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## Place Called Home: Native Sovereignty through Statehood and Political Participation, A

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# A Place Called Home: Native Sovereignty Through Statehood and Political Participation

## ABSTRACT

*This article addresses the efforts of American Indians and the Maori in New Zealand to resolve natural resource disputes and preserve sovereignty through statehood movements and other forms of political participation. This is the third installment in a series published by Stanford University and the University of California Davis<sup>1</sup> on the efforts of indigenous people to maintain control over sovereignty and natural resources through a variety of legal coping strategies.*

*This article analyzes the history of indigenous participation in imported political frameworks in the United States and New Zealand, and concludes that both American Indians and the Maori have attempted to mirror, or otherwise participate in, imported legal constructs to maintain some semblance of sovereignty and control over their natural resources. Although direct participation in the dominant legal and political model is one way of combating erosions in native sovereignty and natural resource control, the article concludes that indigenous people at times will need to adapt to imported colonial norms through other efforts as well.*

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1. Benjamin A. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35 STAN. J. INT'L L. 49, 50–52 nn.6–15 (1999) [hereinafter Kahn, *Legal Framework*]; Benjamin A. Kahn, *Separate and Unequal: Environmental Regulatory Management on Indian Reservations*, 35 ENVTL. L. & POL'Y J. 203–29 (2012) [hereinafter Kahn, *Separate and Unequal*]. A fourth installment in the series is being published by the University of Oklahoma: Benjamin A. Kahn, *Sword or Submission: American Indian Natural Resource Claims Settlement Legislation*, 37 Am. Indian L. Rev. 109 (2012–2013).

## I. INTRODUCTION

The relationship between indigenous peoples and European settlers are typically framed as the byproducts of expansion, benevolent philanthropy, divine religious inspiration, global exploration, paternal supervision, or other justifications devoid of malicious intent.<sup>2</sup> In contrast, a more critical group of scholars protests that such apologist rationale is nothing more than myths and mirrors obscuring a malicious plan to dominate and destroy indigenous culture.<sup>3</sup>

A third approach avoids both ideological extremes, and instead is built on bread and butter economics. In particular, natural resources translate into money that allow for raw survival. While the relationship between indigenous peoples and subsequent settlers consistently revolves around an economic battle for control over natural resources, control over those natural resources is vital to the continuing existence of indigenous communities.<sup>4</sup> I previously applied these assumptions with respect to treaty rights and natural resource allocation issues, i.e., dividing the pie and deciding who gets what.<sup>5</sup> I subsequently applied these assumptions to statutory, fiduciary and constitutional rights in the context of natural resource protection, i.e., environmental quality concerns.<sup>6</sup> This article, in turn, applies these assumptions in the context of natural resource control and direct political participation in dominant imported norms by indigenous people.

Possession of land is crucial to the survival of independent indigenous nations. It allows for self-determination over matters of internal jurisdiction and rights to secure, manage, and develop a sustainable

2. See, e.g., AUGIE FLERAS & JEAN LEONARD ELLIOTT, *THE NATIONS WITHIN: ABORIGINAL-STATE RELATIONS IN CANADA, THE UNITED STATES, AND NEW ZEALAND* 3–4 (1992); VINE DELORIA, *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 85, 89, 92–94 (1974); OREN R. LYONS ET AL., *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 3 (1992); R. David Edmunds, *National Expansion from the Indian Perspective*, in *INDIANS IN AMERICAN HISTORY* 159 (Frederick E. Hoxie ed., 1988).

3. See, e.g., FLERAS & ELLIOTT, *supra* note 2, at 3; FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 5–8 (1975); CAROL ARCHIE, *MAORI SOVEREIGNTY: THE PAKEHA PERSPECTIVE* 145 (1995) (interview with Steven Young); DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 74 (2011) (“The Colonists required the creation of legal and political relationships with the tribes in order to legitimate land transactions”); LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW* 5 (1991) (“Euro-Americans originally used the law in combination with military might to strip indigenous peoples of most of their natural resources.”).

4. See, e.g., Kahn, *The Legal Framework*, *supra* note 1; Kahn, *Separate and Unequal*, *supra* note 1.

5. Kahn, *The Legal Framework*, *supra* note 1.

6. Kahn, *Separate and Unequal*, *supra* note 1.

internal economic base.<sup>7</sup> Land provides natural boundaries and access to precious natural resources such as oil, gas, and metals. Indeed, opponents of Indian sovereignty often rationalize their position by pointing to small tribal land base holdings.<sup>8</sup> The importance of control over natural resources applies to other holdings like water as well, given that water is crucial to sustaining life.<sup>9</sup>

Rights to natural resources are a basis for both economic power and raw survival; therefore it is no surprise that relations between indigenous peoples and settlers largely revolve around a struggle for control over those resources. It also seems obvious that control over such natural resources is vital to the continuing existence of communities that strive for independent political representation and economic sustainability.<sup>10</sup>

If indeed the history of interactions between indigenous peoples and subsequent settlers represents a battle for control over natural resources—and control over those resources is critical to both economic and political power—then these assumptions generate some startling conclusions. Indeed, the formal mechanisms of imported governmental and legal frameworks often systemically parrot settler goals of controlling natural resources.<sup>11</sup> These legal frameworks usually reflect the dominant governments' policy goal of assuming control and proprietary rights over natural resources that were previously under indigenous tribal dominion.<sup>12</sup> Different governments attempt to gain control over indigenous held natural resources with different methods. However, all of those efforts depend on the legitimacy of imported legal frameworks like

7. FLERAS & ELLIOT, *supra* note 2, at 2 (“Land is the economic bedrock for the renewal of aboriginal peoples as a distinct society or nation.”); DELORIA, *supra* note 2, at 178; Whaimutu Dewes, *Fisheries—A Case Study of an Outcome*, in *TREATY SETTLEMENTS: THE UNFINISHED BUSINESS* 134 (Geoff McLay ed., 1995) (Natural resources and knowledge “set the upper bounds on economic development.”).

8. DELORIA, *supra* note 2, at 163, 165.

9. *Water: The Power, Promise, and Turmoil of North America's Fresh Water*, NAT'L GEOGRAPHIC NOV. 1993, at 18–36; *Water: Our Thirsty World*, NAT'L GEOGRAPHIC APRIL 2010, at 36–59.

10. Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 393 (1991); see also BURTON, *supra* note 3, at 18; DELORIA, *supra* note 2, at 110.

11. Kahn, *The Legal Framework*, *supra* note 1.

12. *Id.*; see also JAMES EDWARD FITZGERALD, *THE NATIVE POLICY OF NEW ZEALAND: A SPEECH DELIVERED IN THE HOUSE OF REPRESENTATIVES OF NEW ZEALAND* 32 (1862) (“[A] great part of [the Maori] mistrust these [legal, governmental, and political] institutions you are inventing for them—and it is natural that they should mistrust institutions which they suppose are invented for our benefit, not for theirs. Should we not think exactly the same in their place?”).

contracts, treaties, constitutions, or statutes to support what often boils down to just a pure natural resource grab.<sup>13</sup>

When it comes to allocating natural resources, settlers have used the law they bring from afar to document and justify their division of economic assets previously under indigenous control.<sup>14</sup> When indigenous people find that natural resource rights are subject to imported legal norms and allocation schemes, they must develop coping and protection strategies to deal with the foreign constructs. In the context of resource allocation, this generally has taken the form of a written contract or treaty that defines, allocates, and divides natural resource rights.<sup>15</sup> For example, indigenous people have had to adapt to the imported concept of individual natural resource ownership rights in the face of tension with historic communal ownership norms. With respect to natural resource protection, tribes have statutory, fiduciary, and constitutional rights at their disposal to enforce the same environmental regulatory protection afforded to those outside of reservation boundaries.<sup>16</sup> Absent adequate protection, tribes can turn to the judicial system and sue for their environmental quality and equality.<sup>17</sup> However, all of these protections and enforcement options are legal mechanisms imposed upon indigenous people. One approach to enforce indigenous natural resource rights therefor is to work within the system by using dominant imported legal parameters as both a shield and sword in the battle for natural resource control and protection.<sup>18</sup>

Like all of my work, this article depends on two basic premises: (1) that the history of relationships between indigenous peoples and subsequent settlers largely represents a battle for control over natural resources; and (2) that control over natural resources is a foundation for both economic and political self-sufficiency. Because the relationship between indigenous people and the dominant governments revolves around fights to possess or control valuable natural resources, indigenous people explore and employ a variety of legal survival strategies.

This article explores a wholly different approach for the indigenous quest to maintain control over native natural resources. In addition to working within the foreign system through contract or lawsuit, indigenous people have at times mimicked, mirrored, or directly participated in the imported legal construct in an effort to maintain the political and

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13. See, e.g., Kahn, *The Legal Framework*, *supra* note 1; see also FITZGERALD, *supra* note 12, at 32 (1862); *Tamihana Korokai v. Solicitor-General* [1912] 32 NZLR 321 (CA), 333.

14. Kahn, *The Legal Framework*, *supra* note 1.

15. *Id.*

16. Kahn, *Separate and Unequal*, *supra* note 1.

17. *Id.*

18. *Id.*; Kahn, *The Legal Framework*, *supra* note 1.

economic independence critical to natural resource control. While these coping strategies reflect a certain acquiescence to the dominant political model, they are options for indigenous people to advance their own interests in the face of a stacked political deck. Indeed, both American Indian and Maori communities have sought to maintain sovereignty through formal statehood movements or other direct participation within the dominant political framework. The article focuses on five particular Indian tribes, because they were the communities primarily involved in statehood debates framed by the federal political system in the United States. The article contrasts the experiences of these Indian tribes with that of the Maori in New Zealand, because the Maori represent an example in the monarchy and parliamentary contexts.

Part II addresses how American Indian tribes have at times embraced the imported European political model in response to encroachments on Indian land and sovereignty from immigrants' thirst for Indian natural resource holdings. Indeed, even as the federal government forcibly removed Indian tribes from their homelands and carved up collective tribal resource holdings for individual allotments, these tribes sought statehood status within the federal system in an effort to preserve their self-determination. When efforts geared toward establishing a pan-Indian state failed, Indian nations advocated for tribal sovereignty within the federal system, formed independent legislative entities, and exercised the right to vote and hold office instead. These, and other coping strategies, have allowed Indian tribes to use the dominant political system to advance tribal interests, including Indian sovereignty and control over natural resources.

Part III compares the American Indian experience in adapting to dominant political norms to that of the Maori in New Zealand. Doing so underscores the common experience that indigenous people face when a foreign governmental construct is imposed by immigrants and settlers. Faced with either absolute resistance or adaptation, indigenous people—like the American Indians and the Maori—are resourceful, and quickly find ways to emulate or participate in the imported legal framework. The Maori have relied on a variety of survival strategies to protect native sovereignty and natural resource holdings, including the creation of parallel governmental bodies modeled after western applications, the utilization of voting rights, and the development of dedicated political parties. Each time, these efforts reflect in part Maori concerns over the allocation of natural resources.

This article concludes that the American Indian and Maori experiences with imported legal norms underscore the fundamental connection between preserving indigenous sovereignty and protecting native natural resource holdings. Ultimately, indigenous people will do what

they need to do to survive and compete effectively within a system of new rules. To protect their own natural resources and goal of self-determination, indigenous people size up imported governmental and legal systems, and quickly find ways to adapt and advance their interests. This article demonstrates that direct political participation is one effective way that indigenous people have worked within the system to accomplish native sovereignty and natural resource objectives, but it is also just one arrow in the quiver.

## II. AMERICAN INDIAN EMBRACE OF THE EUROPEAN MODEL

Long before European immigrants set foot on what is now the United States of America, Indian tribal communities existed as sovereign and independent nations. One of the foremost indicators of a secure status of sovereignty is self-determination, i.e., internal control over the political, social, economic, and natural resources of a community.<sup>19</sup> When immigrant pressure for natural resources grew, settlers and colonial governments increasingly threatened Indian nations' status as independent and sovereign communities. In several instances, immigrant pressure for natural resources led to statehood proposals for American Indian communities or other forms of direct political participation.

Although statehood within the United States federal system represents a dramatic diminishment of sovereignty for Indian nations, such proposals served as compromise measures for American Indian communities that wished to salvage their independent status in the face of an overwhelming influx of immigrants. The Okmulgee Council, the Commission to the Five Civilized Tribes, and the Sequoyeh Convention involved three formal proposals for a pan-Indian State.<sup>20</sup> All three of these proposals primarily involved the five "civilized" tribes—the Creek, Chickasaw, Choctaw, Cherokee, and Seminole (the "Five Tribes"). These three proposals for a pan-Indian state surfaced one by one from the Civil War era until the 1907 admittance of Oklahoma as a state. An examination of these proposals provides a telling glimpse of American Indian nations' offensive and defensive survival strategies in the face of immigrant pressure on native sovereignty and natural resources.

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19. Webster's Dictionary defines self-determination in part as "Freedom of the people of a given area to choose their own political status." WEBSTER'S II NEW COLLEGE DICTIONARY 1001 (1995).

20. See *infra* Part II.

### A. Immigrant Pressure Prior to 1830

The Creek, Chickasaw, Choctaw, Cherokee, and Seminole nations carried the title of “civilized” tribes because there was a large degree of intermarriage between tribal members and the outside community.<sup>21</sup> The federal Commission to the Five Civilized Tribes referred to this in its 1904 report, asserting that these tribal members were “Indians only in name.”<sup>22</sup> Creek, Chickasaw, Choctaw, Cherokee, and Seminole lands originally covered virtually the entire southeast area of the United States.<sup>23</sup> However, statehood proposals for the American Indian community revolved around land that the Five Tribes occupied after their removal from eastern lands in the 1830s, in what is now the State of Oklahoma.<sup>24</sup>

The first treaties that Congress signed with the Five Tribes included a clause stating that “at no time” would the Indian Territory fall within the bounds of state control.<sup>25</sup> This official policy implied a tribal right to political status outside that of any state jurisdiction. Therefore the Five Tribes initially appeared willing to make peace with the immigrants, as long as the United States guaranteed the tribes’ status as sovereign nations.

Despite the treaty guarantees, the newly formed United States harbored a taste for the natural resources controlled by the Five Tribes and other Indian nations. The pan-Indian statehood proposals that later emerged stemmed from the correlation between immigrant pressure for natural resources and attacks on tribal sovereignty. The history of federal

21. COMM’N TO THE FIVE CIVILIZED TRIBES, ELEVENTH ANNUAL REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1904, 7–8 (1904) [hereinafter CFCT 1904].

22. *Id.* Among the Five Tribes there are a few additional misnomers. The Creeks were the largest division of Muskogean and approximately half of the Creek community spoke Muscogee. *Id.* The Creek name came from the first British immigrants who renamed the Muskogean based on the numerous streams in the area. U.S. CONGRESS, REPORT WITH RESPECT TO THE HOUSE RESOLUTION AUTHORIZING THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS TO CONDUCT AN INVESTIGATION OF THE BUREAU OF INDIAN AFFAIRS, H.R. REP. NO. 82-2503, 333 (1953) (at least five other languages were spoken in the community since 1730). The Seminoles were Muskogean and had emigrated from Creek lands to Florida soon after 1700. GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 315 (1953). By 1775, these Muskogean became the Seminoles, which translates into separatist or runaway. *Id.*

23. U.S. CONGRESS, REPORT WITH RESPECT TO THE HOUSE RESOLUTION AUTHORIZING THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS TO CONDUCT AN INVESTIGATION OF THE BUREAU OF INDIAN AFFAIRS, H.R. REP. NO. 82-2503, maps 10, 12, 16, 18, & 59 (1953).

