

CLEAN MY LAND: AMERICAN INDIANS, TRIBAL SOVEREIGNTY, AND THE
ENVIRONMENTAL PROTECTION AGENCY

by

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B.A., University of Redlands, 1998
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AN ABSTRACT OF A DISSERTATION

submitted in partial fulfillment of the requirements for the degree

DOCTOR OF PHILOSOPHY

Department of History
College of Arts and Sciences

KANSAS STATE UNIVERSITY
Manhattan, Kansas

2015

Abstract

This dissertation is a case study of the Isleta Pueblos of central New Mexico, the Quapaw tribe of northeast Oklahoma, and the Osage Nation of northcentral Oklahoma, and their relationship with the federal government, and specifically the Environmental Protection Agency. As one of the youngest federal agencies, operating during the Self-Determination Era, it seems the EPA would be open to new approaches in federal Indian policy. In reality, the EPA has not reacted much differently than any other historical agency of the federal government. The EPA has rarely recognized the ability of Indians to take care of their own environmental problems. The EPA's unwillingness to recognize tribal sovereignty was no where clearer than in 2005, when Republican Senator James Inhof of Oklahoma added a rider to his transportation bill that made it illegal in Oklahoma for tribes to gain primary control over their environmental protection programs without first negotiating with, and gaining permission of, the state government of Oklahoma. The rider was an erosion of the federal trust relationship with American Indian tribes (as tribes do not need to heed state laws over federal laws) and an attack on native ability to judge tribal affairs. Oklahoma's tribes, and Indian leaders from around the nation, worked to get the new law overturned, but the EPA decided to help tribes work within the confines of the new law. Despite the EPA's stance on the new law, the tribes continued to try to fight back, as they had in the past when challenged by paternalistic federal policy. The EPA treated the Quapaws and Isletas in a similar fashion. Thus, the thesis of this study is that the EPA failed to respect the abilities of American Indian nations, as did federal agencies of years before, to manage their own affairs. Historians have largely neglected the role the EPA has played in recent Indian history and are just now beginning to document how deliberate efforts at self-determination have been employed by tribes for centuries in America.

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Acknowledgements

My advisor, Professor Bonnie Lynn-Sherow has given me great advice, editing and support. Professors Derek Hoff, David Graff, James Sherow, and Sue Zschoche have all read the draft of my dissertation and provided me with feedback and encouragement. Michelle Nolan has edited at least two draft copies and provided me with much appreciated support. Claire Wilder and Loren Wilder have always been supportive of my journey. Last but most important, my wife, Nikol, and my daughters, Logan and Myka, are amazing. I have tried to shield them from whatever frustrations I have had during the graduate school process. I am so blessed by their support and love.

Dedication

I dedicate this dissertation to my wife Nikol and my daughters, Logan and Myka.

Preface

A dissertation may only have one name on the cover page, but it is truly the work of many. When I went back to graduate school to pursue a master's degree in history, Ray Wilson, my advising professor Fort Hays State, asked me what area of research I hoped to have as a focus. Although Dr. Wilson, now retired, had a long career as a historian of American Indian history, he let me choose my own path. Bow hunting had become a hobby, and enamored with the stereotypes of Indians and the West, I chose Indian history. Under the tutelage of Todd Leahy, my master's thesis advisor at Fort Hays State, it did not take long for my romantic stereotypes about Indian peoples to be overturned, as I began studying American Indian legal history. I was still fascinated with the environment when I began classes at K-State. My advisor, Bonnie Lynn-Sherow, introduced me to the confluence of the stereotypes about Indians and the environment. In this way, I came upon a subject that hopefully has left the stereotypes behind, but that will be useful in enlightening the public about the struggle that Indians have had in keeping their land safe from harm.

Donald Fixico has written that it is imperative for non-Indians writing Indian history to “think like an Indian.” He argued that scholars should think of Indians as proactive, the makers of their own history, not reactive to the stories of others.¹ My study illustrates that Indians have been proactive throughout their relationship with the United States, especially when seeking to control their homelands. After 1970, Indians asked the federal government for control over the protection of their lands from a variety of wastes.

¹ Donald Fixico, “Ethics and Responsibilities in Writing American Indian History,” in *Major Problems in American Indian History*, 2nd, ed., Albert L. Hurtado and Peter Iverson (New York: Houghton Mifflin, 2001), 8.

In this study, I use the terms Indian, Native American, and American Indian interchangeably. In consultation with several historians, including those of American Indian descent, and in reading Indian source material for years, I have come to understand this flexibility in terminology as an accepted practice in writing American Indian history, which in no way shows a lack of respect for culture or people.

Several people have helped me. My advisor, Bonnie Lynn-Sherow, has been patient and kind, providing me with amazing support and advice along the way, in addition to reading several drafts. My committee consisting of professors Derek Hoff, David Graff, James Sherow, and Sue Zschoche, have all read drafts of this study and been supportive and helpful. Michelle Nolan has also edited two drafts. Most importantly, my wife, Nikol Nolan, and my daughters, Logan and Myka, are amazing and have given me terrific support. While I certainly hope there are no errors in this study, if there are, only I am to blame.

Introduction

Since the founding of the United States, the federal government has only reluctantly recognized tribal control of tribal land, also known as sovereignty, self-determination, or self-rule.² The Self-Determination Era (1970-present) promised to be the era in which American Indian tribes could at last forge their own futures. This study considers the role of one federal agency, the United States Environmental Protection Agency (EPA), which began operations on December 2, 1970, at the dawn of the Self-Determination Era, in the period.³ At issue is whether the EPA, which has been in charge of mitigating pollution in America since 1970, has recognized tribal government control over tribally owned land. In other words, has the EPA recognized that American Indians can make decisions about their own land and can protect or exploit it as they wish? Some scholars have considered the EPA to be an intermediary between sovereign Native peoples and public or private entities.⁴ For that matter, the EPA has stated that it recognizes American Indian sovereignty. In 1983, the EPA's Indian Work Group stated that "it would recognize tribal governments as the primary parties for policy formulation and

² Dina Gilio-Whitaker, "Indian Self-Determination and Sovereignty," *Indian Country Today*, assessed October 1, 2015, <http://indiancountrytodaymedianetwork.com/opinion/indian-self-determination-and-sovereignty-147025>. Gilio-Whitaker provides a convincing argument that the term sovereignty is not appropriate to refer to tribal self-determination, as sovereignty refers to the ability of European states with hierarchical structures to rule their nations. I use the term sovereignty in this dissertation, because it has been used by native scholars for many years, and is still prominent in the literature. In addition, native peoples have sought the standing that European nations have as sovereign nations in the eyes of the federal government, ever since the United States stopped agreeing to treaties in 1871.

³ EPA, "The Guardian: Origins of the EPA," EPA.gov, spring 1992, accessed October 4, 2015, <http://www2.epa.gov/aboutepa/guardian-origins-epa>.

⁴ Darren J. Ranco, "Environmental Risk and Politics in Eastern Maine: The Penobscot Nation and the Environmental Protection Agency," Ph.D. diss., Harvard University, 2000; Dan McGovern, *The Campo Indian Landfill War: The Fight for Gold in California's Garbage* (Norman: University of Oklahoma Press, 1995).

implementation on Indian lands, consistent with agency standards and regulations. The Agency is prepared to work directly with Indian Tribal Governments on a one-to-one basis, rather than as subdivisions of other governments.”⁵ Furthermore, in 2010 former EPA Administrator Lisa Jackson created the Office of International and Tribal Affairs to ensure that “we approach our relationship with the sovereign tribal nations within our own country in the same way we approach our relationship with sovereign nations beyond US borders.”⁶ Despite operating during the Self-Determination Era and claiming that it recognizes tribal sovereignty, the EPA has not recognized tribal sovereignty, similar to earlier federal agencies.

