how the Navajo have attempted to use means other than litigation to solve land rights problems.

The Navajo are limited in the types of recovery that they may pursue against the United States. The Navajo do not have any method, other than direct purchase or governmental grant, through which they may recover land from the government. In addition, the ICC was the only way in which the Navajo could receive compensation for the loss of land, and it is now defunct. The Navajo, without any way to regain lost land through the legal system, have been forced to concentrate on the retention and effective use of their existing lands. Thus, for the Navajo, there are no comparable mechanisms to those afforded to the Maori through which land rights claims may be satisfied.

195. *Hopis Offered $50 Million to Settle Flap with Navajos*, ARIZONA DAILY STAR, Dec. 17, 1995, available in 1995 WL 3284459 [hereinafter *Hopis Offered*]. The Hopi Reservation is surrounded on all sides by the much larger Navajo Reservation. *See* Act of June 14, 1934, 48 Stat. 960. The Hopi and the Navajo have a centuries-old land dispute that has been the subject of extensive litigation. *See* Healing v. Jones, 210 F.Supp. 125 (D. Ariz. 1962); Masayesva v. Zah, 65 F.3d 1445 (9th Cir. 1995). Once the boundaries of the Hopi reservation were set within the Navajo Reservation, relocation of tribal members on both sides of the boundary became an urgent issue. *See* generally *Hopis Offered*.


197. *Id.*


199. *Id.*
B. Which System is Better?

From the preceding analysis, it is clear that the mechanisms afforded to the Maori for land rights claims are superior to those of the Navajo. Because the Maori may recover land through the Waitangi Tribunal, they have an inherently superior system in which to reclaim traditional lands lost through fraudulent transactions. The Navajo have no comparable way to reclaim lost land. They may not pursue claims against the United States because the ICC is no longer in existence. In addition, the monetary awards granted to them by the ICC preclude any further litigation. Consequently, the legal structures in New Zealand offer a better forum for the restitution of traditional land and land rights than the legal system in the United States.

With its specialized courts created to deal with Maori land claims, New Zealand has a progressive system for redressing the wrongs committed against the Maori during the period of British colonization and sovereignty. The Land Court, in providing a specialized forum for land rights, is an effective tool for the Maori to use in order to retain land and regulate title. The Waitangi Tribunal allows the Maori to file claims against the government for wrongful actions in the past as well as for present land use issues and receive land as compensation if their claims are proved valid; in this capacity, it is the primary mechanism through which the Maori can seek restitution.

Unfortunately, the Navajo do not have such a system in which to seek compensation for the wrongful actions of the past. The ICC was a satisfactory mechanism for monetary compensation; but its limited window for filing claims, its inability to grant land awards, and its ultimate termination preclude labeling it an effective mechanism through which the misdeeds of the past could be redressed. For the Navajo, reclamation of traditional land, if possible, must now proceed by actual purchase of the land from its present owners; even this is regulated by the federal government, however, as the Bureau of Indian Affairs must approve of additions to the reservation lands. By not providing its indigenous peoples with the possibility of the return of their traditional lands, the United States has not made a thorough attempt to repair

200. See supra text accompanying notes 110-11.
201. See supra Part III.A.3.
202. See supra Part III.B.3.
the damage done to the Navajo and other Native Americans during the nineteenth century.

While New Zealand may have a superior system for the restitution of traditional lands, recent events suggest that this progressive attitude could be undermining the country as a whole. In February of 1996, the annual Waitangi Day ceremony, celebrating the signing of the Treaty in 1840, was disrupted by Maori demonstrations that ruined the ceremony that has traditionally brought the Maori and majority whites (pakeha) together. New Zealand once prided itself on its race relations, but now there is growing anger and pessimism on both sides over how much longer the Maori and the pakeha can coexist. This growing discontent came about after the government proposed to set up a $1 billion N.Z. fund as a full and final settlement for all Maori land claims. The Maori rejected the settlement because it did not involve prior consultation with Maori leaders, the sum was too small, and it excluded Maori claims on national parks, minerals and oil, and riverbeds, and shorelines and seas. The demonstrations were led by Maori radicals, who have become the leading Maori voice in the public arena.

The paramount claim of Maori radicals is that the Maori should be given sovereignty over New Zealand. In May of 1995, then-Prime Minister Jim Bolger bluntly rejected Maori claims to sovereignty over the country in a speech to the ruling National Party convention, stating that “[t]he government will not entertain any division of sovereignty of parliament, nor a powersharing of a king which would involve a Maori parliament or separate legal or taxation systems.” Bolger said that his government recognized genuine grievances existed and that the Treaty had been breached. However, this did not mean that the Treaty sanctions notions of Maori sovereignty; rather, it emphasized partnership. Maori sovereignty, he said, was “the antithesis of [his]

204. Id.
205. Id.
206. Id.
207. Id.
209. Id.
210. Id.
211. Id.
government’s policy." On December 8, 1997, Jenny Shipley was sworn in as New Zealand’s first woman Prime Minister, promising to reverse the fortunes of the embattled coalition government. Following this, Shipley shifted the New Zealand cabinet to the right, which can only mean the maintenance of Bolger’s hardline stance regarding Maori sovereignty.

Likewise, the Navajo Nation will not be granted sovereignty unless a drastic change occurs in the governing policy of the United States towards Native American tribes. The Navajo have limited sovereignty over their reservation lands, but the United States still governs the Navajo externally. Thus, while the Maori have the ability to recover lost lands through the legal system that the Navajo do not, neither group will regain the original sovereignty that they had before they were subjugated unless radical changes occur in the policies and government structure of the respective governments.

While the Maori mechanisms for land rights claims are superior to those afforded to the Navajo, it must be remembered that the Waitangi Tribunal was created in 1975, almost thirty years after the ICC was established. The United States therefore recognized that native groups had legitimate claims against the government and implemented a system in which these groups could receive compensation for wrongful and fraudulent land deals long before New Zealand did. Thus, it should be realized that the United States recognized and addressed the claims of the Navajo and other tribes long before New Zealand’s progressive system was implemented for the Maori.

VI. Conclusion

The Maori of New Zealand and the Navajo of the United States have both struggled to regain their traditional lands and sovereignty during the twentieth century. The first step in regaining lost sovereignty is reclaiming traditional lands. With the Waitangi Tribunal and the Land Court system, the Maori have two effective mechanisms for the reclamation and retention of land that was lost during the period of colonization through fraudulent transfers and outright theft. The Navajo do not have a comparable

212. Id.
system; they are unable to reclaim land and their monetary claims against the United States lodged with the ICC have already been litigated. The only way the Navajo may reclaim land is by direct purchase from the present owners, and even this method must be approved by the Bureau of Indian Affairs. Thus, the mechanisms that address the land rights claims of indigenous peoples in place in New Zealand are far superior to those that exist in the United States.

New Zealand, with its superior mechanisms for resolving native land rights issues, is to be applauded for its efforts in repairing the damage done during the nineteenth century to the Maori. The same cannot be said of the United States, however, as the systems in place that address similar claims are not even close to those in New Zealand in terms of effectiveness. Without the ability to recover traditional lands that were fraudulently purchased or stolen, the Navajo and other tribes in the United States are left with little consolation for the misdeeds of the United States during the previous century. The ability to recover land is an important step in the establishment of indigenous peoples’ rights because it recognizes that wrongs were committed and it allows for reparations that begin the healing of old wounds between indigenous groups and the cultures that colonized them.

Carter D. Frantz