24. See *infra* Part II.B.2, II.C, II.D, & II.E.

25. Bert Hodges, *Notes on the History of the Creek Nation and Some of Its Leaders*, 43 CHRON. OKLA., no.1, 1965, at 15.



and tribal interactions before the 1830 removal of the Five Tribes underscores this connection.

### 1. *From Assimilation to Removal*

Federal Indian policies in the 1780s relied on gradual cultural assimilation to achieve the goal of incorporation, formulated as the only alternative to war with the Indian communities.<sup>26</sup> Such a forceful removal was far too great an expense for the newly born United States to tackle.<sup>27</sup>

Thomas Jefferson formally initiated the idea of encroachment on tribal lands by suggesting the removal of the Five Tribes to western lands.<sup>28</sup> Jefferson proposed removal as the only solution to protect the Indians from mass genocide resulting from immigrant pressure for land and other natural resources.<sup>29</sup> In 1803, President Jefferson proposed a constitutional amendment allowing Indians and whites to trade eastern land for western land.<sup>30</sup> Congress never seriously considered this proposal, as the tribes were still a formidable military foe.<sup>31</sup>

However, the new nation was growing in size and population quickly, as was the immigrant appetite for Indian natural resources. In 1801, the federal government began to build a road on Choctaw land to deliver mail.<sup>32</sup> This was the first sign that the new nation desperately needed the land and resources of the Five Tribes to continue to expand and prosper. In addition, small scale farmers in the Southeast were pressuring the federal government to secure the fertile lands of the Five Tribes.<sup>33</sup> An alliance therefore emerged in the early 1800s between immigrant farmers and federal leaders based on shared beliefs that the Choctaws were wasting prime farmland and that a larger white population would help secure the recently won territory against Spanish ambition.<sup>34</sup> The state of Georgia was most impatient to develop natural resources because it was the last of the original thirteen colonies to

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26. Samuel J. Wells, *Federal Indian Policy, in THE CHOCTAW BEFORE REMOVAL* 181, 184 (Carolyn Keller Reeves, ed., 1985).

27. WILLIAM G. McLOUGHLIN, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* 34 (1986).

28. Arthur H. DeRosier Jr., *Thomas Jefferson and the Removal of the Choctaw Indians*, 1 S.Q., no. 1, 1962, at 52.

29. *Id.*

30. *Id.*

31. See McLOUGHLIN, *supra* note 27.

32. John A. Watkins, *The Choctaws in Mississippi, in A CHOCTAW SOURCE BOOK* 71 (1985).

33. See Wells, *supra* note 26, at 187.

34. See Wells, *supra* note 26, at 192-93.

emerge and therefore felt insecure as a buffer between the United States and Spanish territories.<sup>35</sup>

In 1802, Georgia signed a compact with the federal government that called for the removal of Indians, including the Cherokees within Georgia, in exchange for Georgian western land claims.<sup>36</sup> Thus the first concrete indication that the federal government would infringe on the sovereignty of Indian nations, and pursue western removal with an eye on the Five Tribes' natural resources, emerged from the more abstracted Jeffersonian philosophy.

## 2. Immigrant Encroachment

Thousands of new settlers and immigrants responded to removal rumors, and illegally moved to Cherokee lands in Tennessee and Georgia in 1809 to 1810.<sup>37</sup> These immigrants hoped to squat and establish preemptive rights to Cherokee land and natural resources.<sup>38</sup> In addition, by 1810 the federal government was in desperate need of more roads for postal purposes to connect Mississippi and New Orleans with northeast towns.<sup>39</sup> In 1815, for example, future President Andrew Jackson oversaw the construction of a military road on Mississippi Choctaw land.<sup>40</sup> By 1814, states surrounded the Creeks and Cherokee and those tribes became communities isolated from other Indian nations.<sup>41</sup> Between 1814 and 1816, the market price of cotton doubled and the demand for land of the Five Tribes reached a feverish pitch.<sup>42</sup> Increasing immigrant encroachment led to the first Seminole War from 1816 to 1818.<sup>43</sup> As Mississippi gained statehood in 1817, Secretary of War John C. Calhoun's responsibilities included relations with the Indian nations, and he outlined a new official federal Indian policy: the first step was to eliminate independent Indian nations so that the federal government could control and protect the territories, and the second step was to relegate the Indian nations to a "more reasonable" territory.<sup>44</sup>

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35. DALE VAN EVERY, *DISINHERITED: THE LOST BIRTHRIGHT OF THE AMERICAN INDIAN* 9 (1966).

36. Francis Paul Prucha, *introduction* to JEREMIAH EVARTS, *CHEROKEE REMOVAL: THE "WILLIAM PENN" ESSAYS AND OTHER WRITINGS* 3 (1981).

37. McLOUGHLIN, *supra* note 27, at 154.

38. *Id.*

39. Wells, *supra* note 26, at 188.

40. *Id.* at 193.

41. MICHAEL D. GREEN, *THE POLITICS OF INDIAN REMOVAL: CREEK GOVERNMENT AND SOCIETY IN CRISIS* 42 (1982).

42. McLOUGHLIN, *supra* note 27, at 207.

43. See DeRosier Jr., *supra* note 28, at 52.

44. *Id.*

Immigrants and their offspring had grown so much in population by 1820 that Indian removal from the Southeast was a major issue.<sup>45</sup> More settlers were moving to the Southeast driven by the demand for natural resources; for example, miners discovered gold in Georgia, leading 10,000 prospectors to intrude upon Cherokee land to lay mining claims.<sup>46</sup> Scholar Francis Prucha describes encroachment on the Five Tribes during the 1820s as an “expanding plantation system [that] began its sweep across the Gulf Plains and the impatient whites found the enclaves of Indian lands an unacceptable hindrance.”<sup>47</sup> In 1827, Georgian surveyors, citizens, and squatters disrupted and displaced Creek residents while government agents attempted to recruit Indians west.<sup>48</sup> Indeed, increasing population and military strength led immigrants in the Southeast to become aggressive in their demand for Indian removal.<sup>49</sup> Early in 1827, however, Creeks still owned nearly 200,000 acres in Georgia.<sup>50</sup>

The Treaties of Washington and Fort Mitchell soon called for the surrender of all Creek land in Georgia by January 1, 1827.<sup>51</sup> This reduced Creek land holdings to five million acres in Alabama.<sup>52</sup> Large groups of exploitative traders, speculators, and whiskey sellers encouraged Creeks to remain in the area, while others continued to demand removal.<sup>53</sup>

The Five Tribes had limited alternatives. Without the unity and power to fight off unwelcome immigrants, the Five Tribes effectively faced a choice of eventual removal or genocide. Historian Arthur DeRosier summarizes the period from 1786 to 1825 as one of declining land and natural resources for the Five Tribes:

At times, the Choctaw readily acquiesced in an effort to pacify their land-hungry and aggressive neighbors; at other times, they had to be pressured into negotiations to rectify boundary

45. *Id.*

46. B. NARASINGARAJAN, *STAND WATIE: AN ANALYTICAL STUDY* 4 (1984).

47. Prucha, *supra* note 36, at 3.

48. GREEN, *supra* note 41, at 130.

49. See VAN EVERY, *supra* note 35, at 8 (“[T]he white borderer had learned to regard them as fools, drunkards, demoniac enemies, wretches of sub-human depravity, whose existence constituted an intolerable nuisance which could only be abated by extermination.”).

50. GREEN, *supra* note 41, at 130.

51. Treaty of Washington, art. 12, U.S.-Creek Nation, Jan. 24, 1826, available at <http://georgiainfo.galileo.usg.edu/washing2.htm>.

52. GREEN, *supra* note 41, at 141.

53. GREEN, *supra* note 41, at 149 (“Outside. . . sat the settlers of Alabama and Georgia, like vultures on a fence rail, waiting hungrily for the Nation [Creek] to crumble so they could swoop down and claim the remains—the eastern extremity of the Alabama Black Belt.”).

disputes or pay off overdue commercial debts. Either way the end result was the same; the Choctaw Nation slowly but surely decreased in size. . .<sup>54</sup>

As the pressure for removal reached a climax, the relationship between diminished native sovereignty and immigrant desire for the Five Tribes' resources crystallized. Faced with a mass taking of their entire land base, the continued existence of the Five Tribes as independent nations hung in the balance.

## B. Uncertain Tribal Nations—From Removal to Civil War

In the years leading up to removal, there was a growing chorus to move all Indian tribes west where the federal government could more effectively govern them or tribes could take control of their own government.<sup>55</sup> Although no specific removal policy existed, a series of treaties with the Five Tribes had already diminished or altered native land boundaries.<sup>56</sup> Immigrant and Indian representatives signed many of these treaties, including nine with the Cherokees, six with the Creeks, four with the Choctaws, three with the Chickasaws, and one with the Seminoles.<sup>57</sup>

The foreshadow of a removal policy was present in dealings between the federal government and the Five Tribes before 1830, however, and by 1830 the federal government was secure enough to begin an ambitious and explicit campaign for eastern Indian natural resources.<sup>58</sup> During this time, settlers remained eager to gain control over the land of the Five Tribes.<sup>59</sup>

### 1. *The Official Removal Policy*

The election of Andrew Jackson to the presidency in 1828 was the final piece of the puzzle necessary to implement an official removal policy. When Jackson arrived in office, removal advocates felt that it was

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54. Arthur H. DeRosier Jr., *The Choctaw Removal of 1831: A Civilian Effort*, J. WEST, 1967, at 237.

55. JEREMIAH EVARTS, *A Brief View, in CHEROKEE REMOVAL: THE "WILLIAM PENN" ESSAYS AND OTHER WRITINGS* 200, 208 (Francis Paul Prucha, ed., 1981).

56. FOREMAN, *supra* note 22, at 19.

57. *Id.*

58. VAN EVERY, *supra* note 35, at 106 ("No longer was there a need to take into account the resistance either of Indians or of foreign powers with whom they had so often been allied. The United States had reached a position of strength which made any disposition of the Indians dependent solely upon its own will.").

59. *Id.*

their “hour of triumph.”<sup>60</sup> After all, Jackson was a citizen of Tennessee and a large land speculator himself.<sup>61</sup> Jackson also was a military veteran, had previously been involved with Southeast Indian treaty negotiations, and by 1828 was, by one historian’s account, “the outstanding exponent of the white man’s relentless contest for the lands of the Indian.”<sup>62</sup> As such, Jackson was eager to begin removing the Five Tribes.<sup>63</sup>

Once Jackson was President, the state of Georgia declared jurisdiction over all Indian lands within its boundaries and Mississippi did so as well in 1829.<sup>64</sup> Members of the Five Tribes faced the reality that once Congress approved of the states’ actions, local Indians either had to move off their land or live without tribal organization and subject to state jurisdiction.<sup>65</sup> At this point, the immigrant land of the Five Tribes had grown to a point where removal was all but inevitable.<sup>66</sup>

Despite the cresting demand for removal of the Five Tribes, there were individuals that lobbied against such infringements on native sovereignty. Jeremiah Evarts wrote during this time, under the pseudonym William Penn, that there were 60,000 Indians in the Southeast who would be forced to make the long removal journey (out of a national Indian population of 300,000 to 500,000).<sup>67</sup> The United States Secretary of War estimated higher, placing the population of the Five Tribes alone over the 75,000 individual mark.<sup>68</sup> Evarts understood the correlation between infringements on native sovereignty and the immigrant demand for Indian natural resources, as exemplified in a letter he and other prominent Massachusetts residents wrote to Congress in February of 1830:

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60. R.S. COTTERILL, *THE SOUTHERN INDIANS: THE STORY OF THE CIVILIZED TRIBES BEFORE REMOVAL* 237 (Univ. of Okla. Press 1954).

61. MCLOUGHLIN, *supra* note 27, at 207.

62. FOREMAN, *supra* note 22, at 21.

63. Arthur H. DeRosier Jr., *Andrew Jackson and Negotiations for the Removal of the Choctaw Indians*, 29 *HISTORIAN*, no. 3, 343, 344 (1967) (“If the goal is the removal of Indians from the splendid farm lands of the Ohio, Tennessee, and Mississippi valleys, Jackson reasoned, then let us quit philosophizing and procrastinating and do the job as quickly and painlessly as possible.”).

64. *Id.* at 346.

65. COTTERILL, *supra* note 60, at 239.

66. VAN EVERY, *supra* note 35, at 9 (The Five Tribes “had been inundated by a cataclysmic wave of overwhelmingly superior force and numbers.”).

67. JEREMIAH EVARTS, *Essays on the Present Crisis in the Condition of the American Indians*, in *CHEROKEE REMOVAL*, *supra* note 55, at 43, 48 (The source states “Southwest” because the United States had not expanded west at the time of the writing. It has been changed for clarity.).

68. *Id.*

It would seem impossible to assign them [Indians] any place, where they will not stand in the way of the whites; and where the supposed interests of the whites would not be promoted by their removal, or their extinction.<sup>69</sup>

Other anti-removal advocates, such as Boston resident William Reed, concentrated their protests on the destitute conditions awaiting the Five Tribes in the West. In 1831, Reed wrote that proposed removal lands were almost completely composed of prairie, devoid of any wood except for very mountainous areas, without running water in the winter months, and that before removal the Choctaw and Chickasaw nations already had appropriated all of the decent land in the area.<sup>70</sup> Besides concerned citizens such as Reed, many northern Congressmen opposed the removal plan because they were wary of an increased southern electorate base.<sup>71</sup>

Nevertheless, the removal proposal passed through Congress and became official federal policy.<sup>72</sup> One scholar even contends that President Jackson and federal officials were overly eager to help restless white settlers begin the removal process:

Indians were called into councils and gorged with pork and beef and plied with whisky; chiefs, warriors, and other influential men of the tribes by argument, persuasion, cajolery, threats, or bribes, the means depending on the exigencies of the occasion, were induced to agree to terms set down on paper called treaties. Indian removal by the government was thus formally inaugurated.<sup>73</sup>

In 1832, the Paynes Landing Treaty called for the completion of Seminole removal within three years.<sup>74</sup> Dissension within the tribe resulted in the Second Seminole War from 1835 to 1842, costing the federal government twenty million dollars and 1,500 American lives.<sup>75</sup> After gold surfaced within Cherokee limits in Georgia, the New Echota Treaty was bullied through in 1835 and called for complete Cherokee removal by the winter of 1838 to 1839.<sup>76</sup> Although the Chickasaws were ambiva-

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69. JEREMIAH EVARTS, *Memorial of Citizen of Massachusetts, in CHEROKEE REMOVAL*, *supra* note 55, at 224, 232.

70. JEREMIAH EVARTS, *Memorial of the American Board, in CHEROKEE REMOVAL*, *supra* note 55, at 290, 299.

71. See COTTERILL, *supra* note 60, at 239.

72. *Id.* at 238–39.