There is a small but growing collection of literature about American Indians and environmental resource protection, but scholars have not yet answered the question of whether or not the EPA has recognized tribal self-determination. The best scholarship on the subject comes from anthropologist Darren Ranco, who spent two years in the late 1990s with the Penobscots of Eastern Maine. His unpublished dissertation “Environmental Risk and Politics in Eastern Maine: The Penobscot Nation and the Environmental Protection Agency” (2002) detailed the proceedings in the late 1990s between the Penobscots of Maine and the EPA to set dioxin standards for the Penobscot River. Ranco believed that the EPA had the authority to recognize tribal self-rule, but in the end was not willing to do so.

The Penobscot people asked the EPA to force the Lincoln Pulp and Paper Company, located north of Penobscot lands, to stop releasing dioxin into the Penobscot River, which runs

⁵ LaDonna Harris, Stephen M. Sachs, and Barbara Morris, “Honoring Indian Nations’ Sovereignty,” in *Re-creating the Circle: The Renewal of American Indian Self-Determination*, eds. LaDonna Harris, Stephen M. Sachs, and Barbara Morris (Albuquerque: The University of New Mexico Press, 2011), 125-126.

⁶ Dave Ryan, “EPA Announces the New Office of International and Tribal Affairs,” accessed September 13, 2015, <http://yosemite.epa.gov/opa/admpress.nsf/df3c84313061411f8525740a0057efe1/59b590ea7955e143852576e8006137f7!opendocument>.

south through the Penobscot lands. Dioxin is a poisonous chemical that comes from paper processing, specifically the bleaching of paper. The Penobscots agreed to the EPA's guidelines for the chemical dioxin that the agency was going to force the Lincoln Pulp and Paper Company to abide by for release into the Penobscot River. The tribe used the river for fishing and other tribal needs and thus asked the EPA to enforce tribal guidelines that were more stringent than previously agreed upon by the two entities. The Penobscots' request placed them outside the realm of what the EPA usually allowed, as far as tribal input on the question of poison guidelines for the river. The EPA has tended to overrule tribes on scientific grounds, and in the Penobscot case the EPA saw no scientific reason to enforce the Penobscots' standards for higher water quality. Ranco concluded that the EPA should have been open to rationales outside the Euro-American realm of information and should have recognized the Penobscot's ability to choose their own standards.⁷

Ranco contrasted the Penobscot case study with that of the Isleta Pueblos, who set water quality standards for the Rio Grande in the 1990s, to show that the EPA did not treat the Penobscots as sovereigns, while the EPA treated the Isletas as sovereigns. Ranco was wrong in this case, though. Ranco argued that the Isletas were able to win the battle for water quality standards with the city of Albuquerque and the state of New Mexico, because the Isletas took ownership of the discussions with the two. Ranco contended the EPA was simply an intermediary between the Isletas and the state government of New Mexico and city government of Albuquerque. In contrast, according to Ranco, the EPA did not act as an intermediary with the Penobscot Tribe and the Lincoln Company, because the tribe was not a sovereign nation under

⁷ Darren J. Ranco, "Environmental Risk and Politics in Eastern Maine: The Penobscot Nation and the Environmental Protection Agency," Ph.D. diss., Harvard University, 2000.

the Maine Indian Claims Settlement Act, which meant that it had given up its power of control over Penobscot land to Maine. What Ranco did not realize, though, was that the EPA did not treat the Isletas as a sovereign nation, because the Clean Water Act dictated the Isletas' position and the EPA's position.⁸ In other words, the EPA did not recognize tribal self-rule in either case.

Scholars have interpreted the EPA as a benign negotiator in Indian affairs. Dan McGovern's *The Campo Indian Landfill War: The Fight for Gold in California's Garbage* (1995) argued that the EPA in that case was a well-intentioned middleman. The book detailed the attempts by the Campos of San Diego County in the early 1990s to build a waste dump east of San Diego. McGovern, a former administrator with the EPA's Region IX (Pacific Region), concluded that both sides of the issue should have compromised over the right of the Campos to build a waste dump on their land next to the San Diego suburbs. McGovern cast the EPA as an arbitrator in a discussion between two parties of equal status, which was charitable of McGovern, but still did not recognize the tribes' desire for self-rule. McGovern was correct to illustrate, although not intentionally, that the EPA did not recognize the long history of the Campos' authority over the disposition of their homelands. McGovern was seemingly not aware of tribal self-rule, which was the major flaw of his study, along with the unacknowledged fact that the EPA has often chosen sides.⁹

Environmental political scientist and historian Daniel McCool and journalist Marjane Ambler have missed the important role that the EPA has played in tribal resource development. Daniel McCool's *Command of the Waters* (1987) argued that iron triangles negatively affected tribal water rights. An "iron triangle" is the political science term for relationships among federal

⁸ Ibid., 104-108.

⁹ Dan McGovern, *The Campo Indian Landfill War: The Fight for Gold in California's Garbage* (Norman: University of Oklahoma Press, 1995).

departments, Congressional committees, and constituents that benefits all three entities. Iron triangles do not recognize the rights of the tribes to be at the decision making table. According to McCool, the Bureau of Indian Affairs (BIA) was willing to defer to state laws during the early twentieth century. It was a conflict of interest for Congress to recognize tribal rights to water, because that would get in the way of federal and state irrigation projects. Yet, tribes still pressed for their water rights. McCool adeptly illustrated how Congress has often not abided by Supreme Court decisions, much as this dissertation illustrates in the case of the Osage Nation and the EPA.¹⁰ But, McCool failed to include the EPA as further illustration of the ways Congress and the EPA did not respect tribal governance over tribal land and water during the Self-Determination Era.

McCool's *Native Waters* (2002) argued that Indians gained access to more water after 1970 during the Self-Determination Era, than during the whole of the twentieth century. In the late 1970s, non-Indians and the federal government became interested in negotiating with tribes over water rights, instead of taking water by simply ignoring tribal treaties. McCool explained how numerous tribes gained access to water, such as the Papago Tribe, who won a total of 66,000 acre feet of surface water, but agreed to limit ground water pumping to just 10,000 acre feet annually. In fact, the Army Corps of Engineers actually transferred 9,300 acres of land back to the tribes from 1997 to 2002. McCool also mentions that the Corps and the Bureau of Reclamation as of 1998 began to seek consultation with tribes, at times, before projects were

¹⁰ Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water* (Tucson: University of Arizona Press, 1987), 231.

created.¹¹ In similar fashion, this dissertation illustrates tribal relationships with the EPA, especially in the case of the Osage Nation, which McCool did not cover.