73. FOREMAN, *supra* note 22, at 13.

74. Treaty with the Seminole, art. 7, U.S.-Seminole Indians, May 9, 1832, 7 Stat. 368.

75. H.R. Rep. No. 82-2503, *supra* note 22, at 575.

76. *Id.* at 268.

lent about living with the Choctaws (who outnumbered them by three to one), these two tribes signed removal treaties soon as well. The “1836 Creek War” completed the tail ends of Creek removal, as the last of the Five Tribes holding out.<sup>77</sup>

The federal government had imposed a removal policy upon the Five Tribes, to secure valuable natural resources. The tribes’ only condolence was that the removal treaties allowed fee simple title to the new lands and permanent Indian political existence outside of state boundaries and jurisdiction.<sup>78</sup> Faced with genocide, the Five Tribes accepted removal to an Indian territory in what is now Oklahoma.<sup>79</sup> Only a sacrifice of their eastern land base would ensure native sovereignty, so the Five Tribes headed west on the infamous “Trail of Tears” associated with removal.<sup>80</sup> Meanwhile, the success of Jackson’s removal policy led to immigrant bonfires and celebrations across Mississippi and other areas in the Southeast.<sup>81</sup>

After 1835, thousands of southeastern Indians from Georgia, North Carolina, eastern Tennessee, Mississippi, Alabama, and other southern states moved west as well. Other tribes such as the Cherokees in western North Carolina stayed behind or waited a few decades before migrating.<sup>82</sup> From 1855 to 1858, a third Seminole War broke out between federal forces and Seminoles defying removal. In the process, the Seminole population decreased from 5,000 to only 500 individuals in the Southeast.<sup>83</sup>

## 2. *The Civil War and Indian Sovereignty*

Most members of the Five Tribes were either neutral or pro-Union as the civil war approached.<sup>84</sup> When federal representatives turned down Indian offers to help fight as a “savage practice,” most tribal members succumbed to the pressure of their slave owning members and aligned with the Confederacy.<sup>85</sup> In addition, Confederate treaties with the Five Tribes were very favorable to the Indians, allowing for native political

77. GREEN, *supra* note 41, at 185.

78. VINE DELORIA JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 23 (1984).

79. See H.R. Rep. No. 82-2503, *supra* note 23, at maps 10, 12, 16, 18, & 59.

80. DeRosier, *supra* note 54, at 237–47.

81. *Id.*

82. CFCT 1904, *supra* note 21, at 8.

83. Charles H. Fairbanks, *The Ethno-Archeology of the Florida Seminole*, in *A SEMINOLE SOURCE BOOK* 187 (William C. Sturtevant, ed., 1987).

84. *Id.*

85. *Id.*

representation as well as full title to tribal lands.<sup>86</sup> Fighting alongside the Confederacy during the war, the Five Tribes lost tribal members as well as four million dollars in cattle and other property.<sup>87</sup>

As the war continued, a bill surfaced in Congress on February 20, 1865 that called for statehood in the Indian territory. The bill attempted to increase federal control over Indian affairs, as the text of the bill called for a federally appointed governor and core of officials for the new Indian state.<sup>88</sup> This statehood proposal did not ensure continued Indian sovereignty and self-determination because the form of government proposed required the integration, and oversight, of exterior federal officials.<sup>89</sup> Although the statehood proposal that surfaced in Congress in 1865 never made any progress, it corresponded with the rising value of the land and resource base of the Five Tribes. After all, the Five Tribes had traded indigenous southern resources for a vast chunk of the Western United States.

The day that Congress ratified Civil War peace treaties with the Five Tribes, they gave approval to railroad charters and conditionally granted the corporations a ten year title option to Indian land needed for the railroads. In passing these Acts, Congress created incentives for the railroads to advocate for territorial, or statehood, status for the Indian territory so lands conditionally granted to the railroads would be public lands once the area came into the Union as a State or a Territory.<sup>90</sup> Immediately following the war, Kansan and Texan cattlemen illegally used over six million acres of Cherokee land for grazing purposes.<sup>91</sup> Tribal emigrants, including Delawares, Munsies, Shawnees, Osages, Modocs, and Sioux, migrated to the western lands of the Five Tribes soon after the war as well. The federal Commissioner for the Five Tribes recognized the increasing demand for the Five Tribes' land resources following the war:

The treaties of 1866, and other treaties also, guarantee to the five civilized tribes the possession of their lands; but, without the moral and physical power that is represented by the Army of the United States, what are these treaties worth as a protection against the rapacious greed of the homeless people of the

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86. DELORIA & LYTLE, *supra* note 78, at 24.

87. H. CRAIG MINER, *THE CORPORATION AND THE INDIAN: TRIBAL SOVEREIGNTY AND INDUSTRIAL CIVILIZATION IN INDIAN TERRITORY 1865-1907*, at 4 (1976).

88. Allen G. Applen, *An Attempted State Government: The Okmulgee Constitution in Indian Territory 1870-1876*, 3 KAN. Q. 89 (1971).

89. DELORIA & LYTLE, *supra* note 78, at 19.

90. Amos Maxwell, *The Sequoyah Convention*, 28 CHRON. OKLA., no. 2, 1950, at 161, 163.

91. Hanna R. Warren, *Reconstruction in the Cherokee Nation*, 45 CHRON. OKLA., no. 2, 1967, at 180, 187.



States who seek homesteads within the borders of the Indian Territory?<sup>92</sup>

As pressure from railroads, industry, speculators, and both immigrant and other tribal settlers increased on the Five Tribes' western land, so did the demand for more government in Indian territory.

Immigrant settlers often felt that the Five Tribes possessed no formal government, since the policies of the tribal governments historically were not recorded in text. Land hungry settlers disliked communal concepts that prevented individual ownership and control over natural resources, and such systems bolstered a perception that the Five Tribes' governments were inadequate. This excerpt from an official federal government report exemplifies the immigrant attitude toward the Five Tribes' sovereignty:

Soon after the [Civil] [W]ar the waves of commerce in their westward flow began to surge over the boundaries of the Indian Territory. Then the inadequacy of their legislative and judicial bodies to maintain law and order and the fallacy of their system of land tenure became apparent.<sup>93</sup>

The immigrant perception of the system of government in the Five Tribes' territories was wrong, however. For example, the Creeks always had an elaborate system of self-governance, and successfully employed an executive branch, a legislature, a judicial branch, and a police force in their territory before the Civil War.<sup>94</sup> Still, the federal government felt that the Five Tribes' system of self-governance before the Civil War was inadequate and needed reformation.

### C. The Okmulgee Council and the First Serious Statehood Proposal

One of the stipulations included in the peace treaties that the federal government and the Five Tribes signed after the Civil War was a clause that the tribes would form a council with the aim of creating one government for the five diverse Indian nations.<sup>95</sup> The idea of a grand council for a pan-Indian state was a last attempt by the federal government to accommodate the Five Tribes. Although any Indian state would necessarily diminish tribal sovereignty, the federal government was al-

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92. Atkins, *Annual Report of the Commissioner of Indian Affairs* (1886), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 169 (Francis Paul Prucha, ed., 1975).

93. COMM'N TO THE FIVE CIVILIZED TRIBES, REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1906, at 5 (1906) [hereinafter CFCT 1906].

94. DELORIA & LYTLE, *supra* note 78, at 22.

95. *Id.*

lowing members of the Five Tribes to control the process and organization of any statehood plan.<sup>96</sup> Soon after, however, the federal government would change its Indian policy to one based on direct control, and begin to dictate a specific governmental form.<sup>97</sup>

The 1866 peace treaties provided funding until 1874 for an Indian International Council—more commonly known as the Okmulgee Council.<sup>98</sup> The Okmulgee Council would meet at the Creek Capitol in the town of Okmulgee to formulate a statehood plan, preserve traditional culture, and maintain tribal affiliations.<sup>99</sup> The initial meetings of the Okmulgee Council occurred in September and December of 1870. Nine tribes attended the first Okmulgee session, including representatives from the Five Tribes, the Osages, and several smaller tribes.<sup>100</sup> But in March of the same year, a compulsory congressional plan for a State of Oklahoma that would incorporate the Five Tribes' territory emerged.<sup>101</sup> These concurrent movements officially set the stage for future statehood arguments, i.e., would there be dual statehood which allowed the Five Tribes to retain some sovereign and independent status, or would there be one state called Oklahoma that included the Indian territory?

The Okmulgee Council began meeting on an annual basis, and even drafted a Constitution in 1871 that called for a government complete with a judicial system and a general assembly (including a senate and house of representatives).<sup>102</sup> The Okmulgee Constitution was elaborate, and was the product of detailed formulation and drafting meetings requiring committees on federal relations, international relations, judiciary, finance, education and agriculture, and congressional bills and rules.<sup>103</sup> However, the Okmulgee Council never obtained lawmaking powers because neither the tribes, nor Congress, ever ratified the Okmulgee Constitution.<sup>104</sup>

Soon after the Council drafted the Constitution, it received the first inkling of a negative federal reaction. In 1871, President Ulysses Grant announced his support for the Okmulgee Council, with two quali-

96. *Id.* at 23.

97. *Id.* at 26.

98. *Id.*

99. CHIEF G. W. GRAYSON, *A CREEK WARRIOR FOR THE CONFEDERACY: THE AUTOBIOGRAPHY OF CHIEF G. W. GRAYSON*, 147–48 (W. David Baird, ed., 1988).

100. *Journal of the General Council of the Indian Territory*, 3 CHRON. OKLA., no. 1, 1925, at 33.

101. Maxwell, *supra* note 90, at 163.

102. *Journal of the General Council of the Indian Territory*, *supra* note 100, at 39–46.

103. *Id.*

104. Muriel H. Wright, *A Report to the General Council of the Indian Territory Meeting at Okmulgee in 1873*, 34 CHRON. OKLA., no. 1, 1956, at 7.

fications: (1) the proposed Indian government possessed too much autonomy as the proposed Constitution did not require future Okmulgee legislation to receive federal congressional approval; and (2) federal representatives should appoint the Governor of the pan-Indian state instead of election by tribal members.<sup>105</sup> President Grant seemed inclined to allow Indian autonomy—but only to the extent that Congress approved and controlled the pan-Indian state. Transmogrified as such, the Okmulgee statehood plan would have become another disguised affront to tribal sovereignty.

Okmulgee organizers expected five hundred tribal representatives at the June 1872 meeting. Representatives attended from as far off as New York, the Great Lakes, and the plains.<sup>106</sup> Ironically, President Grant's position on Indian statehood made clear that a truly sovereign Indian state was nearly impossible. With this in mind, from 1872 to 1876 the Council concentrated its efforts on protesting any attempt to encroach on or legislate Indian lands.<sup>107</sup> Cherokee representatives in particular worked against federal territorial aims and concentrated their efforts on pan-Indian unity.<sup>108</sup> In the end, all Five Tribes opposed statehood as imagined by the federal government as an unacceptable encroachment on tribal sovereignty.<sup>109</sup> This tribal opposition led to the end of federal funding for the Council in 1874.<sup>110</sup>

Not only was the Okmulgee Council having differences with the federal government, but there was internal dissension as well. The Creeks, Choctaws, and a few smaller tribes ratified the first Okmulgee Constitution, but other tribes did not out of fear of losing land.<sup>111</sup> The Chickasaws led the small tribe opposition to the Okmulgee Constitution.<sup>112</sup> Small tribes, such as the Chickasaws and Seminoles, feared domination at the hands of larger tribes due to unequal representation.<sup>113</sup> Representatives finally worked out a revised agreement, suitable to both large and small tribes, which provided for representation of one senator per tribe and one representative per 1,000 in tribal population.<sup>114</sup> Despite

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105. Applen, *supra* note 88, at 93.

106. ARRELL M. GIBSON, *THE CHICKASAWS* 245 (1971). The federal government paid Okmulgee representatives four dollars a day plus mileage expenses. *Id.*

107. See Applen, *supra* note 88, at 96.

108. MORRIS L. WARDELL, *A POLITICAL HISTORY OF THE CHEROKEE NATION 1838–1907*, at 296 (1938).

109. See GRAYSON, *supra* note 99, at 158.

110. *Id.*

111. *Id.* at 147.

112. See Applen, *supra* note 88, at 95.

113. See *id.*

114. See GRAYSON, *supra* note 99, at 148 (the pace of negotiations was slow because meetings often required four or five interpretations).

this eventual Indian consensus, federal representatives rejected the final constitution proposed by the tribes because it did not include any provisions for individual land allotments.<sup>115</sup>

The federal government preferred individual land allotments to collective tribal ownership, which was an unworkable communal concept in a system designed around individual rights. Moreover, the federal government hoped to carve out property needed for railroad expansions.<sup>116</sup> Federal representatives, therefore, were increasingly strident in their demand that the Five Tribes allocate land in individual allotments rather than communally.<sup>117</sup> Okmulgee representatives began to fear that the federal government would attempt to impose its own form of statehood over Indian lands to gain control over Indian natural resources.<sup>118</sup> The Council therefore drafted a resolution detailing its opposition to any federal sales of Indian land to railroad companies, and “protesting against any legislation by Congress impairing the obligation of any treaty provision, and especially against the creation of any government over the Indian Territory other than that of the General [Okmulgee] Council.”<sup>119</sup> Without federal funding, or any hope of success, the Okmulgee Council continued to hold sessions until 1878.<sup>120</sup> The Five Tribes tried to use Indian statehood as a defense against infringements on tribal sovereignty, but the federal government envisioned statehood as a control mechanism that would diminish native autonomy and allow for greater federal control over tribal natural resources.

It was no accident that federal representatives envisioned Indian statehood as a method to diminish tribal sovereignty and gain control of natural resources. Demand for the Five Tribes’ land only forty years after removal was growing, along with the immigrant population of the country.<sup>121</sup> Congress passed the first legislation allowing railroads to rent Indian land in the mid-1870s.<sup>122</sup> Around the same time, in 1874, a federal commission traveled to the Indian territory of the Five Tribes and recommended statehood for the area.<sup>123</sup> Scholar and advocate Vine Deloria de-

115. DELORIA & LYTLE, *supra* note 78, at 24.

116. *See id.* at 25.

117. *Id.* at 24.

118. *See Journal of the General Council of the Indian Territory*, *supra* note 100, at 42.

119. *Id.*

120. DELORIA & LYTLE, *supra* note 78, at 24.

121. SUSAN WORK, THE “TERMINATED” FIVE TRIBES OF OKLAHOMA: THE EFFECT OF FEDERAL LEGISLATION AND ADMINISTRATIVE TREATMENT ON THE GOVERNMENT OF THE SEMINOLE NATION, *reprinted in* A SEMINOLE SOURCE BOOK, *supra* note 83.

122. *Id.*

123. *See* Maxwell, *supra* note 90, at 164.

scribes the relationship between Indian natural resources and the federal insistence on approving and dictating any Indian statehood proposal:

It was inconceivable to the federal officials that [an Indian] state could be admitted to the Union that did not provide for free commerce with other states, and the communal holding of land struck directly at the personal land tenure system already entrenched in other states . . . how could commerce proceed when the best that white citizens might ever achieve within the new Indian state might be the leasing of lands? Property rights, rather than political rights, doomed the Indian state that the Congress had demanded the Indians form. . .<sup>124</sup>

From the standpoint of the Five Tribes, an immigrant community of settlers arrived, demanded individual allotments of land, challenged the form of communal ownership by the Indian tribe or nation, and ultimately attacked native sovereignty to achieve this goal. Breaking up tribal land, in short, would erode collective Indian identity and sovereignty.

The Five Tribes still had a substantial population and natural resource base. The federal Census population of Indians among the Five Tribes in 1880 was 64,587 individuals.<sup>125</sup> The land held by the Five Tribes totaled over twenty million acres.<sup>126</sup> This land was about the size of the state of Maine, and in some areas was rich in minerals, timber, and agricultural resources.<sup>127</sup> The Indians held this land in common, much to the chagrin of the immigrants.<sup>128</sup>

Members of the Five Tribes were primarily agriculturists, and were stable and settled despite holding land in common. Individuals considered improvements on land to be private property, with most tribal members living on small individual farms or homesteads.<sup>129</sup> Individ-

124. DELORIA & LYTLE, *supra* note 78, at 24.

125. COMM'N TO THE FIVE CIVILIZED TRIBES, REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1907, 558 (1907) [hereinafter CFCT 1907].

126. COMM'N TO THE FIVE CIVILIZED TRIBES, TENTH ANNUAL REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1903, at 8 (1903) [hereinafter CFCT 1903].

127. COMM'N TO THE FIVE CIVILIZED TRIBES, SEVENTH ANNUAL REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1900, at 7-8 (1900) [hereinafter CFCT 1900].

128. LESLIE HEWES, OCCUPYING THE CHEROKEE COUNTRY OF OKLAHOMA 1 (Univ. of Neb. Studies: New Series No. 57 1978). ("Cherokee culture, although markedly changed by contacts with whites, was distinguished by a basic attitude toward the land — that it belonged to all members of the tribe.")

129. *Id.* at 5.

uals controlled and occupied most of the better land, although the tribe itself held title to the lands in common.<sup>130</sup>

In 1879, a man named David Payne led a group of white settlers called the “Boomers” to mass on the southern Kansas border adjacent to land of the Five Tribes.<sup>131</sup> Starting in 1860, the population of Kansas had increased from about 100,000 people to about 1,000,000 people.<sup>132</sup> The increasing number of Kansas immigrants craved Indian natural resources to homestead and farm.<sup>133</sup> Payne and the Boomers wanted the “Unassigned Indian Lands” (in what became central Oklahoma) for white settlers, but the Creek and Seminole ceded the land in 1866 for the specific resettlement of other Indian nations.

Indian representatives, that had been involved with the defunct Okmulgee Council, appealed to federal representatives in March of 1880 to prevent a Boomer invasion of the Five Tribes’ land.<sup>134</sup> In April and July of 1880, federal troops repelled two parties of Boomers led by Payne that attempted to settle forcefully in Indian territory.<sup>135</sup> Payne also encouraged homeless settlers to move onto Indian lands illegally, and his contacts in Washington kept constant pressure on federal representatives regarding the settlers’ need for Indian natural resources.<sup>136</sup>

By the 1880s the Five Tribes lost their attempts to control railroad rights of way, leading to a proliferation of cattle and oil business interests westward as railroads accessed Indian lands.<sup>137</sup> A pattern of diminished sovereignty emerged with the breakdown of native control, with tribal infighting, hesitancy between tribes and federal representatives over jurisdiction, and eventually the dominance of outsider corporations with financial backing for land, cattle, oil, and gas.<sup>138</sup> As the demand for Indian natural resources rose, attacks on tribal sovereignty made predictable inroads.

Federal officials interested in Indian natural resources were concerned that interlopers were monopolizing the most productive land in the absence of controlling legislation. This situation provided the federal government with rationale to involve themselves in autonomous Indian

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130. CFCT 1904, *supra* note 21, at 8.

131. GRAYSON, *supra* note 99, at 152.

132. DEP’T OF THE INTERIOR, CENSUS OFFICE, COMPENDIUM OF THE TENTH CENSUS, JUNE 1, 1880, at 4 (1883).

133. GRAYSON, *supra* note 99, at 152.

134. *Id.*

135. *Id.*

136. *Id.*

137. MINER, *supra* note 87, at 115.

138. *Id.* at 118–19.

affairs.<sup>139</sup> After the Boomer incidents, there had been a general lull in settler demand for Indian natural resources.<sup>140</sup> The land grants that Congress promised the railroad companies if Indian land became public had expired, and the industries were content to rent resources in a territory that had no tax liabilities.<sup>141</sup> This brief slack in immigrant demand for Indian resources disappeared when federal officials opened the “Unassigned Indian Lands” to non-native settlers in 1889.<sup>142</sup> A federal Commission would later write:

Indian territory furnished too attractive a region to escape the wave of trade desire and as a result there has been brought to the domain of the [five] tribes a flood of humanity seeking its share of prosperity, jostling and clamoring for opportunity with that vigor and energy which characterizes Americans; but which, in the light of the solemn treaties under which was promised to these tribes the undisturbed possession and occupancy of their lands, has been unseemly to a degree which may well shock the mind of an impartial observer.<sup>143</sup>

By 1890, the immigrant demand for the natural resources of the Five Tribes was larger than ever. If historical patterns continued, the Five Tribes could anticipate some form of federal attack on tribal sovereignty in an attempt to gain control of these valuable resources.

#### D. The Commission to the Five Civilized Tribes

In 1887, Congress directly attacked Indian self-determination by passing the General Allotment Act.<sup>144</sup> The Act called for Indian land to be allotted in severalty,<sup>145</sup> which federal officials described as “a direct division of their estate with consequent individual ownership of their homes.”<sup>146</sup> The Five Tribes were exempt from the 1887 Act, so they

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139. HEWES, *supra* note 128, at 47 (“Those who decried the land system of the Five Civilized Tribes as “un-American” and their tenure as impeding progress now had the additional argument that the “real” Indian, the full blood, was being dispossessed in his own country.”).

140. *Id.*

141. *Id.*

142. Maxwell, *supra* note 90, at 165.

143. COMM’N TO THE FIVE CIVILIZED TRIBES, EIGHTH ANNUAL REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1901, 7 (1901) [hereinafter CFCT 1901].

144. Indian General Allotment Act, Act Feb. 8, 1887, ch. 119, 24 Stat. 388 (repealed 2000).

145. *Id.*

146. CFCT 1900, *supra* note 127, at 7.

waited.<sup>147</sup> Congress passed the Dawes Act in 1889 and extended the allotment requirement to the Five Tribes, under pressure from natural resource hungry settlers and Protestant missionaries who approved of general assimilation but were concerned over settler corruption of Indians.<sup>148</sup>

By 1892, there were two statehood bills on the floor in Congress. The first called for dual statehood, and had the support of Democrats hoping to gain representatives in Congress from two newly admitted southern states.<sup>149</sup> Tribes generally preferred this dual statehood proposal as the lesser of two evils, for it retained some semblance of autonomy and sovereignty in creating a pan-Indian state.<sup>150</sup> The other bill called for combining the Five Tribes' territories with neighboring lands to create one state.<sup>151</sup> Republicans favored this single statehood proposal, as a Democratic Oklahoma appeared inevitable.<sup>152</sup> When the idea of single statehood emerged in January of 1892, Creek leaders specifically objected to the bill as a breach of previous treaties.<sup>153</sup>

On March 3, 1893, Congress passed legislation instructing the President to appoint three commissioners to negotiate with the Five Tribes over allotment.<sup>154</sup> This group became the Commission to the Five Civilized Tribes, or the Dawes Commission.<sup>155</sup>

The Dawes Commission's first report specifically discounted the implication that allotment was the first step in dismantling tribal sovereignty.<sup>156</sup> The Commission felt that "while legislation by Congress for all the petty needs of the Territory is impracticable in the highest degree, the more urgent requirements of the people must be met by this means for the present."<sup>157</sup> So, the Dawes Commission was not created to impose a single state in the territories that would destroy tribal sovereignty.<sup>158</sup> Early Commission reports implied that the government supported the creation of a separate pan-Indian state, but considered allotment "requi-

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147. *Id.*

148. See MICHAEL C. COLEMAN, PRESBYTERIAN MISSIONARY ATTITUDES TOWARD AMERICAN INDIANS 1837–1893, at 157 (1985).

149. Maxwell, *supra* note 90, at 166–67.

150. *Id.* at 167.

151. *Id.* at 166.

152. *Id.*

153. Hodges, *supra* note 25, at 15.

154. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645.

155. GRAYSON, *supra* note 99, at 162.

156. COMM'N TO THE FIVE CIVILIZED TRIBES, ANNUAL REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1899, 28 (1899) [hereinafter CFCT 1899].

157. *Id.*

158. *Id.*



site and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.”<sup>159</sup> Initially, the Dawes Commission appeared to be the federal government’s attempt to address perceived problems in the Five Tribes’ governing systems, without imposing a single statehood territorial government.<sup>160</sup>

The Dawes Commission initially worried about the single statehood idea, because the Indians in the territory were becoming rapidly outnumbered by waves of white immigrants and settlers.<sup>161</sup> The 1899 Commission report stated that the conditions for statehood were “not yet ripe” and “wholly impracticable,” since there were nearly four settlers for every registered tribal citizen in the territory.<sup>162</sup> From 1890 to 1900, the settler to Indian ratio in the territories changed from 2:1 to 6:1.<sup>163</sup> These settlers wanted representation in Congress, and it appeared clear that some form of statehood would occur eventually.

Pressure mounted for the Commission to complete allotment so that some form of statehood could be imposed on the territory, however progress was slow. The Five Tribes would not even discuss allotment with federal officials after the 1893 Act passed, because the Commission only had negotiating power, and could not demand that tribes begin to draft or rewrite tribal membership lists.<sup>164</sup> Allotment was not a very popular idea among the Five Tribes, who wanted no form of statehood or other infringement on their right to determine how to govern tribal members and allocate natural resources.<sup>165</sup>

Many of the large landholders among the Cherokees, and other tribes, also opposed allotment, for it would diminish their resource holdings.<sup>166</sup> Many within the tribal communities that disliked allotment aggressively pursued opposition to the Commission.<sup>167</sup> Critics of the Five Tribes’ governments, on the other hand, felt that white settlers and mixed-blood Indians were corrupting the land in common system by monopolizing large tracts.<sup>168</sup> Regardless, a Creek Chief, G.W. Grayson, understood that allotment would lead to both diminished tribal sover-

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159. CFCT 1899, *supra* note 156, at 66.

160. GRAYSON, *supra* note 99, at 162.

161. CFCT 1899, *supra* note 156, at 28.

162. *Id.*

163. Maxwell, *supra* note 90, at 169.

164. GRAYSON, *supra* note 99, at 164 n.23.

165. *Id.* at 163.

166. CFCT 1901, *supra* note 143, at 11.

167. CFCT 1906, *supra* note 93, at 7.

168. Atkins, *supra* note 92, at 197.

eignty and immigrant attempts to exploit the five tribe's natural resources:

Here we, a people who had been a self-governing people for hundreds and possibly a thousand years, who had a government and administered its affairs ages before such an entity as the United States was ever dreamed of, are asked and admonished that we must give up all idea of local government, change our system of land holding to that which we confidently believed had pauperized thousands of white people—all for why; not because we had violated any treaties with the United States which guaranteed in solemn terms our undisturbed possession of these; not because of any respectable number of intelligent Indians were clamoring for a change of conditions; not because any non-enforcement of law prevailed to a greater extent in the Indian territory than elsewhere; but simply because regardless of the plain dictates of justice and a [C]hristian conscience, the ruthless restless white man demanded it.<sup>169</sup>

The Dawes Commission had no ability or legal authority to impose allotment, and was effectively powerless within the first few years due to widespread tribal suspicion and opposition.<sup>170</sup>

Allotment represented the first step towards a form of Indian statehood, and thus diminished tribal sovereignty. Federal officials were frustrated by the lack of Indian cooperation, and began to address the perceived need for a new government for the Five Tribes. On November 20, 1894, the Dawes Commission wrote that “the treaties never contemplated the un-American and absurd idea of a separate nationality in our midst, with power as they may choose to organize a government of their own, or not to organize any government nor allow one to be organized. . . .”<sup>171</sup>

Federal officials were gearing up to debate, and attack the right of the Five Tribes to remain sovereign. The same Commission report made the natural resource motivations for this onslaught all too clear:

[I]t has become no longer possible. It is hardly necessary to call attention to the contrast between the present conditions surrounding this Territory and those under which it was set apart. Large and populous States of the Union are now on all sides or it, and one-half of it has been constituted a Territory

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169. GRAYSON, *supra* note 99, at 163.

170. *Id.* at 164.

171. Atkins, *supra* note 92, at 171.

of the United States. These States and this Territory are teeming with population and increasing in numbers at a marvelous rate. The resources of the Territory itself have been developed to such a degree and are of such immense and tempting value that they are attracting to it an irresistible pressure from enterprising citizens. The executory conditions contained in the treaties have become impossible of execution. It is no longer possible for the United States to keep its citizens out of the Territory. Nor is [it] now possible for the Indians to secure to each individual Indian his full enjoyment in common with other Indians of the common property of the Territory.<sup>172</sup>

By 1894, the Commission had articulated its intentions and seemed prepared to condone the incorporation of the Five Tribes' territories into one state with the lands of surrounding white settlers.<sup>173</sup>

The 54th session of Congress included a delegate from Indian territory, and three bills were introduced from 1895 to 1896 calling for a "Territory of Indianola."<sup>174</sup> The federal government was determined to gain control of Indian natural resources through some form of statehood, whether the Five Tribes liked the idea or not.

By 1896, federal officials determined that they would have to empower the activist Commission to legally proceed with allotment and statehood.<sup>175</sup> The Commission recognized the federal mood in 1896, when it reached several preliminary agreements with the Five Tribes that still required verification by tribal members. On June 10, 1896, Congress passed an annual allocation bill that expanded the Commission's power to allow them to determine citizenship and tribal enrollment.<sup>176</sup> The bill memorialized the federal government's intentions to revamp and re-create tribal government:

It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory, and afford needful protection to the lives and property of all citizens and residents thereof.<sup>177</sup>

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172. *Id.* at 191.

173. *Id.*

174. Maxwell, *supra* note 90, at 188.

175. CFCT 1906, *supra* note 93, at 7.

176. *Id.*

177. *Id.* at 9 (citing Appropriations Act of 1896, ch. 398, 29 Stat. 321, 340 (1896)) ("Meanwhile matters grew from bad to worse and Congress recognized the fact that if the Indians would not agree to any plan which would reform the growing evils the United States Government was in duty bound to correct them arbitrarily.")

The 1896 bill only allowed three months to register all members of the Five Tribes.<sup>178</sup> The requirements to be placed on tribal citizenship rolls were: blood inheritance with a continuous affiliation and residence, adoption by national or tribal council, freedmen under certain treaty stipulations, appeals to the Dawes Commission, and inclusion via court decision, or intermarriage.<sup>179</sup> When it became clear that this short period was too optimistic, the Commission abolished the deadline.<sup>180</sup> This was only the beginning of the Commission's troubles, as new difficulties emerged.

### 1. Enrollment

Each of the Five Tribes had their own set of problems with the enrollment process. The Creeks had internal dissent over tribal membership—some wanted a blanket policy that would make African-American and mixed blood freedmen that were not included on older tribal rolls full tribal citizens.<sup>181</sup> The Seminoles spoke little English, and could not provide much of the census information, or even established family names.<sup>182</sup> The Chickasaw and Choctaw held their lands in common and had high degrees of intermarriage, making it difficult to determine specific tribal membership.<sup>183</sup> The Cherokee were the most difficult, as 985 Delaware Indians from Kansas that joined the Cherokee tribe in return for 157,600 acres felt that they should receive individual Cherokee land allotments as tribal members, whereas the Cherokees disagreed with any additional allotment to the Delawares.<sup>184</sup> A United States Court of Claims ultimately had to address the issue.<sup>185</sup>

The demand for Indian natural resources led to scores of false claims for enrollment. Green McCurtain, the Principal Chief of the Choctaw Nation, wrote on October 3, 1900 that “[T]here was a wild rush to get in applications. The applicants were, in almost every instance, white people from the surrounding States, who had never before claimed citizenship, but who were induced by the allurements alone of getting something for nothing. . . .”<sup>186</sup> Litigation emerged over enrollment, including those filed by freedmen who wished to register in full on tribal

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178. Appropriations Act of 1896, ch. 398, 29 Stat. 321, 339 (1896).