Journalist Marjane Ambler similarly does not mention how the EPA did not recognize tribal ownership and authority in *Breaking the Iron Bonds* (1990), a study of how tribes took control of their natural resources during the Self-Determination Era, instead of waiting for the federal government to act on their behalf. Among several examples, Ambler detailed the establishment of the Navajo Environmental Protection Agency, which worked alongside the EPA to regulate energy development on the reservation. Ambler included the EPA as a partner with tribes that worked within the guidelines that Congress set forth for tribes.¹² A similar discussion of cooperating between the EPA and tribes came from LaDonna Harris, Stephen M. Sachs and Barbara Morris in their chapter “Honoring Indian Nation’s Sovereignty: Building Government to Government Relations Between Tribal Governments and Federal, State, and Local Governments,” in *Re-Creating the Circle: The Renewal of American Indian Self-Determination*, also edited by Harris, Sachs, and Morris. Harris, Sachs, and Morris explained that the EPA’s efforts through its Indian Work Group in 1983 to recognize tribes as independent nations that could be partners with the EPA to protect the environment. Further, through the provision in the Water Quality Act of 1987 to treat tribes like states for purposes of setting water quality standards, the EPA had become a model of how the federal government should act toward tribes.¹³ The Osage case study in this dissertation details a similar phenomenon where the EPA

¹¹ Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* (Tucson: The University of Arizona Press, 2002), 123-124.

¹² Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development* (Lawrence: University Press of Kansas, 1990), 177-178.

¹³ Harris, Sachs, and Morris, “Honoring Indian Nations’ Sovereignty,” 124-128.

partnered with the Osage Nation to further environmental protection and programs. The Osage case study also makes it clear, however, that the EPA was not willing to recognize tribal self-determination. The federal government has continued to hold Indians at bay during the Self-Determination Era by limiting and circumventing the tribes' rights to self-determination.

There has also been a whole category of scholarship about Indians and their relationship with the environment, but not necessarily cleaning polluted land. Within the genre of Indians and their connection to the environment, which sprouted post-1970 with the rise of environmentalism in America, there has existed the overarching question of whether Indians have always illustrated ecological knowledge in a modern sense, or whether they have used the land in unsustainable ways. In other words, were Indians the first environmentalists?

The concept that some tribal patterns of sustainable environmental use might save the planet is at the heart of Christopher Vescey's and Robert Venable's edited collection of essays, *American Indian Environments* (1980). Christopher Vescey's "American Indian Environmental Religion" illustrated the sanctity of animals in some tribal religion and bemoaned the use of isolated incidences of overkill as examples of a lack of ecological understanding by all Indians. For example, even when the Micmacs of the Northeast chose to kill beavers beyond sustainable limits, the slaughter did not mean that they were unaware of the damage they were imposing on the local ecosystem. It meant that they needed to kill beavers to survive.¹⁴ While many people stereotype the Indians of centuries ago through a Eurocentric lens, Vescey understood that Indians of bygone centuries were in control of their actions. Vescey's call to accept the goals of Indian peoples apart from the non-Indian agenda is certainly a part of this dissertation, which

¹⁴ Christopher Vescey, "American Indian Environmental Religion," in *American Indian Environments: Ecological Issues in Native American History*, ed. Christopher Vescey and Robert W. Venables (Syracuse, NY: Syracuse University Press, 1980), 1-37.

builds on the concept that native people can choose their own path by showing how, indeed, native peoples have chosen their own path, even in the face of a lack of sovereignty recognition by the United States.

Not long after Vescey's essay appeared, historian J. Donald Hughes came along with a similar concept in *American Indian Ecology* (1983) that also subscribed to the idea that Indian environmental philosophy could save animals and vegetation from destruction. According to Hughes, Indians lived in harmony with nature for centuries, which provided for the numerous accounts of an unspoiled continent when European explorers arrived. Indians' appreciation of nature was not romantic, but utilitarian. Some native peoples killed animals, but thanked the animals, believing that they just shed their skins before going back to their animal villages. Other native peoples believed that plants possessed sacred qualities, having to be harvested and gathered in ways specific ways. Many tribes did not practice crop rotation, but perfected intercropping. They burned for fertilizer and planted nitrogen rich beans, which climbed the corn stalks planted right next to the beans. Native peoples planted corn and beans next to squash, so the squash leaves could block the sun, and thus inhibit weed growth. Hughes called for non-Indians to follow the land ethic of Indians in order to survive the problems of environmental destruction.¹⁵ When considered in conjunction with Ranco's theory on the Penobscots described earlier, Hughes' argument is powerful, because we see in the last forty years that Indians are not able to choose the path to environmental protection that they believe in, especially if it does not coincide with EPA science.

The third important book on the Native American land ethic came twelve years later in *The Ecocide of Native America: The Environmental Destruction of Native Lands and People*

¹⁵ Donald J. Hughes, *American Indian Ecology* (El Paso: Texas Western Press, 1983).

(1995) by historians Donald Grinde and Bruce Johansen. In addition to English resources, the authors used Spanish documents to trace Indian beliefs about the land to argue that Americans should follow Indian traditions of land protection. The authors believed that the Indians' values about the earth were the result of their circular way of envisioning time, which contrasted with the linear time concepts of the federal government and non-Indians, which were based primarily on capitalism and a need for material progress. A prime example of the dangers of non-Indian thinking occurred in 1978 on the Navajo reservation, when the largest nuclear melt down in American history occurred at Church Rock. Perhaps the disaster could have been averted with input from Navajos, who knew there were problems. Non-Indian journalism simply did not care to report the Navajo melt down with the same gusto, thus Indian problems were swept away. Grinde and Johansen suggested that the environmental crises of the late twentieth century could have been cured if the United States and other major world powers followed American Indian land practices. The ultimate problem for the authors was that non-Indians have been making decisions about land for so long that change is difficult.¹⁶ Thus, Indian self-rule is at the heart of Grinde's and Johansen's book. Indians should be able to choose their own path in terms of environmental protection, because, according to Grinde and Johansen, it will be the right path. The theory smells of an idealized version of Indian America, not based in the historical reality that Indians live in the same capitalist economy as non-Indians forcing tough choices that sometimes lead to unsustainable land practices.

Among the most controversial responses to studies that argue that Indians were the first ecologists is anthropologist Shepard Krech III's *The Ecological Indian* (1999). He argued that

¹⁶ Donald A. Grinde and Bruce E. Johansen, *The Ecocide of Native America: Environmental Destruction of Indian Lands and Peoples* (Santa Fe: Clear Light, 1995).

non-Indians could not call Indians ecologists, because Indian beliefs and practices did not mesh with modern American scientific concepts of ecology. Krech analyzed several areas of resource use considered to be the building blocks of the ecological Indian myth. For example, he believed the Eden myth to be false. The Eden myth described early America as wonderful based upon sustainable environmental practices of the Indians. Krech argued that the lack of Indian population pressure led to an Eden like land when Europeans arrived, not native practices meant to be ecologically sound. As for the theory that tribes across the American continent set fire to grasslands with the noble intention of rejuvenating the land and improving grazing conditions, Krech also disagreed. He illustrated that early aboriginal populations on the American continent set fires intentionally to trap animals and did not treat the fires with care. Krech used the example of the Flatheads of modern Montana, who let fires burn out of control, which is not ecologically responsible due to the modern problems of smoke pollution and the potential to set fire to animal habitat.¹⁷ Krech's views are also important for readers of this dissertation, because he has argued that many native peoples often act in their own self-interest, and to make ancient cultures the poster-children for the environmental movement of the modern era is inappropriate. This dissertation builds on Krech's theme. For instance, in the Osage case study, we see that they expressed their sovereign right to have their land cleaned, although they were not asking for the oil companies to leave.

Among the critics of Krech's work was Darren J. Ranco, in "The Ecological Indian and the Politics of Representation: Critiquing the Ecological Indian and the Age of Ecocide," in *Native Americans and the Environment: Perspectives on the Ecological Indian* (2007). He argued that Krech's stance was wrong since Indian leaders often used the ecological Indian

¹⁷ Shepard Krech, III, *The Ecological Indian: Myth and History* (New York: Norton, 1999).

stereotype as a way to create a discourse that non-Indians understood. Ranco wanted Krech to make such arguments within the context of the battles that Ranco faced with the Penobscots against the EPA over water quality on their land.¹⁸ This dissertation builds on Ranco's research, looking at how the EPA and Indian tribes struggle to find a common discourse, and how the EPA has not recognized tribal abilities to make decisions.

Another powerful critique of Krech belonged to David Rich Lewis and his article on the Skull Valley Goshutes' modern attempts at building an underground nuclear storage site, which appeared in *Native Americans and the Environment: Perspectives on the Ecological Indian* (2007). Lewis incorporated a history of the tribe, one of deprivation, with a discussion of their modern needs and battles for federal and state recognition of their right to self-rule. Residents of Utah did not want the tribe to have a nuclear storage facility, because they did not want nuclear waste in their backyard. Residents of Utah did not realize that Goshute leaders had done comprehensive research on the project and did not want a catastrophe either. The Goshutes studied modern ecological science, and propelled by their own desire for self-rule, made powerful arguments for their future. Lewis's conclusion is that modern Indians cannot be classified as either ecological or not ecological, but instead exhibit both qualities.¹⁹ Taken a step further, the theoretical discussion of the Indian-as-ecologist illustrates that Indian sovereignty has been a threatening concept for non-Indians, because non-Indian political and environmental goals do not mesh with the reality that Indians are capable of making their own decisions about

¹⁸ Darren J. Ranco, "The Ecological Indian and the Politics of Representation: Critiquing the Ecological Indian in the Age of Ecocide," in *Native Americans and the Environment: Perspectives on the Ecological Indian*, ed. Michael E. Harkin and David Rich Lewis (Lincoln, NE: University of Nebraska Press, 2007), 32-51.

¹⁹ David Rich Lewis, "Skull Valley Goshutes and the Politics of Nuclear Waste: Environment, Identity, and Sovereignty," in *Native Americans and the Environment: Perspectives on the Ecological Indian*, ed. Michael E. Harkin and David Rich Lewis (Lincoln, NE: University of Nebraska Press, 2007), 304-342.

land use. The following case studies bring Indian self-determination to light. When we account for Indian self-determination, we see that the EPA has consistently used non-Indian standards for their environmental guidelines, and thus the federal government during the last forty years has still not shown support for the decision making power of Indians on environmental issues.

There is also an extensive collection of scholarship about Indian self-rule that does not necessarily revolve around environmental protection. The general thrust of the following scholarship illustrates that the United States has not respected the ability of Indians to judge their own affairs. The preeminent author of numerous studies on Indian self-rule and self-government was the prolific Indian activist and scholar Vine Deloria Jr., whose book *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* published in 1974, illustrated how the federal government had not followed through on its trust responsibility. Deloria wrote that tribes should have been recognized as foreign states, as described in the United States Constitution, whose ability to run their own affairs had not been respected by the federal government. Deloria argued that the federal government should make treaties with Indian tribes again, because it would place the United States at the forefront of the first world nations in how it dealt with its aboriginal populations. More important, for the federal government to resume treaty-making provisions, it would mean that the federal government had finally thrown away the myths and stereotypes about Indians and begun respecting the governing abilities of Indian nations.²⁰ Deloria's goal to resume treaty making was lofty for 1974, and this dissertation shows that the goal has still not been realized, as all tribes living in the United States are still subjected to the whims of Congress.

²⁰ Vine Deloria Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1974).

Vine Deloria and Clifford M. Lytle's *American Indians, American Justice* (1983) is dedicated to how various courts in the United States deal with tribes. It is a key book for anyone who want to analyze the relationship between the federal government and tribal nations in the United States. The authors' analysis of the Cherokee Cases in which the legal status of Indians was established as "domestic dependents" (tribes are sovereign, yet have to abide by federal law) is thorough, highlighting that Chief Justice John Marshall's decisions were both pro and anti-Indian. The authors also explained that the court was split four ways over the cases, with two justices who believed that the tribes had sovereignty as independent nations.²¹

A third book of Deloria's that is important to read to understand Indian sovereignty is *The Nations Within: The Past and Future of American Indian Sovereignty*, authored again with Lytle. Deloria claimed that Indians were unique in the world, because they were the only aboriginal people still practicing a separate form of government within the boundaries of another nation. Within that premise, the authors' goal is to explain the idea of self-government so that all people could differentiate the concept from nationhood. Nationhood, to the authors, was tribal government created by the tribe, while self-government was the establishment of government structure as understood and approved by the United States as part of the Indian Reorganization Act of 1934. The authors also distinguished between self-determination and self-government for the future of Indian life, arguing that the tribes should separate the two ideas. Self-government, which by the authors' definition is modeled after the federal interests, does not necessarily hold the key for Indian justice on reservations. Tribal government should look to the elders and the

²¹ Vine Deloria Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983).

old customs for their answers to legal issues.²² Overall, Deloria's scholarship mixes a variety of academic themes, but from a historical standpoint, the following case studies and analysis do not take issue with his concepts, but instead seek to build on his concepts within the scope of the Self-Determination Era. This dissertation takes Deloria's concept of self-rule and shows how the federal government, through the EPA, still does not respect tribal self-rule, despite the efforts of tribes to exert self-determination in the modern era.

Another scholar, whose work on Indian legal matters is relevant, is John R. Wunder. His "*Retained by the People*" *A History of American Indians and the Bill of Rights* (1994) illustrated how the Bill of Rights to the Constitution excludes Indians, and what the exclusion means for Indians. Wunder covered all the topics that are important for understanding Indian sovereignty, including income from gaming and self-determination during the Self-Determination Era. Wunder argued that the meaning of self-determination to the federal government and to Indians is quite different. The federal government believed that Indians would make some decisions for themselves, while Indians held self-determination to represent complete legal and political sovereignty, with the federal government honoring all treaties. Wunder illustrated that the federal government came up short in honoring the Indian perspective on self-determination. The Supreme Court, such as in the case of *United States v. Dion* (1986), in which the court upheld federal endangered species law over tribal religious freedom, rarely has recognized Indians as a people protected by the Bill of Rights.²³ This dissertation does not contradict Wunder's conclusions, but instead inserts the EPA into the story. While no American citizen is at liberty to

²² Vine Deloria Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Random House, 1984).

²³ John R. Wunder, "*Retained by the People:*" *A History of American Indians and the Bill of Rights* (Oxford: Oxford University Press, 1994).

pollute, Indians have also been limited in their ability to mitigate pollution on their own terms, despite being sovereign nations.