179. CFCT 1899, *supra* note 156, at 11.

180. *Id.* at 17.

181. *Id.* at 12.

182. *Id.* at 12–13.

183. *Id.* at 14.

184. *Id.* at 17.

185. *Id.* at 17; Delaware Indians v. Cherokee Nation, 38 Ct. Cl. 234 (1903), *aff'd and modified*, 193 U.S. 127 (1904).

186. CFCT 1901, *supra* note 143, at 217.

rolls to receive the largest possible allotments.<sup>187</sup> In addition, many of the Mississippi Choctaws that had remained east during removal now wanted to migrate west and receive allotments.<sup>188</sup> Fraudulent land agents often manipulated these eastern Choctaws, and offered them assistance and transportation in exchange for liens on land allotments.<sup>189</sup> Claimants came from everywhere, including the Gulf of Mexico, the Great Lakes, Oregon, and Massachusetts.<sup>190</sup> By 1898, the Commission was under siege, and could not handle the barrage of natural resource driven enrollment claims.<sup>191</sup>

## 2. *The Beginning of Allotments*

Despite these setbacks, federal officials were determined to complete allotment and finalize some sort of statehood. A Commission report described the federal reaction to the problems that plagued the Dawes Commission from 1893 to 1898:

Under these conditions Congress was in 1898 fairly confronted with the alternative of either abandoning its policy and abolishing the Commission, or else of converting the Commission from merely a negotiating body into also an executive and semijudicial [sic] body, and of proceeding with the work under the constitutional power of Congress, and largely, at least, regardless of the will of the tribes.<sup>192</sup>

In 1898, Congress passed the Curtis Act, which incorporated several agreements between the Commission and the Five Tribes, and required allotment in the territories of the Five Tribes.<sup>193</sup> The federal government insisted that allotment was for the benefit of the tribal members.<sup>194</sup> Federal representatives were convinced that the Five Tribes could not handle their own affairs—or used that justification to allocate the Five Tribes' natural resources, and completely dismantle any semblance of

187. CFCT 1906, *supra* note 93, at 15.

188. *Id.*

189. AFTER REMOVAL: THE CHOCTAW IN MISSISSIPPI 98 (Samuel J. Wells & Roseanna Tubby, eds., 1986).

190. CFCT 1906, *supra* note 93, at 32.

191. *Id.*

192. CFCT 1903, *supra* note 126, at 5.

193. CFCT 1901, *supra* note 143, at 9.

194. CFCT 1899, *supra* note 155, at 7 (“the results sought to be obtained by the United States Government in Indian Territory are absolutely essential to the welfare, happiness, and prosperity of that race whose origin is shrouded in mystery and romance, and the sum of whose destiny is soon to set, leaving no evidence of material or intellectual growth to mark its passing.”).

tribal sovereignty.<sup>195</sup> A Commission report acknowledges this rapacious intention, but blamed it on inadequate tribal capacity:

That was the beginning not only of the allotment of the land, or rather the preparatory work therefor, but also of the effacement of the tribal governments. The primary cause of this step was the incapacity of the tribes for self-government.<sup>196</sup>

The Curtis Act allowed the Commission to access older tribal roles to complete enrollment.<sup>197</sup> If the Commission and any of the Five Tribes could not agree on allotment, the Curtis Act included deadlines after which the Commission could determine allotment.<sup>198</sup> With the passage of the Curtis Act, the Commission had the authority to proceed with allotment.<sup>199</sup> Putting aside the cause and effect quandary, weakened tribal government was the ultimate bedmate of allotment.

An expanded four-person Commission worked with renewed speed, and managed to complete a preliminary enrollment of the Seminoles<sup>200</sup> by July of 1898, and quantify the individual Seminole allotment at 40 acres. The Commission commenced Creek enrollment on April 1, 1899, with a preliminary individual allotment allocation of 160 acres.<sup>201</sup> On June 30, 1899, however, only the northeast portion of Creek territory showed more than scattered progress on actual allotments.<sup>202</sup> The Commission predicted that enrollment would be complete in at least four of the Five Tribes by June 30, 1900, and that all surveying and appraising of land could finish by 1901 pending additional appropriations.<sup>203</sup> The Commission also estimated that by completion, there would be a total of

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195. DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 92, at 197 (“With the Curtis Act, Congress accomplished by legislation what the Dawes Commission has been unable to do by negotiation—effectively destroy the tribal governments in the Indian Territory.”).

196. COMM’N TO THE FIVE CIVILIZED TRIBES, REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1905, 579 (1905) [hereinafter CFCT 1905].

197. CFCT 1901, *supra* note 143, at 13.

198. DELORIA & LYTLE, *supra* note 78, at 25.

199. *Id.*

200. CFCT 1899, *supra* note 156, at 13.

201. COMM’N TO THE FIVE CIVILIZED TRIBES, NINTH ANNUAL REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1902 41 (1902) [hereinafter CFCT 1902].

202. COMM’R TO THE FIVE CIVILIZED TRIBES, DEP’T OF THE INTERIOR, LAWS, DECISIONS, AND REGULATIONS AFFECTING THE WORK OF THE COMMISSIONER TO THE FIVE CIVILIZED TRIBES 1893 TO 1906, exhibit 8 (1906).

203. CFCT 1899, *supra* note 156, at 12.

84,000 enrolled citizens in the Five Tribes.<sup>204</sup> But the federal government had effectively limited the current, and future, populations of the Five Tribes, and weakened the collective options of tribal members by splintering communal land and resource holdings.

### 3. Allotments and Tribal Government

The federal government remained committed to revamping the governments of the Five Tribes. Reiterating the federal objective of blended statehood, the Commission wrote in 1899:

Slowly but persistently the waves of public opinion and sentiment have surged upon the sand foundations of the tribal governments until dissolution is now all but complete, and with the Government of the United States lies the responsibility of seeing that the transitory stage from fragile and impermanent tribal governments to sound footing among the sisterhood of States of the Union be passed in safety and wisdom. . . Gradually the old, unstable structures of Indian governments are giving way to a substantial modern form of government which shall harmonize and blend in our national scheme of civil rule. . . pending the establishment of a territorial or state government. . .<sup>205</sup>

As the federal government gained control over allotment, the question for the Five Tribes became how to salvage the statehood situation rather than how to avoid it altogether.<sup>206</sup>

The last fight for the tribes in 1899 would be over the eventual determination of single, or dual, statehood for the surrounding territories. Dual statehood, including one pan-Indian state, was the tribes' best hope to preserve a sense of sovereignty and autonomy. On January 14, 1899, the Dawes Commission promised in writing to the Cherokees that the tribe would never be part of any settler dominated state without the tribe's express approval, and that if a state emerged against the wishes of the tribe, it would be a state composed solely of the Five Tribes' territories.<sup>207</sup> These written promises appeared to secure some degree of future Indian sovereignty.

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204. *Id.*

205. CFCT 1899, *supra* note 156, at 27.

206. See COLEMAN, *supra* note 148, at 62 ("Choctaws used increasing expertise in the ways of Americans as a defense against incorporation, and struggled throughout the rest of the nineteenth century to maintain their separate existence as a nation. . . Although. . . the Choctaws could not escape the allotment crusade to break Indian lands into individual farms.").

207. Maxwell, *supra* note 90, at 168.

As allotment proceeded, the Commission faced even more problems over natural resource allocation and allotment than it had over enrollment. The Commission felt that the educated members of the tribe were corrupt, and threatened the integrity of their work.<sup>208</sup>

However, immigrants and settlers that coveted Indian natural resources posed the greatest threat to any semblance of honest allotments.<sup>209</sup> The Commission described the relation between those manipulating allottees and the popular demand for Choctaw timber lands:

The timber lands, therefore, present a tempting field to speculators, who have used every means to induce fullblood Indians to select timber land in allotment, hoping to obtain the timber at its appraised value, or even a lower price.<sup>210</sup>

The Choctaw timber had commercial value totaled 1,247,473.63 acres, exemplifying the scope of potential natural resource exploitation during the allotment process.<sup>211</sup>

Not only did the Commission have to face corrupt Indians and throngs of exploitative immigrant land and timber speculators, wealthy oil and gas interests were attempting to manipulate the allotment system as well.<sup>212</sup> Indeed, speculators and investors pressed the allotment process to profit off Indian natural resources such as land, minerals, oil, and gas.<sup>213</sup>

208. CFCT 1905, *supra* note 196, at 6. “The same interests are opposed to the completion of [allotment] that were opposed to its being commenced, and as the end draws near they pursue with redoubled energy the same tactics of obstruction, fault finding, exaggeration, slander, and all manners of false statements, in order to confuse the situation, muddy the waters, embarrass, hinder, and prevent the conclusion of the work—we venture the assertion that inquiry will develop that they are false in substance, and are voiced only by men whom we have foiled, or are seeking to foil, in unlawful and predatory practices, or by the credulous and deluded followers of such men.” CFCT 1903, *supra* note 126, at 9.

209. CFCT 1905, *supra* note 196, at 36. The same forces that lobbied Washington to legislate Indian territories manifest themselves in less respectable occupations as well. Middlemen and speculators would coach allottees that were naive to the corruption associated with natural resources that appeared abundant. *Id.* For instance, less educated Indians took nearly every pine timber allotment at the instigation of speculators. *Id.*

210. CFCT 1904, *supra* note 21, at 46.

211. *Id.*

212. CFCT 1905, *supra* note 196, at 6. According to the Commission, the discovery of petroleum compounded exploitation efforts: “To home influences have been added strong outside alliances, arising chiefly, from the discoveries of petroleum in the Territory. Aggregation of capital and influence have combined to push predatory schemes.” *Id.*

213. *Id.* at 40.



One cannot underestimate the proliferation of immigrant profiteers at the turn of the century. Out of 101,754 individuals in Cherokee territory in 1900, for example, only 35,000 were tribal members.<sup>214</sup>

As enrollment decreased and allotment increased, pressure for statehood in the area rose. In 1900, the Commission explained their intention to impress upon “ignorant” freedmen and Indians the benefits of civilization and education, and a federal government that purportedly afforded liberty, protection, peace, and prosperity for its subjects.<sup>215</sup> As prospects for dual statehood dimmed, the Commission made mention in its 1900 report of statehood after allotment as part of an “express determination of Congress to bring about such changes as would enable the ultimate creation of a territory of the United States, with the view to the admission of the same as a State of the Union.”<sup>216</sup>

The Commission never mentioned statehood again, because it was inevitable that single statehood would prevail.<sup>217</sup> But nevertheless, the Commission blatantly documented an example of the relationship between decreased tribal sovereignty and settlers’ exploitation of Indian natural resources in 1900:

Had it been possible to secure from the five tribes a cession to the United States of the entire territory at a given price, the tribes to receive its equivalent in value, preferably a stipulated amount of the land thus ceded, equalizing values with cash, the duties of the commission would have been immeasurably simplified, and the Government would have been saved incalculable expense. One has but to contemplate the mineral resources, developed, and undeveloped, and existing legislation with reference thereto, to realize the advantages which awaited such a course. When an understanding is had, however of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty—it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment.<sup>218</sup>

Therefore, the allotment process was merely the latest ploy in a plot stretching back to the first interactions between federal officials and Indian nations—a scheme designed to challenge and eliminate tribal sovereignty as the first step toward the goal of gaining total control over Indian natural resources.

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214. RUSSELL THORNTON, *THE CHEROKEES: A POPULATION HISTORY* 116 (1990).

215. CFCT 1900, *supra* note 127, at 8.

216. *Id.* at 7.

217. *See generally* CFCT 1901–07, *supra* notes 21, 93, 125, 126, 143, 196, & 201.

218. CFCT 1900, *supra* note 127, at 7.

#### 4. *The Completion of Allotments*

Facing the single statehood alternative, tribal members stepped up their efforts to achieve dual statehood in the early 1900s.<sup>219</sup> But the railroad companies that supported an Indian state after the Civil War vehemently opposed dual statehood at this time.<sup>220</sup> The railroad corporations now enjoyed a modest yearly rental fee to tribes for the land that they used, and felt that a single state government controlled by settlers would tax and legislate them less than an Indian state.<sup>221</sup> Railroad lobbyists combined with oil, gas, land, and settler interests to form an unofficial “Territorial Ring” to press for the elimination of dual sovereignty in the area, the opening of the land to immigrant settlers, and single statehood.<sup>222</sup> The Dawes Commission felt it was unjust and in conflict with the spirit of the nation to deny the settlers the right of franchise, despite their earlier admittance that, “[t]he non-citizen does not own a foot of soil. . .and with a voice in legislation, the non-citizen would soon legislate the Indian into a state of innocuous desuetude.”<sup>223</sup>

By 1901, there was no doubt that the Commission was a hostile and aggressive force hoping to eliminate tribal sovereignty and perhaps even the Five Tribes themselves. The Commission report from that year underscored federal resistance to tribal sovereignty, insisting that “[i]t could not have been contemplated by Congress that within the borders of the United States should be permitted to spring up independent republics, unanswerable to the General Government.”<sup>224</sup> The Commission took this position, despite acknowledging that the Five Tribes “independent of treaty considerations, [are] entitled to the undisturbed possession of a domain of reasonable proportions.”<sup>225</sup> This government declaration confirms the hostile federal attitude toward rising tribal demands for dual independence or statehood. In 1901, the federal judiciary decided independent enrollment suits, which allowed the Commission to finish tribal enrollments.<sup>226</sup> On March 13, 1901, the appropriations bill for the Commission included a clause reasserting the Curtis Act stipulation that

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219. Maxwell, *supra* note 90, at 172.

220. *Id.* at 171.

221. *Id.*

222. MINER, *supra* note 87, at 77.

223. CFCT 1899, *supra* note 156, at 28.

224. CFCT 1901, *supra* note 143, at 6.

225. *Id.*

226. *See generally id.* at 112–28 (Appendix 13, Decisions of United States Courts in Indian Territories); *see also* Kimberlin v. Comm’n to Five Civilized Tribes, 53 S.W. 467, 3 Indian Terr. 16 (1899); 1898 COMM’R OF INDIAN AFFAIRS ANN. REP. 458–526 (1898).

allowed the Commission to create deadlines for enrollment.<sup>227</sup> On April 2, 1901, the Commission subsequently closed the Seminole citizenship roll, and worked diligently to complete that tribe's allotments.<sup>228</sup> By February 28, 1902, the Enid and Anadarko Railroad Act passed through Congress, and resulted in railroad territory acquisitions that were exempted from allotment.<sup>229</sup> Confident that there were even more available resources, the Commission began to make exemptions from allotments for other interests.<sup>230</sup>

On June 28, 1902, the Commission completed Seminole allotment and recommended selling the surplus of 18,630.64 acres to settlers with the proceeds going to the tribe.<sup>231</sup> In August of the same year, members of the Cherokee nation approved a July 1, 1902, Act of Congress that stipulated a Cherokee allotment of 110 acres per person.<sup>232</sup> Also on July 1, 1902, Congress ratified an Act that set Choctaw and Chickasaw allotments at 320 acres for full tribal members and forty acres for freedmen.<sup>233</sup> The Creek nation also received a new deadline for enrollment.<sup>234</sup> After this, all five of the tribes would have completed enrollment, quantified individual allotments, and prepared to begin allotting lands.<sup>235</sup> In the case of the Seminole, land allotment was already complete.<sup>236</sup>

Allotment acre amounts were approximate, with actual allotments based on land value. The Commission used a sliding scale that allowed lesser acreage allotments for more valuable land and greater acreage allotments for less valued areas.<sup>237</sup> For instance, the Commission valued the typical 320 acre Choctaw and Chickasaw allotment at \$1,041.28

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227. Act of Mar. 3, 1901, ch. 832, 31 Stat. 1058, 1077 (1901) (appropriations act for the current and contingent expenses of the Indian Department). "The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto."