What about the history of the EPA itself? Scholarship on the EPA has often been politically charged. McGovern's study, mentioned earlier in this section, has been one of the better books on the EPA, with its somewhat moderate take on the political aspirations of the agency. Political scientists Mark Landy, Marc J. Roberts, and Stephen R. Thomas in *The Environmental Protection Agency: Asking the Wrong Questions from Nixon to Clinton* (1994) made claims of political pluralism (that several entities had power) when discussing the EPA. They argued that pluralism, sometimes politically desirable, does not work well within the realm of science where crises often need quick and definitive answers. The authors also explain that the EPA, from its inception, was a government department with an objective to protect human health, not the health of the land. The authors constantly refer to politicians' responsibility to educate the public, yet they leave American Indians out of the group known as the public. Interestingly, this study provides a framework for understanding and critiquing the EPA's experiences with tribes, even though there is no mention of tribes. The pluralism that the authors argued hurt the decision making process at the EPA also has damaged tribes, and ultimately challenges environmental protection.²⁴ This dissertation does not make a statement on the EPA's putative pluralism, but it does illustrate that whatever choices the EPA has made, have been made in the effort to interpret federal law.

Another scholar that has criticized the EPA is history professor E.G. Vallianatos, who recently released *Poison Spring: The Secret History of Pollution and the EPA* (2014). The author

²⁴ Mark K. Landy, Marc J. Roberts and Stephen R. Thomas, *The Environmental Protection Agency: Asking the Wrong Questions from Nixon to Clinton* (Oxford: Oxford University Press, 1994).

used government documents and insider interviews to illustrate how science at the EPA has been compromised due to the interference of chemical companies, and acceptance of interference by the EPA. Vallianatos, trained in the history of science, worked for the EPA for twenty-five years as a program analyst. He signed on with the federal agency in 1979 in the hopes of shaping policy decisions, but his idealism eventually turned to disillusionment. One of the author's major issues is that the EPA has political appointees that are often tied to the corporations that the agency has tried to regulate. Another problem for the author is that the EPA tolerates small amounts of pollution when no pollution should be tolerated at all. Ultimately, the author's call is to stand up against agribusiness and defend the earth.²⁵ This dissertation, essentially, agrees with Valliantos, but takes the discussion a step further by applying the evidence to tribes. Again, the EPA is a federal agency with bureaucrats who follow federal laws.

On the other end of the spectrum of scholarship are studies done by think tanks such as the CATO institute. Lawyer James V. DeLong's *Out of Bounds, Out of Control: Regulatory Enforcement at the EPA* (2002) charged that the EPA's enforcement procedures for carrying out federal laws are wholly inadequate based on a concept DeLong calls "the rule of law." He defines the rule of law as law that government is bound by, and therefore is fixed prior to carrying out a procedure. All affected bodies understand the law and have necessary warning to abide by it. DeLong charged that the EPA has maintained the ability to judge what is legal and that it makes the laws that define its powers. Ultimately, DeLong takes issue with the Supreme Court's *Chevron* standard (described in chapter one of this dissertation) that federal agencies should be given deference to interpret federal laws. DeLong's opinion is that laws should be

²⁵ E.G. Vallianatos, *Poison Spring: The Secret History of Pollution and the EPA* (New York: Bloomsbury Press, 2014).

further interpreted by Congress.²⁶ The major problem with DeLong's stance is that Congressmen have repeatedly argued that they do not have the time to work out the minute details of laws, thus the existence of the Code of Federal Regulations. DeLong did not mention the EPA's relationship with the Osage Nation, but his theory would mean that oil corporations would not have to abide by Osage law or environmental guidelines to protect reservation lands.

What most historians, scholars, and EPA officials have failed to articulate clearly is that the EPA, through implementation of policies and procedures, interprets federal law. When dealing with Indian tribes, the EPA must interpret the Clean Water Act (CWA 1972), the Safe Drinking Water Act (SDWA 1974), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA 1980), also known as Superfund, due to the enormous expenses incurred in soil removal and other remediation procedures that restore the land.

The primary argument of this study is that the United States was effectively disrespectful of native ownership of land and resources prior to the Self-Determination Era, and the federal government has provided only limited recognition of tribal sovereignty regarding land issues during the Self-Determination Era, with the EPA serving as the main executive agency interacting with tribal governments over the use of tribal land. As noted earlier, this dissertation is one of a handful of evidence-based studies to analyze the EPA's work with Indians.

Before presenting the evidence included in the case studies, chapter one outlines the key cases and federal laws that have defined Indian self-rule in the United States. The chapter details not only the famous Cherokee Cases of the early nineteenth century, which are the primary basis

²⁶ James V. DeLong, *Out of Bounds, Out of Control: Regulatory Enforcement at the EPA* (Washington D.C.: Cato Institute, 2002).

for the federal trust relationship, but also some lesser-known cases of the twentieth century. Ultimately, the reader sees that there has been no clear path to Indian self-determination. Even in the Self-Determination Era, federal law and the federal court system have limited Indian self-rule.

This study includes three case studies that each investigate one of the three major federal laws that govern environmental resource protection and American Indian tribes. By analyzing the Isleta Pueblo of New Mexico, the Quapaw of northeast Oklahoma, and the Osage of northcentral Oklahoma, the limits and extent of the EPA's authority with those tribes under federal legislation is illustrated.²⁷ Case specific studies provide a more detailed and representative overview of the EPA as a federal agency and its relationship with tribes nationally. Case studies also connect the recent history of the tribes' relationships to the EPA to culturally consistent, long held traditions and values as a way of demonstrating the power of tribal self-identity and governance in shaping and redefining their legal relationship as nations to the United States.

Each case study has its own section, with two chapters. The first chapter of each case study begins with the tribes' experiences with European powers prior to the creation of the United States. An analysis of European and tribal contact shows that not only have the Isletas, Quapaws, and Osages survived European invasion, but that since each tribe existed as a nation prior to the signing of the Constitution, it stands to reason that each tribe has long considered itself sovereign. Then, the first chapter of each case study moves to the treaties that each tribe signed with the United States, which established the trust relationship with the federal

²⁷ The fourth major act the EPA deals with is the Clean Air Act, but the vast majority of American Indians live in areas untouched by the reach of this act.

government. Last, the majority of chapters two, four, and six are devoted to the tribes' relationships with the federal government in the twentieth century prior to 1970, which illustrates that the federal government was disrespectful of tribal self-rule prior to the formation of the EPA, and serves as a comparison for the final chapters about the tribes' experiences with the EPA.

Chapter Two details the Pueblos' ability to exert self-determination in the face of repeated infringement on their legal rights to self-rule and argues that the federal government was disrespectful of Pueblo sovereignty over tribal land prior to 1970. For example, during the 1920s the Pueblo Land Board, given the responsibility to give land back to the Pueblos, shortchanged the Pueblos in its final decisions. Further, during the 1930s, the Interdepartmental Rio Grande Advisory Committee worked to provide land for use by the Pueblos, yet did not recognize the tribes' desires involving land use.

Chapter Three illustrates that the EPA only allowed the Isleta Pueblos to write water quality standards for the Rio Grande, because the Isletas were willing to write standards as strict as those of the EPA. Even though the EPA approved the Isletas' standards, the EPA did not treat the tribe as an equal partner in making decisions as understood by the tribe. The EPA followed the guidelines of the Clean Water Act, which called on the water standards of Indian tribes to match federal standards as set by the EPA.

Chapter Four argues that the Bureau of Indian Affairs of the Interior Department (BIA) protected and encouraged non-Indian mining leases on Quapaw land, but did not provide the Quapaws a voice in the process. The Interior Department struck inferior deals with mining companies with the justification that it was better to take lower profits from an established company, than to sign a contract for higher profits with a mining company that was new to the

mines. The Quapaws continued to ask for better royalty deals from mining and had to pressure federal officials for investigations into what mining companies were doing on Quapaw land.

Chapter Five details the Tar Creek Superfund during the Self-Determination Era and how the EPA cleaned the mining areas in Quapaw country in the 1990s, arguing that the EPA limited tribal involvement due to the federal Comprehensive Environmental Response, Compensation, and Liability Act. The EPA included the Quapaw tribe in some aspects of the process, but did not provide the tribe the money to clean their land, as the tribe's environmental office desired.

Chapter Six argues that the federal government marginalized the Osage tribe over the entirety of its relationship with them until the Self-Determination Era. This chapter explains the creation of the Osage mineral estate and how the BIA answered requests by Osage land owners to investigate alleged claims of pollution by oil companies. The BIA was more concerned about protecting profits for corporations and, to a lesser extent, profits for the Osages. When individual Osages complained of oil pollution to the local BIA office, the BIA's solution was not to force changes to oil drilling practices, but instead to ask for payment from the oil companies to compensate landowners. The BIA did not recognize the Osages' sovereign right to set retribution costs. Remarkably, the Osages managed to remain on the land that they had known since the beginning of European arrival in North America, even as they continued to work against federal misunderstandings of Osage traditional values and legal rights.

Chapter Seven presents evidence that the EPA was further compromised in its fair treatment of the Osages and their concerns about pollution due to Senator James Inhofe's "Midnight Rider," which was a last minute addition to a transportation funding bill that the president signed into law on August 10, 2005. The rider forced tribes to negotiate deals with

Oklahoma to gain control of oil waste injection and other environmental programs.²⁸ The Osages expected the EPA to not only help them operate an underground injection program to inject waste water from oil pumping into safe underground rock formations, but also to recognize the Osage Nation's right to oversee its underground injection program. The EPA, however, ignored the special relationship the tribes have with the federal government, making it similar to federal agencies of the past. The Osage Nation's leaders and tribal representatives repeatedly asked the EPA, the President, and Congress to help Oklahoma's tribes find an answer to the Midnight Rider, but to no avail.

The greater significance of this dissertation is that it illustrates that American Indian history should not be defined by United States legislation, but by the Indians themselves who continue to act as sovereigns. Regardless of the federal agency, American Indians have requested that their land be respected by the federal government. Our textbooks should not introduce American Indians to the youth of America through the lens of federal legislation, but through the eyes of sovereign America Indian nations.

²⁸ *Safe, Accountable, Flexible, Efficient Transportation Equity Act*, Public Law 109-59, Stat. 1937, Section 10211, Part B, (2005). (The Midnight Rider)

Chapter 1: American Indian Sovereignty Defined

Sovereignty is a confusing topic for the layperson and the scholar, thus it is important to provide a brief introduction to the history of tribal sovereignty in the United States. This dissertation offers a historical overview of federal policy related to Indian sovereignty by examining three tribes' interactions with the EPA. Scholars sometimes understand self-governance as equivalent to tribal sovereignty, but some law scholars note a distinct difference historically between sovereignty and self-governance. In general, self-governance is the freedom given to native nations to direct policies that have been put in place by the federal government, most recently as a consequence of the Indian Reorganization Act of 1934 (IRA), sometimes referred to as the Indian New Deal. Sovereignty, on the other hand, stems from native designed policies and programs that meet the needs of the people as they understand them, not a federal agency, such as the EPA.²⁹

Scholars of Indian law have always claimed it is extremely important to define the nuances of sovereignty. The Lakota historian and activist Vine Deloria Jr. described tribal sovereignty as the ability to “determine one’s own course of action with respect to other nations [both Indian and other].”³⁰ Fred Hoxie and other scholars have echoed Deloria’s theme. As Hoxie put it, “Indian peoples have exhibited a continuous allegiance to their territories and to the goal

²⁹ N. Bruce Duthu, *American Indians and the Law* (New York: Viking, 2008), xxvi; Vine Deloria, Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Random House, 1984), 10.

³⁰ Vine Deloria Jr., “Self-Determination and the Concept of Sovereignty,” in *Economic Development and American Indian Reservations*, ed. Roxanne Dunbar Ortiz (Albuquerque: University of New Mexico Indian Studies, 1979), 22.

of governing their homelands without interference.”³¹ The National Congress of American Indians described the essence of tribal sovereignty as “the ability to govern and to protect the health, safety, and welfare of tribal citizens within tribal territory.”³²

The term sovereignty, however, also has specific legal connotations. Historian John R. Wunder offered a definition of sovereignty based on the treaty the United States signed at the Montevideo Convention on the Rights and Duties of States in Montevideo, Uruguay on December 26, 1934. Article One of the treaty states that “sovereign nations have permanent populations, a defined territory, a government that functions, and the ability to conduct relations with other governments.” Thus, according to that definition, Indian tribes have been sovereign for centuries, and within the United States system of laws.³³ Along that same argument, historian Michael Leroy Olberg has written that “treaties rest at the heart upon a recognition of American Indian tribal sovereignty, even if the nature and limits of that sovereignty have been fiercely contested throughout the nation’s history and eroded significantly by the federal courts and Congress.”³⁴ Therefore, even though the United States has not recognized tribal sovereignty in recent history, based on the federal government’s past recognition of tribal sovereignty through the treaty process, tribal nations have always been sovereigns.

³¹ Dave Edmonds, Fred Hoxie and Neal Salisbury, *The People: A History of Native America* (New York: Houghton Mifflin, 2007), ix.

³² National Congress of American Indians, “An Introduction to Indian Nations in the United States,” http://www.ncai.org/about-tribes/Indians_101.pdf, accessed May 19, 2014.

³³ John R. Wunder, “*Retained by the People:*” *A History of American Indians and the Bill of Rights* (Oxford: Oxford University Press, 1994), 8; Council on Foreign Relations, “Montevideo Convention on the Rights and Duties of States,” <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>, accessed October 7, 2013.

³⁴ Michael Leroy Oberg, *Peacemakers: The Iroquois, the United States, and the Treaty of Canandaigua, 1794* (New York: Oxford University Press, 2015), 2.

Spanish theologian Francisco de Victoria originally cast the idea that Indians are sovereign in 1532 in what has become known as the “Doctrine of Discovery.” The King of Spain invited Victoria to advise the Spanish monarchy on its rights of discovery in the Americas. Victoria believed that the native peoples of the Americas were the true owners of their land, and therefore the Spanish “discovery” could only convey title to the Spanish where the land in the Americas was ownerless, or where the Indians had signed a treaty assigning new title to the Spanish. Victoria argued that the Spanish could not wage a just war against the Indians, and thus could not take the land of the Indians by virtue of conquest.³⁵ The “Doctrine of Discovery” has been consistently misconstrued throughout the history of Indian relations with foreign governments, as Americans such as Chief Justice John Marshall argued that the doctrine upheld their right to take American land since no European nation ruled the continent. Vine Deloria has argued that Victoria’s view of Indian relations should be revisited in the modern era, because it encouraged respect for tribal sovereignty.³⁶

The United States has a poor record respecting tribal sovereignty over land issues, even though sophisticated Indian social and political systems pre-dated the arrival of Europeans in the fifteenth century, well before the signing of the United States Constitution. It is the Constitution, in fact, that most clearly articulated the relationship between the new nation and native political authority. Article I, Section Eight, gives Congress exclusive control of commerce with Indians, articulating the tribes are sovereign nations.³⁷ The Non-Intercourse Act of 1790 chipped away at

³⁵ Felix S. Cohen, *Handbook of American Indian Law*, 4th ed. (Washington D.C.: GPO, 1944), 46-47.