228. CRCT 1902, *supra* note 201, at 43-45.

229. Enid and Anadarko Railroad Act, Pub. L. 57-26, 32 Stat. 43, 43-44 (1902); *see also* CFCT 1903, *supra* note 126, at 8.

230. MINER, *supra* note 87, at 212 (According to H. Craig Miner, the railroads' success was symbolic of a Gilded Age in which rapid change, action not evaluation, and the predominance of the fastest and loudest interests prevailed).

231. CFCT 1903, *supra* note 126, at 56.

232. *Id.* at 37-38.

233. Act of July 1, 1902, Pub. L. 57-228, 32 Stat. 641, 642 (1902).

234. Act of Mar. 1, 1901, ch. 676, 31 Stat. 861, 869-70 (1901).

235. *See* CFCT 1903, *supra* note 126, at 55-56.

236. *Id.* at 56.

237. *Id.* at 50-52.

(\$130.16 for freedmen), and adjusted any acreage allotment based on fluctuations in land value.<sup>238</sup> Land valuation was based on available timber or other natural resources.<sup>239</sup>

Legislation that addressed allotment quantifications also included a clause that exempted from allotment a parcel of land surrounding the village of Sulphur, with twenty dollars per acre compensation to the Chickasaw.<sup>240</sup> This parcel, just under 640 acres, was a valuable natural resource area, including minerals, sulfur springs, and the surrounding creeks of Sulphur, Rock and Buckhorn.<sup>241</sup> As tribal governments dismantled, natural resources like those were exempted from allotment and carved out as almost pure takings.

The Commission had nearly completed allotments for the Five Tribes by 1903. All told, the Commission issued over 90,000 allotments totaling 19,511,899.39 acres.<sup>242</sup> The Commission reviewed more than 128,406 applications for enrollment, with scores of others pending due to court proceedings.<sup>243</sup> For example, the Choctaw and Chickasaw Citizenship Court eventually decided 256 cases that affected 3,487 claimants (granting only 161 tribal members).<sup>244</sup>

Corruption that plagued the allotments continued. Speculators pressed Indians who had hoped to avoid allotment into choosing widely separated tracts of ten or more acres to discourage possession and improvement, and encourage Indians to sell their allotments.<sup>245</sup> The Commission sought to discourage this specific practice with a draft resolution on August 8, 1903, but was overruled by Interior Department officials within a month.<sup>246</sup>

Meanwhile, lands that were contested by the Delawares sat fallow.<sup>247</sup> The Supreme Court decided the case in its October 1904 term.<sup>248</sup> The Court decided to allot the Delawares a full 160 acre allotment regardless of whether there were sufficient lands, with an offset for the approximately 157,000 acres promised to the Delawares in treaty.<sup>249</sup>

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238. *Id.* at 50–52.

239. *Id.* at 50.

240. Act of July 1, 1902, Pub. L. 57-228, 32 Stat. 641, 655 (1902).

241. *Id.* at 655.

242. CFCT 1903, *supra* note 126, at 34. The Commission issued 6,950,043.66 acres to the Choctaws; 4,703,108.05 acres to the Chickasaws; 4,420,070.13 to the Cherokees; 3,072,813.16 acres to the Creeks; and 365,854.39 to the Seminoles.

243. *Id.* at 8.

244. CFCT 1905, *supra* note 196, at 585.

245. CFCT 1904, *supra* note 21, at 38.

246. *Id.* at 38–40.

247. CFCT 1903, *supra* note 126, at 46.

248. *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 127 (1904).

249. *Id.* at 349.

The Commission estimated in 1903 that the cost of allotment to date for the federal government was approximately five cents an acre.<sup>250</sup> At this point, Creek lands were virtually allotted, Seminole lands finished, and the Commission projected that Cherokee allotment would be completed by 1904, followed by Chickasaw and Choctaw by early 1905.<sup>251</sup> Predictably, the Commission recommended selling surplus Creek lands to immigrant speculators and settlers.<sup>252</sup> On March 3, 1903, the Indian Appropriation Act passed, and included a call for the dissolution of the Seminole government by March 4, 1906 (the other four tribes already had agreed to dissolution in previous allotment agreements).<sup>253</sup> As such, allotment directly and immediately led to diminished tribal sovereignty.

On June 3, 1903, the exhaustion of funds forced the Commission to suspend activities until the next fiscal year.<sup>254</sup> No additional enrollments occurred in the 1903 to 1904 fiscal year, except among the Creeks, who did not have an agreed upon closing date for enrollment applications.<sup>255</sup> That year, the Secretary of the Interior ordered notices printed in English, and Muscogee, setting the closing date for Creek enrollment to June 13, 1904.<sup>256</sup> Shortly after appropriating funds to the Commission in April of 1904, however, Congress reopened the settled Delaware claims, and reopened the tribal rolls of all Five Tribes to children that were born since the last deadline.<sup>257</sup> This was to assure a uniform deadline among the tribes, and Congress ordered equal allotment distributions among those with new and legitimate citizenship claims.<sup>258</sup>

With the Commission's work nearly finished, the enormity of the allotment task became clear. To solicit enrollment applications, the Commission wrote hundreds of thousands of letters and sent enrollment parties into the Indian territories.<sup>259</sup>

The Commission had documented approximately 90,000 tribal members out of a total population of 600,000 individuals by 1904.<sup>260</sup> The 90,000 tribal members came out of 200,000 claimants, each requiring a

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250. CFCT 1903, *supra* note 126, at 8.

251. *Id.*

252. *Id.* at 56.

253. Appropriation Act of March 3, 1903, 32 Stat. 982 (1903).

254. CFCT 1903, *supra* note 126, at 57.

255. CFCT 1904, *supra* note 21, at 7.

256. *Id.* at 17.

257. CFCT 1905, *supra* note 196, at 579.

258. CFCT 1904, *supra* note 21, at 8.

259. CFCT 1905, *supra* note 196, at 582 ("The Commission's enrollment parties have visited every part of the Indian Territory, carrying its voluminous records and its extensive camping paraphernalia into regions rarely if ever before visited by the white-man.")

260. CFCT 1904, *supra* note 21, at 6.

long process with a potential appeal to Washington.<sup>261</sup> For example out of 24,634 claims from applicants for citizenship as Mississippi Choctaws, the Commission rejected or dismissed 22,100 and only granted ten percent status as tribal members.<sup>262</sup> Eventually, the Commission's work produced over 250,000 conveyances evidencing allotment titles, each containing specific, detailed documentation of associated deeds and patents.<sup>263</sup>

Despite the complexity and size of the allotment process, by 1904 the remaining tribes were ninety percent finished.<sup>264</sup> A summary of the allotment process lies in the annals of Congress:

In 1889 the Cherokee [Dawes] Commission was created for the purpose of abolishing the tribal governments and opening the territories to white settlement, with the result that after fifteen years of negotiation an agreement was made by which the government of the Cherokee nation came to a final end 3/3/1906; the Indian lands were divided.<sup>265</sup>

The objectives for the Dawes Commission therefore included abolishing tribal governments and opening Indian lands to white settlement, but did not actually include statehood or even allotment.

The final cost of the federal allotment crusade was ten cents an acre, or over two million dollars.<sup>266</sup> The results of allotment were clear: dissected tribal autonomy, and diminished tribal control over natural resources. The Choctaws from Mississippi even had to live on their existing land parcels for three years before the allotment of land became official.<sup>267</sup> In 1905, the remaining Commissioner worked on the loose ends of the allotment process, and concluded that “[m]any [Cherokee] full-bloods were opposed to the allotment of land and failed or refused to appear and select their allotments. It became necessary to arbitrarily allot land to this class of citizens.”<sup>268</sup> Illegal settlers and speculators were still milling around at the time, and on March 3, 1905, Congress appropriated \$15,000 dollars for the removal of settlers and intruders in Indian

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261. *Id.*

262. *Id.* at 15. Reviews and appeals to the Secretary of the Interior slowed down the process as well. *Id.* at 6.

263. CFCT 1906, *supra* note 93, at 61.

264. CFCT 1904, *supra* note 21, at 7.

265. H.R. Rep. No. 82-2503, *supra* note 23, at 269.

266. CFCT 1904, *supra* note 21, at 6.

267. CFCT 1905, *supra* note 196, at 39.

268. *Id.* at 621.

territories.<sup>269</sup> The Commissioner exclaimed in his 1905 report that “what is still to do—is but the gathering of fragments.”<sup>270</sup> The only allotments actually left to complete were those recent claims for newborns and minors.<sup>271</sup> The Commission therefore closed the book on allotment when it transferred authority in 1905 to the Secretary of the Interior, “to negotiate agreements looking to dissolution of the tribal governments and the transfer of land titles from the tribes as communities to the individual Indians.”<sup>272</sup> On April 26, 1906, Congress passed H.R. 5976, which allowed the Department of the Interior to close an enrollment case, and stand by the decision without any chance of future appeal.<sup>273</sup> The destruction of tribal autonomy and the diminishment and dispersal of tribal natural resources were the final legacies of completed allotment.

The allotment story is a potent example that immigrant greed for Indian natural resources was a pressing enough motivation to overtake any obstacle, including sovereign governments. Even the Dawes Commission members were not immune from the insatiable settler desire to exploit Indian natural resources. Allotment exemptions included land for town sites, churches, schools, and cemeteries; the Commission also made allotment exemptions for railroad corporations, and coal, asphalt, oil, gas, and mineral interests.<sup>274</sup> For example, the Chickasaw and Choctaw nations had 1,386,720 acres of their land exempted from allotment for a forest reserve and another 507,607.95 acres exempt for other purposes.<sup>275</sup> These exemptions totaled nearly twenty percent of the Chickasaw and Choctaw tribal land.<sup>276</sup> Several Dawes Commissioners also invested with exploitative agents and speculators.<sup>277</sup> Commissioners formed trust companies that invested in, and leased, allotted lands, with the promise to sell to oil or other natural resource companies.<sup>278</sup> Other Commissioners served as board members, attorneys, stockholders, or as executives of companies that had interests in Indian natural resources.<sup>279</sup> The Commis-

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269. Ch. 1479, 43 Stat. 1060 (1905) (“An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes.”).

270. CFCT 1905, *supra* note 196, at 35.

271. CFCT 1907, *supra* note 125, at 5. Total Choctaw and Chickasaw area was 11,660,952.35 acres. CFCT 1905, *supra* note 196, at 608.

272. CFCT 1905, *supra* note 196, at 39.

273. CFCT 1906, *supra* note 93, at 25.

274. CFCT 1907, *supra* note 125, at 22.

275. *Id.* at 21.

276. *See id.*

277. McLoughlin, *supra* note 32, at 416.

278. *Id.*

279. Miner, *supra* note 87, at 192.

sion even attempted to exempt pine timberlands from allotment, but was instructed otherwise by the Secretary of the Interior on April 25, 1904.<sup>280</sup>

Unlike the Okmulgee proposal, which represented Indian defense against non-native encroachment, the allotment story is one in which the federal government used statehood as the latest rational to exploit Indian natural resources and destroy tribal sovereignty. The Dawes Commission pressed tribal enrollment and allotments as the only path to Indian self-determination, but the process only eroded collective tribal strength.

### E. The Sequoyah Convention and the Last Chance for Statehood

Faced with the threat to tribal sovereignty and natural resources represented by the Dawes Commission, leaders of the Five Tribes began to organize defenses in the early twentieth century.<sup>281</sup> By 1900, it was clear that allotment and statehood would proceed in the Five Tribes' territories.<sup>282</sup> The only question was whether the tribes could salvage the situation by pressing for dual statehood, which could include a semi-autonomous pan-Indian state. In May of 1903, leaders from the Five Tribes met to discuss statehood for the first time since the Dawes Commission and discussed plans for a pan-Indian state called Sequoyah.<sup>283</sup>

In the summer of 1905, tribal representatives met in Muscogee for the Sequoyah Constitutional Convention.<sup>284</sup> At the Convention, a Cherokee formally proposed a State of Sequoyah.<sup>285</sup> Tribal officials worked to formulate a plan for representation and a constitution.<sup>286</sup> On August 21, the Convention decided that the new State of Sequoyah would be split into 48 counties with equal representation.<sup>287</sup> Members of the Five Tribes overwhelmingly voted to approve the proposal.<sup>288</sup> Sequoyah representatives submitted the proposal to Congress, but federal lawmakers never considered it.<sup>289</sup> Understanding the history of the Dawes Commission, however, one could conclude that the Sequoyah proposal was a defense

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280. CFCT 1905, *supra* note 196, at 31.

281. Maxwell, *supra* note 90, at 173. The name Sequoyah originated in honor of the individual Sequoya, who invented the Cherokee alphabet in the 1820s. H.R. Rep. No. 82-2503, *supra* note 23, at 268.

282. Maxwell, *supra* note 90, at 173.

283. *Id.*

284. *Id.* at 161.

285. *Id.*

286. *Id.*

287. THEDA PERDUE, NATIONS REMEMBERED: AN ORAL HISTORY OF THE FIVE CIVILIZED TRIBES 1865-1907, at 194 (1980).

288. *See id.*

289. ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 162-64 (Princeton Univ. Press 1972).



mechanism against a single statehood idea that would have imbedded the Five Tribes into a foreign state's jurisdiction.<sup>290</sup>

Unfortunately by 1905, the settler population in the areas surrounding the Five Tribes was so large and demanding that the cry for single statehood was deafening.<sup>291</sup> The larger immigrant population could lobby and demand statehood with more force than representatives from the Five Tribes.<sup>292</sup>

With control over tribal autonomy and Indian natural resources at stake, there was little doubt that the federal government would prevail in the statehood debate.<sup>293</sup> Once Congress rejected Sequoyah and the Five Tribes' last attempt to salvage tribal sovereignty, it was only a matter of time before single statehood for the territories passed.

In 1907, the federal Union admitted the State of Oklahoma as a single state with jurisdiction over lands previously held by the Five Tribes.<sup>294</sup> The five tribal governments officially existed only until allotment was complete.<sup>295</sup> Within the year, the State of Oklahoma liquidated and absorbed the Indian territory.<sup>296</sup> Tribal members were now a part of a state in which they were vastly outnumbered, and subject to legislation conceived by immigrants and settlers.