³⁶ Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 2-3.

³⁷ U.S. Const. art. I, § 8, cl. 3.

tribal sovereign status as it required American citizens to garner Congressional approval before purchasing land from Indians.³⁸

Following a series of costly wars during the mid-nineteenth century with American Indian nations that fiercely resisted the use of treaties for the purpose of making room for new non-Indian settlement through land cessions that reduced the size of tribal land holdings, the limits of native people's land rights within the boundaries of the new United States became problematic. The Supreme Court under Chief Justice John Marshall (1801-1835) attempted to create a kind of "limited" sovereignty for Indians in the nineteenth century.

Marshall's series of rulings on Indian affairs began somewhat ominously for Indians' sovereignty. The first of the cases that the Supreme Court heard that changed Indian legal status in the United States was *Fletcher v. Peck* (1810), where the Court held that Georgia could sell land within its limits as long as the state constitution allowed it to do so. The state legislature could not, however, break contracts made by previous legislatures. Georgia passed a land grant, known as the Yazoo Land Act of 1795, for the benefit of four development companies, but the next state legislature voided the land grant when it found out that it was passed with the help of bribes. Land speculator John Peck bought part of the original grant in 1800, and then he turned around and sold the land to speculator Robert Fletcher. Fletcher brought suit against Peck in order to get back his original investment, claiming that Peck's title was not legal. In order to side with Fletcher, the Court needed to judge that the land belonged to the state of Georgia and not the Cherokees. Marshall did not take Cherokee ownership into consideration, instead stating that

³⁸ Cohen, *Handbook of American Indian Law*, 67.

the contract between the two men in question had to be upheld. Thus, the Cherokees, according to Marshall, did not have sovereignty over their land.³⁹

Marshall maintained his lack of respect for Indian ownership of land in *Johnson v. McIntosh* (1823), where he decided that Indians could not hold title to land in the United States. The case was based on Thomas Johnson's land claim. He was a non-Indian colonist who purchased a piece of Illinois Indian and Piankeshaw Indian land in 1775, and upon his death left the land to his son Joshua Johnson. A land dispute arose in 1818 when William McIntosh, also a white colonist, bought the land in question from the federal government. Marshall settled the disagreement by stating that Indians could not hold title to lands and therefore the titles bought from Indians were null.⁴⁰ So, often overlooked prior to his famous Cherokee decisions, Marshall had made it clear that Indians could not hold title to land within US borders. Then, in the 1830s, in response to powerful states' rights arguments from Georgia, Marshall changed his thoughts on the subject.

In *State v. George Tassels* (1830), the Georgia Superior Court decided that the Cherokee Nation could make rules in regard to intra-tribal affairs, but that Georgia had power over tribes that lived within Georgia's borders. The Hall County superior court sentenced George Corn Tassel, a Cherokee Indian who killed an Indian named Sanders Talking Rockford, to be hanged. The Georgia Superior Court said that states possessed full criminal and civil jurisdiction over Indian tribes within their boundaries as a matter of state sovereignty, and thus it was legal for the

³⁹ Fletcher v. Peck, 10 U.S. 87 (1810); Sydney Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*, (Cambridge: Cambridge University Press, 1994), 28-29; Alex McBride, "Landmark Cases: Fletcher v. Peck (1810)," PBS: The Supreme Court, accessed April 2, 2015, http://www.pbs.org/wnet/supremecourt/capitalism/landmark_fletcher.html.

⁴⁰ Johnson v. McIntosh, 21 U.S. 543 (1823); Deloria and Lytle, *American Indians, American Justice*, 4.

state to hang Corn Tassel for his crime. The court also judged that since a president never declared war on a tribe, Indian tribes were not foreign nations with sovereignty over their land and affairs. Lastly, the court held that it could make judgments for crimes on the Cherokees' lands, since the natives lacked the intelligence necessary to live without supervision. The court's paternalistic rationale did not make sense to Corn Tassels' attorney, William Wirt, who appealed the Georgia Superior Court's decision to the US Supreme Court. But, in a crazy twist, before the Supreme Court could hear the case, the Georgia legislature met in special session and ordered the execution of Corn Tassel. Wirt, understandably angry, had the inspiration to challenge Georgia and future states' rights arguments.⁴¹

Wirt's chance to challenge Georgia's states' rights argument came in 1831, when he argued for the Cherokee sovereignty in *Cherokee Nation v. Georgia* before the Supreme Court. Wirt stated that the Cherokee Nation was a foreign nation with separate laws, and therefore it did not need to abide by laws of Georgia, or any political or legal representative thereof, because of several treaties the Cherokee Nation signed with the United States. Justice Marshall agreed that the Cherokee Nation did not need to abide by the laws of Georgia, but that the Cherokee Nation also did not wholly constitute a foreign nation, despite its treaties with the federal government. The Cherokee Nation, said Marshall, was one of many "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian."⁴² The Marshall decision was a double-edged sword. On the one hand, it diminished the power of Indian tribes to act as foreign nations, but it also stipulated that it was the federal government's responsibility to

⁴¹ State v. George Tassels, 1 Dud. 229 (1830); Haring, *Crow Dog's Case*, 29-30, 34.

⁴² Haring, *Crow Dog's Case*, 30-31; *Cherokee Nation v. Georgia*, 30 U.S. 15-17 (1831).

enforce laws for the protection of Indians—and specifically to protect native peoples from arbitrary state laws.⁴³

The outlines of the federal-tribal trust relationship were further defined in 1832 in the Supreme Court decision *Worcester v. Georgia*. Georgia, on its own authority, arrested eleven missionaries for trespassing on Cherokee land. Georgia requested the missionaries take an oath of allegiance to the state before being released, and all but two of the missionaries initially took the oath. Marshall ordered the state to release the two remaining missionaries, because the federal government, not the state of Georgia, possessed exclusive authority over Indian affairs as defined by the Constitution. In what was potentially a constitutional crisis, Georgia ignored Marshall's opinion, and President Andrew Jackson refused to enforce the opinion of the Supreme Court against the state. The two missionaries remained in prison until they took the oath of allegiance to the state.⁴⁴ The narrowly avoided constitutional crisis initiated by Jackson created a backlash that solidified Marshall's definition of the federal-Indian trust relationship for another century. Jackson later admitted his error.⁴⁵ Thus, the federal government was, and still is, responsible to protect Indian land against the infringement of states and non-Indian citizens.

Treaties have further defined the federal-Indian trust relationship and limited Indian self-rule within the borders of the United States. From the time of the American Revolution until 1871, the federal government made treaties with Indian tribes primarily to move them from their lands and provide non-Indians with land for settlement. Non-Indians often did not wait for treaties to settle Indian lands. When non-Indians squatted illegally on Indian lands, they pressured federal administrators, among them William Clark of Lewis and Clark fame, to

⁴³ Ibid.

⁴⁴ *Worcester v. Georgia*, 31 U.S. 561 (1832); Haring, *Crow Dog's Case*, 32-33.