The Indian population of Oklahoma at the time was just over five percent of 1,414,177 people.<sup>297</sup> The Seminoles, the smallest of the Five Tribes, totaled only 2,138 individuals (including 986 freedmen) out of the million and a half people in Oklahoma.<sup>298</sup> Prospects for a pan-Indian state completely disappeared. Although the federal government abrogated the allotment policy in the 1934 Indian Reorganization Act, the damage was done.<sup>299</sup> Settlers and immigrants officially, and effectively,

290. Hodges, *supra* note 25, at 17.

291. DEBO, *supra* note 289, at 159 ("Although statehood has represented the most ardent aspirations of every new American community, it is doubtful if any other people ever longed for that magic goal with the intensity of the white inhabitants of the Indian Territory. A white population very much larger than that of any state at the time of its admission to the Union had been living under conditions of political dependence never experienced before by a frontier settlement.").

292. *See id.*

293. Amos Maxwell, *The Sequoyah Convention Part II*, 28 CHRON. OKLA., no. 3, 1950, at 333 ("[T]here is a natural law among men and nations that when one nation or people is stronger than its neighbor the stronger will overwhelm the weaker. This natural law which ignores all treaties was exemplified by Congress when it rejected the bid for statehood for the proposed State of Sequoyah.").

294. *See* DELORIA & LYTLE, *supra* note 78, at 25.

295. *Id.*

296. COLEMAN, *supra* note 148, at 62.

297. DEBO, *supra* note 289, at 170.

298. H.R. Rep. No. 82-2503, *supra* note 23.

299. Indian Reorganization Act (1934), 25 U.S.C. §§ 461-479 (2006).

destroyed the governments of the Five Tribes. In the process, Indian natural resources were fractioned, wasted, stolen, or lost.

### F. American Indian Involvement Within Dominant Political Models

The United States government also attempted to create parallel tribal institutions modeled after imported European political norms. The United States Congress passed the 1934 Indian Reorganization Act (“IRA”), and encouraged tribal self-government and the creation of tribal constitutions modeled after the governmental framework adopted by the settlers of America.<sup>300</sup> As one commentator summarized, the IRA centered around reinvigorating tribal governments and “[t]hese arrangements gave them a legal basis for civic organization comparable with that of the white communities.”<sup>301</sup> Tribes formed the National Congress of American Indians (“NCAI”) in 1944 to address and advance tribal treaty and sovereignty rights.<sup>302</sup> Even then, however, the NCAI positioned itself as an independent body only to “monitor federal policy and coordinate efforts to inform federal decisions that affect tribal government interests.”<sup>303</sup>

Without the promise and control inherent in a pan-Indian state, American Indian nations were reduced to semi-sovereign wards of the federal government.<sup>304</sup> American Indians received the right to vote and had other full citizenship rights in 1924.<sup>305</sup> Still, the right to vote does not necessarily lead to collective action let alone aggregate impact, so American Indians have attempted to influence the debates over self-governance and natural resources through election to office in the federal government itself.<sup>306</sup>

300. *Id.* at 148; A. GRENFELL PRICE, *WHITE SETTLERS AND NATIVE PEOPLES* 45, 46 (1972).

301. PRICE, *supra* note 300, at 45.

302. *Mission and History*, NATIONAL CONGRESS OF AMERICAN INDIANS, <http://www.ncai.org/about-ncai/mission-history> (last visited Sept. 23, 2012).

303. NAT’L CONGRESS OF AM. INDIANS, 2007–2008 NCAI ANNUAL REPORT: 65TH ANNIVERSARY - PROTECTING SOVEREIGNTY IN THE PAST, PRESENT, AND FUTURE 4 (2008), available at [http://www.ncai.org/resources/ncai-publications/ncai-annual-reports/2008\\_NCAI\\_Annual\\_Report.pdf](http://www.ncai.org/resources/ncai-publications/ncai-annual-reports/2008_NCAI_Annual_Report.pdf).

304. See generally FLERAS & ELLIOT, *supra* note 2, at 149–60.

305. *Id.* at 149.

306. For example, Osage Charles Curtis was elected to the House of Representatives in 1892 and to the Senate in 1906. WILLIAM E. UNRAU, *MIXED-BLOODS AND TRIBAL DISSOLUTION: CHARLES CURTIS AND THE QUEST FOR INDIAN IDENTITY* 9–10 (Univ. Press of Kansas, 1989); *Charles Curtis*, Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C001008> (last visited Sept. 23, 2012). Lakota Sioux Benjamin Reifel also served in the House of Representatives from 1961 to 1971 *Benjamin Reifel*, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000152> (last visited Sept. 30, 2012), and Cheyenne Ben

American Indians also utilize the lobbying process to influence federal decision makers. The federal government helped create the NCAI in 1944 as part of a federal and Indian consultation process pursuant to the IRA.<sup>307</sup> This Congress eventually served as a lobbying forum for Indian interests, e.g. lobbying against the American “termination” policy.<sup>308</sup> Recent accounts of Indian lobbying efforts also make clear that tribes often heavily utilize the lobbying arm in an attempt to influence federal policy.<sup>309</sup>

Whether through suffrage, election into the government, or lobbying efforts, American Indians have found a variety of ways to participate directly in the dominant political institutions and models without the benefits of absolute sovereignty or even statehood within a federal model. Each one of these coping strategies represents some degree of American Indians succumbing to imported political norms, but also represents affirmative use of an imposed political system to advance American Indian interests. The balance of power that results directs and impacts the debate over the allocation, and protection, of American Indian natural resource holdings.

American Indian efforts to preserve sovereignty and control over natural resources through statehood efforts or other forms of participation in the dominant political framework are not isolated examples of native coping and survival strategies in the face of immigrant pressure. Although the scope of this article does not extend to a comprehensive review of such efforts by indigenous people across the world, comparing the American Indian experience with that of the Maoris in New Zealand can provide an illustrative example of the commonalities that native communities face when their natural resources are under pressure or at risk.<sup>310</sup> Both American Indians and Maoris were fairly isolated geographically, until European settlers arrived hungry for new land and natural resources. American Indians had to adapt to a federal representative system, whereas Maoris had to adjust to monarchy and parliamentary models. Despite these differences, the coping and survival strategies utilized by Indians and Maoris in the face of natural resource threats are remarkably similar.

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Nighthorse Campbell was in the House of Representatives and Senate from 1987–2005, *Ben Nighthorse Campbell*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000077> (last visited Sept. 30, 2012).

307. FLERAS & ELLIOT, *supra* note 2, at 153.

308. *See id.*

309. *See* Michael Janofsky, *Senate Opens Hearings on Lobbyists for Tribes*, N.Y. TIMES, Sept. 30, 2004, at A26.

310. Kahn, *The Legal Framework*, *supra* note 1.

### III. MAORI ACCEPTANCE OF THE EUROPEAN MODEL

Prior to the English arrival in what is now New Zealand, Maori tribal communities also existed as sovereign and independent nations. These tribes exercised internal control over their politics, society, economics, and natural resources, but when the demand from English settlers for Maori natural resources increased, the independence of Maori tribes was at risk.<sup>311</sup> This led to land wars between the English and Maori tribes, and a Maori “King Movement” modeled on English norms and designed to maintain the independent and sovereign status of Maori communities. Maoris also sought the right to vote and participated directly in the legal system imported from England. These offensive and defensive survival strategies show how Maoris utilize imported legal and political norms to protect their natural resources and independence.

#### A. The Evolution of Maori Political Institutions and Models

Maori dissatisfaction with their political representation in the settler or Pakeha government led to a movement for Maori statehood soon after the signing of the Treaty of Waitangi between England and the Maoris on February 6, 1840. In doing so, a significant portion of the Maori people attempted to challenge the New Zealand government on its own terms by adopting English governmental norms and applying them to an independence movement.

##### 1. *The Maori King Movement and Land Wars*

Several tribes banded together to elect the Waikato Maori Chief Te Wherowhero as a Maori King in 1858. The allied tribes subsequently created a flag, a council of state, a code of laws, and a police force.<sup>312</sup> Indeed, from 1865 until 1881 the Maori of “King Country” operated as an autonomous polity that was beyond the control of the colonists.<sup>313</sup> While this “King Movement” represented a challenge to the New Zealand government itself, it was also a tacit acceptance of the European model of government. European political norms essentially were grafted onto the existing Maori institution of the tribe or assembly.<sup>314</sup>

According to one nineteenth century observer, the king movement represented a Maori “desire” and “pining” for a “separate national-

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311. JOAN METGE, *THE MAORIS OF NEW ZEALAND* 25–26, 29–36 (2nd ed. 1976).

312. *Id.* at 33; CLAUDIA ORANGE, *THE STORY OF A TREATY* 46 (1989).

313. PETER SPILLER ET AL., *A NEW ZEALAND LEGAL HISTORY* 133 (1996).

314. KAYLEEN M. HAZLEHURST, *POLITICAL EXPRESSION AND ETHNICITY: STATECRAFT AND MOBILISATION IN THE MAORI WORLD* 5, 7 (1993); G.L. PEARCE, *THE STORY OF THE MAORI PEOPLE* 69 (1972).

ity.”<sup>315</sup> Another contemporaneous commentator concluded that the naming of a Maori king was “a simple step” towards the formation of an “independent nation” for Maoris.<sup>316</sup> The peace promised by the Treaty of Waitangi had come at the cost of Maori independence. The King Movement thus arose in response to the failures inherent in the Treaty of Waitangi, according to this same observer:

Governor Hobson inaugurated British rule by the so called Treaty of Waitangi, by which *some* of the tribes ceded the sovereignty and right of pre-emption over all the lands in the country. If the treaty made by some of the independent states was ever binding on the whole, it was allowed to lapse from want of power to enforce it, and it is now totally repudiated by the tribes who have declared their independence, generally on the pretexts that they never consented to it, and that it has never been enforced.<sup>317</sup>

In short, one Maori summarized at the time how the purpose of the king movement was to “preserve [Maori] sovereignty.”<sup>318</sup> But when private Pakeha individuals drafted a Maori language petition to the Queen in 1860, they described the King Movement as an “experiment” and disavowed any attempt to challenge the Crown’s “sovereignty.”<sup>319</sup> Maori representatives, however, refused to adopt and sign the petition.<sup>320</sup> Although the Maori had modeled the King Movement after English political norms, the Maori viewed the “King Movement” as a way to preserve sovereignty and control over their own destinies.

The King Movement, therefore, was the Maori response to a system of governance in New Zealand that was purely imported and that did not allow for Maori to have a political voice.<sup>321</sup> The lack of Maori control over natural resources, like water, was particularly sensitive. Indeed, the rise in Maori political protest activity beginning in the 1860s

315. James Edward Fitzgerald, Speech Delivered in the House of Representatives of New Zealand: The Native Policy of New Zealand (Aug. 6, 1862) (transcript available at the Alexander Turnbull Library, National Library of New Zealand, Te Puna Matauranga o Aotearoa, Wellington, N.Z.).

316. CAPTAIN J.C. JOHNSTONE, THE MAORIES AND THE CAUSES OF THE PRESENT ANARCHY IN NEW ZEALAND 10 (1861) (on file as part of “Pamphlets, Vol. 20,” with the Alexander Turnbull Library, National Library of New Zealand, Te Puna Matauranga o Aotearoa, Wellington).

317. *Id.* at 6–7 (emphasis in original).

318. *Id.* at 12 (quoting testimony of Waata Kukutai to the Waikato Committee, without further citation).

319. *Id.* at 37–39.

320. *Id.*

321. PEARCE, *supra* note 314, at 68–69.

directly related to the Crown's assertion of absolute title over water resources.<sup>322</sup> As such, an underlying cause of the King Movement was immigrant pressure on natural resources that previously were ample for all.<sup>323</sup> Maori discomfort with the New Zealand government and the legal imposition of European land tenure ideals only increased after a Land Court created by the immigrants began to allocate grants to Maori land.<sup>324</sup>

Land wars between Maoris and the New Zealand government soon followed from 1863 to 1872.<sup>325</sup> These land wars were characterized by an 1864 edition of the *London Times* as "a war of sovereignty."<sup>326</sup> Some reform subsequently occurred with the 1867 Maori Representation Act, when the New Zealand government provided Maori males with suffrage that was not dependant on holding title to land and dedicated four Maori seats in Parliament.<sup>327</sup> The 1867 Act acknowledged that the property qualification effectively disenfranchised the Maori:

[O]wing to the peculiar nature of the tenure of Maori land and to other causes the Native Aboriginal inhabitants of this Colony of New Zealand have heretofore with few exceptions been unable to become registered as electors or to vote at the election of members of the House of Representatives or of the Provincial Councils of the said Colony.<sup>328</sup>

On a broader scale, however, New Zealand continued to move away from any political model that would accommodate pluralism or varying degrees of sovereignty, including any Maori political or legal self-determination. New Zealand eliminated provincial governments in 1876, exemplifying a pattern favoring centralism over localism.<sup>329</sup>

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322. NEW ZEALAND LAW COMM'N, THE TREATY OF WAITANGI AND MAORI FISHERIES: MATAITAI — NGA TIKANGA MAORI ME TE TIRITI O WAITANGI, PRELIMINARY PAPER NO. 9, at 147 (1989).

323. *Id.* at 152.

324. *Id.*

325. Claudia Orange, *The Treaty of Waitangi—Competing Views*, in TE REO O TE TIRITI MAI RANO: THE TREATY IS ALWAYS SPEAKING 18–19 (Bernard Kernot & Alistair McBride eds., 1989) [hereinafter *Treaty of Waitangi*] (quoting 1864 *London Times* without additional citation).

326. *Id.*

327. See generally Maori Representation Act 1867, (N.Z.); accord. METGE, *supra* note 311, at 4; Constitution Room Exhibit, New Zealand National Archives, Wellington.

328. Maori Representation Act of 1867, *supra* note 327, at Preamble.

329. Constitution Room Exhibit, *supra* note 327, at 152.

## 2. *The Kotahitanga and Maori Councils*

The Maoris continued to pursue a greater degree of self-determination despite the increasing dominance of a central New Zealand sovereign, modeling independent legal and political regimes after the dominant European style framework. Representatives of tribes outside the King Movement met annually during the 1880s to organize petitions to the New Zealand government for separate Maori civil institutions.<sup>330</sup> When the New Zealand government rejected their requests, the tribes outside the King Movement set up an independent Maori Parliament called the Kotahitanga.<sup>331</sup> The King Movement had evolved into a movement that included a parliamentary body with the creation in 1894 of this “Kingitanga’s Kauhanganui” or “Great Council” that was empowered to pass laws and impose taxes and fines.<sup>332</sup>

The Kotahitanga relied on the 1835 “Declaration of Independence” as the source for the Maori right to autonomous action.<sup>333</sup> The Kotahitanga was modeled on the Pakeha General Assembly, with electoral districts, an upper and lower house, and formal debating.<sup>334</sup> In part due to Maori dissatisfaction with the New Zealand government’s land policies, the Maori Kotahitanga and Kauhanganui Parliaments began enacting their own legislation relating to natural resources, like land, in the 1890s.<sup>335</sup> Complaints relating to water resources also pervaded Maori political protest activity during the latter part of the nineteenth century.<sup>336</sup> The Kotahitanga met for eleven years, and disbanded in 1902 only after the New Zealand government passed legislation establishing local Maori Councils.<sup>337</sup> As some Maori advocates contend, however, the Maori Councils Act was part of an effort to defeat Maori self-determination by making the Maori Parliament or Kotahitanga obsolete.<sup>338</sup>

Although the modern New Zealand government allows Maori tribes limited roles in administering governmental services, the government firmly rejects that this concession will ever lead to “parallel institu-

330. METGE, *supra* note 311, at 36.

331. *Id.* at 47; *accord.* ORANGE, *supra* note 312, at 67.

332. METGE, *supra* note 311, at 47; ORANGE, *supra* note 312, at 67; SPILLER ET AL., *supra* note 313, at 155.

333. Orange, *supra* note 325, at 22.

334. Tim McCreanor, *The Treaty of Waitangi: Responses and Responsibilities*, in HONOURING THE TREATY: AN INTRODUCTION FOR PAKEHA TO THE TREATY OF WAITANGI 43 (Helen Yensen, Kevin Hague, & Tim McCreanor eds., 1989).

335. SPILLER ET AL., *supra* note 313, at 128.

336. NEW ZEALAND LAW COMM’N, *supra* note 322, at 147–53.

337. METGE, *supra* note 311, at 36.

338. Tania Rangiheuea, *The Role of Maori Women in Treaty Negotiations and Settlements*, in TREATY SETTLEMENTS: THE UNFINISHED BUSINESS, *supra* note 7, at 105.

tions.”<sup>339</sup> Nevertheless, some representatives of Maori interests continue to argue that governmental policies affecting Maoris should be formulated by Maoris or that any legislation impacting Maori interests should receive Maori approval prior to adoption, and continue to propose new governmental arrangements that would accommodate a “Maori Parliament,” a “Maori House within Parliament,” a “Maori/Pakeha Senate,” or a “National Maori Assembly.”<sup>340</sup>

## B. Maori Participation Within Dominant Political Institutions and Models

Maoris have attempted to influence public policy affecting Maori natural resources by creating independence movements that paralleled European political institutions and models, e.g. Maoris’ pursuit of the King Movement and the Kotahitanga as independent Maori governing bodies. The failure of the King and Kotahitanga movements represented a lesson that the only effective way to deal with immigrant pressure on Maori natural resources was to learn how to influence the imported legal system.”<sup>341</sup>

The first step toward Maori participation within the dominant political process in New Zealand was suffrage. Maori interests within the existing European-style political framework received some assurance of representation when Maoris received four parliamentary seats in 1867.<sup>342</sup> That year, Maori males also received a right to vote that did not depend on the ownership of land and similar suffrage for Maori women began in 1893.<sup>343</sup> By 1894 one of the Maori Members of Parliament (MPs) had introduced a “Native Rights Bill” calling for the creation of a separate Maori constitution and a formal Maori legislature to enact laws relating to the Maori.<sup>344</sup> Therefore, beginning in the late nineteenth century, the Maori attempted both to emulate European-style political and legal institutions with parallel, independent institutions and to work within the

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339. Compare FLERAS & ELLIOT, *supra* note 2, at 207, with Honorable Douglas Graham, *Address by the Minister in Charge of Treaty of Waitangi Negotiations*, in TREATY SETTLEMENTS: THE UNFINISHED BUSINESS, *supra* note 7, at 146.

340. M.H. Durie, *Proceedings of a Hui at Hirangi Marae, Turangi*, in TREATY SETTLEMENTS: THE UNFINISHED BUSINESS, *supra* note 7, at 26.

341. HAZLEHURST, *supra* note 314, at 6.

342. See generally Maori Representation Act of 1867, *supra* note 327; The Electoral Act of 1893, 33–83, at §§ 148–56 (New Zealand.).

343. The Maori Representation Act of 1897, *supra* note 327; accord. METGE, *supra* note 311, at 36; ABOUT NEW ZEALAND, PUBLIC AFFAIRS AND PROTOCOL DIVISION, NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE 3 (1995).

344. SPILLER ET AL., *supra* note 313, at 155.



existing European-style institutions by engaging in the imported political process as official representatives or via the right to vote.

In the 1920s, the Ratana church established a political party catering to Maori interests like statutory ratification of the Treaty of Waitangi.<sup>345</sup> By the 1943 election, Ratana members held all four of the Maori parliamentary seats.<sup>346</sup> The Ratana effort was the first indication that the Maori could constitute a significant political force within the confines of the New Zealand democratic model.<sup>347</sup>

From 1979 through 1980, the first meetings occurred of the “Mana Maori Motuhake” party, also known as the Maori Self-Determination Party.<sup>348</sup> This party was not centered around a Maori independence movement, but represented an attempt to provide a uniquely Maori political platform for interests that traditionally had been subsumed within the Labour Party.<sup>349</sup> At this point, Maori political representatives had accepted the larger framework of imported parliamentary authority and stopped emulating European political models through parallel institutions.<sup>350</sup> The Party essentially acknowledged the utility of imported legal forms, and hoped that a stronger Maori presence in bureaucracies and government agencies would make the New Zealand government more representative and responsive to Maori concerns.<sup>351</sup> This legacy has carried on, as political parties centered on Maori interests continue to exist today in New Zealand.<sup>352</sup>

Beginning in 1993, the government began to calculate the dedicated Maori seats on the same population basis as other seats.<sup>353</sup> The Public Affairs and Protocol Division of the New Zealand Ministry of Foreign

345. ORANGE, *supra* note 312, at 71.

346. *Id.* at 71.

347. Interview with Douglas Graham, Minister of Justice and Minister in Charge of Treaty of Waitangi Negotiations, Bronwyn Arthur, Crown Law Attorney, Margaret Dugdale, Team Manager for Policy/Negotiations with the Office of Treaty Settlements, and Lauren Perry, Minister Graham’s Private Legal Secretary in Wellington, N.Z. (April 15, 1997) [hereinafter *Graham Interview*]. New Zealand’s Minister of Justice contends that one of the weaknesses of the dedicated Maori seat system is that the seats always have been occupied by members of the same party, and because of strong party discipline individual legislators have never exercised any true political independence. *Id.* According to Minister Graham, the existence of dedicated Maori seats allows other politicians the luxury of avoiding championing a Maori perspective on issues affecting the Maori based on an understanding that legislators occupying dedicated Maori seats will account for any Maori concerns. *Id.*

348. HAZLEHURST, *supra* note 314, at 62.

349. *See id.* at 68–69.

350. *See id.* at 75.

351. *Id.* at 75.

352. *See* MAORI PARTY, (2010), <http://www.maoriparty.org>.

353. *Graham Interview*, *supra* note 347.

Affairs and Trade neatly summarized the Maori role in this form of parliamentary democracy as of 1995:

There are currently 99 members of Parliament (MPS), who are all elected. Four of these are Maori MPs representing the mixed populations of general electorates [and] are also of Maori descent. Citizens of Maori heritage choose whether to register on the Maori or the General roll of electors, and may change their registration from time to time.<sup>354</sup>

As of 1996, however, representation of Maori interests in New Zealand changed dramatically.

New Zealand eliminated its majority rule system in 1993, and on October 12, 1996, New Zealand held its first election based on a new voting system under the “mixed-member proportional representation method” (MMP).<sup>355</sup> This method provides minority parties with a larger governmental voice and opens the door to coalition governments:

Under the MMP, each voter has two votes: one is for the party preferred to win [the] government for a three year term; the other is the choice of a local representative in a parliament expected to swell to 120 seats from 99. The party vote alone determines which parties have the numbers to form a government, and each party’s relative power within the coalition.<sup>356</sup>

A Royal Commission in turn concluded that the dedicated Maori seats should be abolished because the MMP system would lead to greater opposition and minority political representation.<sup>357</sup> Despite these findings and his personal reservations about the dedicated seats, the former New Zealand Minister of Justice concluded that the Maori seats were still beneficial on balance and should only be eliminated if Maoris agreed to such a change by registering on the general electoral role.<sup>358</sup> In recent times, approximately fifty percent of Maori voters have registered on the gen-

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354. *Id.*

355. S. Karene Witcher, *New Zealand Politics Turn Tumultuous: New Voting System May Bring Discord, Harm Economy*, WALL ST. J., Oct. 9, 1996, at A18.

356. *Id.*; accord. NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE *supra* note 343, at 17; Interview with Margaret Dugdale, Team Manager for Policy/Negotiations, Office of Treaty Settlements, and Bronwyn Arthur, Attorney, Crown Law, in Wellington, N.Z. (April 15, 1997) [hereinafter Dugdale Interview].

357. Witcher, *supra* note 355.

358. *Id.*

eral electoral role, with the other fifty percent of Maori voters registered on the Maori role.<sup>359</sup>

The 1993 electoral reforms have aided Maori political representation. There were five dedicated Maori seats by 1997.<sup>360</sup> Furthermore, New Zealand was a two party country from the 1930s until the early 1990s, but with the onset of MMP many parties emerged.<sup>361</sup> The MMP system therefore opened the door for a greater small political party role, including those catering to Maori concerns. The New Zealand government summarizes that “MMP offers an opportunity for a range of parties to gain seats by achieving at least five percent of the party vote.”<sup>362</sup> In theory, this allows for a greater governmental role for Maoris.<sup>363</sup> Indeed, the importance of the MMP change and the possibility of increased Maori representation in Parliament is magnified by New Zealand’s single chamber Parliament system as any concentration of parliamentary power is not diluted by balancing powers of other representative bodies.<sup>364</sup> But in any case, Maoris have largely accepted the parliamentary system and now work within the larger New Zealand political party framework.

### C. Maori Political Participation and Sovereignty

Maoris also have to be creative to maintain control over their natural resource assets. Governmental norms brought by colonists have allowed for immigrant encroachment on Maori natural resources, but these same legal constructs often provide Maoris with options to minimize the negative impacts of an imposed government. These issues came to a head during the Maori King Movement and the push for a Kotahitanga.<sup>365</sup> Settlers sought broader state jurisdiction, but Maori leaders maximized opportunities to control their natural resources and sov-

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359. *Id.*

360. Dugdale Interview, *supra* note 356.

361. *Id.*

362. NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, *supra* note 343, at 17.

363. Compare Hiwi Tauroa, HEALING THE BREACH: ONE MAORI’S PERSPECTIVE ON THE TREATY OF WAITANGI 96 (1989) (quoting Justice Wallace, Chairman of the Human Rights Commission, Royal Commission on the Electoral System), with HONOURING THE TREATY 124 (Helen Yensen, Kevin Hague & Tim McCreanor eds., 1989) (“[a]t best, if all Maori people voted for the same Maori party, something that would never be expected of Pakeha, Maori could gain ten to twelve per cent [sic] of the seats in Parliament.”).

364. Witcher, *supra* note 355, at A18 (New Zealand’s “upper house” of parliament was abolished in 1950); PAUL TEMM, THE WAITANGI TRIBUNAL: THE CONSCIENCE OF THE NATION 111 (1990).

365. See *supra* Part III.A.

ereignty.<sup>366</sup> When those efforts petered out, Maoris immersed themselves in the imported legal norms by obtaining the right to vote, fielding Maori candidates for election, and lobbying the New Zealand government directly.<sup>367</sup> As with the American Indian experience, all of these survival strategies have included efforts to advance Maori interests in natural resource allocation and protection.

#### IV. CONCLUSION

Again, this article is premised on two assumptions. First, the history of relationships between indigenous peoples and settlers largely represents a battle for control over natural resources. Second, control over such resources is a foundation for both economic and political self-determination. Because control over natural resources is so important, indigenous people have utilized a wide range of coping strategies to preserve their rights. One such strategy seeks greater participation by indigenous people within the imported legal construct in an effort to maintain political and economic independence. Both American Indian and Maori communities have sought to maintain sovereignty and to protect their natural resource rights through formal statehood movements, and other direct participation within the imported political framework. From suffrage, to fielding candidates, to creating political parties, to utilizing the lobbying process, indigenous peoples have engaged in creative efforts to preserve their natural resource rights through direct participation in imported legal and political frameworks. And in doing so, indigenous people have used imported norms as both a defensive shield and offensive sword in the fight for native sovereignty.

Ultimately, the history of relations between the United States federal government and the Five Tribes reveals that onslaughts on tribal sovereignty were motivated by immigrant desires for Indian natural resources. From removal to the Dawes Commission, Indian nations like the Five Tribes have faced renewed attacks on tribal autonomy when their natural resources were most valuable to the surrounding settlers, yet Indians have fought back within the immigrants' own legal system.

American Indians must be creative to protect their natural resource assets. Imported governmental norms can rationalize or legitimize the amount and takings of American Indian natural resources. However, the same legal norms often afford American Indians certain entitlements, rights, and protections, and can be deployed defensively or offensively to mitigate the negative impacts of an imposed legal system.

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366. *Id.*

367. *See supra* Part III.B.

These dynamics all came to bear in the debates over American Indian statehood and the alternative that became the State of Oklahoma. Settlers used the statehood concept to demand the fractionalization and division of tribal assets and to subsume Indian holdings to a dominant state and jurisdiction, whereas American Indian leaders used the opportunity to advocate for a pan-Indian state as one path to maximize Indian sovereignty and control over natural resources. Exposed in the process was the quintessential connection between the need for control over natural resources and the perpetration of native sovereignty. Without a consolidated land and natural resource base, American Indian statehood proponents ultimately could not justify or explain the practical implementation of a dedicated pan-Indian state. As American Indians lost control over the statehood debate, they simultaneously lost control over vast natural resource holdings. Just a few years later Oklahoma was the next state in the union, and immigrants and settlers controlled huge swaths of natural resource holdings formerly held by American Indian tribes or tribal members. Still, American Indians eventually tried to manipulate the imported legal norms for their benefit by obtaining the right to influence the political process directly through voting rights, fielding Indian candidates for elective office, and lobbying the federal government directly on matters of interest to Indian tribes. All of these coping strategies included efforts to advance American Indian interests in the allocation and protection of natural resources.

Similarly, Maori participation in the New Zealand government also reflects attempts to preserve native sovereignty and natural resource rights in a monarchy and parliamentary context. The King Movement and the Kotahitanga were efforts by Maoris to adopt increasingly dominant imported legal norms to protect their land and other resources. As true Maori movements for independence and sovereignty floundered, Maoris also switched gears and began participating within the dominant political institutions and models through the Ratana Party, the Maori Self-Determination Party, through elected Maori Representatives in Parliament, and through the direct right to vote. Each of these Maori political and legal efforts occurred during times when an imported population sought to erode Maori natural resource rights.

So again, the history of relations between the New Zealand government and the Maori underscores that attacks on tribal independence were driven by an immigrant thirst for Maori natural resources. From the Treaty of Waitangi to the Maori Self-Determination Party, Maori tribes faced increasing assaults on tribal sovereignty when their natural resources were most attractive to the encroaching immigrants—but again have protected themselves through the settlers' own political norms.

Nevertheless, direct political participation by indigenous people within a dominant legal and governmental system is not necessarily the most effective strategy in fighting for native sovereignty or natural resource control. Because there are so many players and special interests participating directly in the process, the agenda of indigenous people tends to get lost in the shuffle as a minority background debate. Indigenous people just do not have the critical population mass necessary to dominate or lead through the right to vote, lobbying, or other forms of direct political involvement. Moreover, relying on direct political participation alone borders on total acquiescence.

So sometimes, indigenous people need to challenge the dominant system through the judicial process or any other means necessary to press the twin goals of native sovereignty and control over natural resources. Failure to remain vigilant and active in the courts, however, puts collective or tribal natural resource holdings at risk and in the process undermines ongoing efforts toward indigenous self-determination. Absent a massive boom in the population of indigenous peoples, direct political participation in legislative efforts or public policy debates is not enough and needs to be complemented by a judicial strategy. By taking advantage of and even exploiting dominant governmental and legal norms imported by colonists through a variety of survival strategies, indigenous people have the best chance of controlling their collective assets and political future.