⁴⁵ Ron Satz, *American Indian Policy in the Jacksonian Era* (Norman: Red River Books, 2002), 74-75.

remove Indians. From 1808 to his death in 1838, William Clark served as the superintendent of Indian affairs,⁴⁶ and slowly negotiated away the Osages' land, and other tribal lands, through a series of treaties. The Osage Nation's first peace treaty with the United States in 1808 alone took almost the entire area of what would become the state of Missouri from the Osage Nation.⁴⁷

After the era of treaty making ended in 1871, the federal government could officially open a war of extermination on Indians, which it had sparingly done during the treaty era. The most infamous of the United States Army's wars on Indians was George Custer's famous "Last Stand" on June 25, 1876, when Sioux, Cheyenne, and Arapaho bands destroyed Custer's Seventh Cavalry on the banks of the Little Bighorn River, an event known by Indian peoples as the battle of Greasy Grass. Custer was convinced that he could run a surprise attack on the Sioux, Cheyenne, and Arapaho, defeat them, gain glory for himself, and open the lands for white settlement. His plan failed miserably, mostly due to his arrogance, and his lack of respect for the Indians' knowledge of their terrain and their skill as fighters.⁴⁸ For much of the period between 1876 and the passage of the Dawes Act (1887), which took the land of Indians, the official policy of the United States was to move Indians to reservations by force if it could not be done peacefully.⁴⁹

There was still a question at hand: regardless of whether Indians were forced or agreed to go to reservations, did the federal government or the states have jurisdiction on reservations?

⁴⁶ "William Clark," Kansapedia, Kansas Historical Society, accessed December 23, 2013, <http://www.kshs.org/kansapedia/william-clark/17244>.

⁴⁷ Treaty with the Osage, 7 Stat. 107 (1808).

⁴⁸ Heather Cox Richardson, *Wounded Knee: Party Politics and the Road to an American Massacre* (New York: Basic Books, 2010), 61-70.

⁴⁹ Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (Cambridge: Cambridge University Press, 1989), 1-5.

According to *Worcester*, that had been decided; the federal government held jurisdiction. The states would get their revenge, though. In *US v. McBratney* (1882), the Supreme Court overturned its decision in *Worcester*. McBratney, a non-Indian, was on trial for killing another non-Indian on the Ute Reservation in Colorado. The state court sentenced McBratney to be hanged. McBratney appealed, arguing that the state did not hold jurisdiction on the Ute Reservation. The Supreme Court held that it was not Congress's intent to leave jurisdiction of non-Indians on reservations to Indian justice, or even federal justice, thus the Supreme Court upheld the state court's opinion. The court completely ignored *Worcester*.⁵⁰ But, what if an Indian killed an Indian on the reservation? The Supreme Court decided that question shortly thereafter.

The case of Crow Dog challenged the federal government's ability to control the lives of Indians on reservations. Crow Dog, a traditional Brule Sioux leader, killed Spotted Owl, a federally approved Brule Sioux leader, on the Sioux reservation, and was tried in the First Judicial Court of the Territory of Dakota in 1883. The territorial court found Crow Dog guilty of murder and sentenced him to die. The Supreme Court overturned the conviction, stating that due to the Treaty of 1868 between the United States and the Sioux, the Sioux reservation was not part of the Territory of Dakota, and therefore, the territorial court had no jurisdiction over an Indian killing another Indian on reservation land. In addition, the Sioux treaty created a structure for handling criminal issues on the reservation. The treaty stated that in cases of criminal activity, the tribe must offer up the defendant for trial to the federal government. If the tribe did not present the accused, then payment from the tribe's annuity would go to the family of the victim. Furthermore, the Supreme Court decided that Indians retained right to their own tribal law in

⁵⁰ United States v. McBratney, 104 U.S. 621 (1882); Harring, *Crow Dog's Case*, 54-55.

cases involving only Indians as part of their sovereign jurisdiction on their reservations.⁵¹ But, the *Crow Dog* decision created a problem for the Bureau of Indian Affairs, as it could not completely control all activities on the reservation.

Congress responded by moving to make Indian courts and tribal justice insignificant. The Indian Appropriation Act of 1885 made violent crimes committed on federal territorial land subject to federal territorial courts.⁵² *United States v. Kagama* (1886) put the Indian Appropriation Act to the test with the question of whether a federal district court had jurisdiction over the trial of Kagama, an Indian who killed Iyouse, also an Indian, on the Hoopa Reservation within the limits of Humboldt County, California. The Court relied most heavily on Marshall's opinion in *Cherokee Nation*, stating that the tribes were dependent nations that owed no allegiance to the states, thus the federal court did, indeed, hold jurisdiction.⁵³ *Kagama* gave the federal government, not the states, priority in cases involving major crimes by Indians and, unlike *Crow Dog*, gave power to the federal court system to judge crimes between Indians on reservations.

The *Kagama* decision opened the door for the Dawes Act, which President Grover Cleveland signed into law on February 8, 1887, marking a new approach by the federal government to the Indian "problem," by seeking to make Indians emulate white farmers. The act provided for the President to allot 160-acre farms for the heads of households, 80-acre farms for single men over eighteen, and 40-acres to children. Farmsteads were to be held in trust by the secretary of the interior for twenty-five years and could not be sold or transferred. Indians who accepted allotments could petition to become citizens of the United States, and they could

⁵¹ Ex Parte *Crow Dog*, 109 U.S. 556 (1883); Haring, *Crow Dog's Case*, 100-101.

⁵² Indian Appropriation Act, 23 Stat. 385 (1885).

⁵³ *United States v. Kagama*, 118 U.S. 375 (1886).

remove themselves from the protection of the federal government. The law also provided for the sale of so called “surplus” lands to the highest bidder, which ultimately led to millions of acres of Indian land being transferred to non-Indians.⁵⁴ The “civilizing” of the Indian race, according to Francis Leupp, later commissioner of Indian affairs, was necessary because Indians had not progressed as far as non-Indians as a race. Leupp stated that, “in simple terms, the great mass of Indians have yet to go through the era, common to the history of all races, when they must be mere hewers of wood and drawers of water.”⁵⁵

In addition to “civilizing” Indians, the law allowed for the federal government to transfer Indian land to non-Indians. Not only did unallocated land end up on the selling block, but speculators also convinced Indians to sell their allotments, hoping to gain access to the mineral wealth.⁵⁶ Overall, the Dawes Act was part of a larger trend of Indian land transferring to non-Indians at the end of the nineteenth century. For instance, the Ute Treaty of 1880 called on the White River Utes to cede 12 million acres of their mineral-rich land of Colorado.⁵⁷ The federal government also dissolved tribal courts in 1898 with the Curtis Act, extending the jurisdiction of federal courts into Indian country.⁵⁸ At the turn of the twentieth century, Indian peoples’ ability

⁵⁴ Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton: Princeton University Press, 1940), 23; Indian General Allotment Act, 25 U.S.C. § 331 (1887).

⁵⁵ Bonnie Lynn-Sherow, *Red Earth: Race and Culture in Oklahoma Territory* (Lawrence: University Press of Kansas, 2004), 137.

⁵⁶ Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934* (Bloomington: Indiana University Press, 1991), 10.

⁵⁷ Frederick Hoxie, *A Final Promise*, 44.

⁵⁸ Debo, *And Still the Waters Run*, 65.

to direct and control their own destinies, and resources, had just about reached its lowest level, but it got worse with the Supreme Court's decision in *Lone Wolf v. Hitchcock* (1903).⁵⁹

Lone Wolf marked a primary and historical watershed in the history of the relationship between Indians and the federal government. Here, the Supreme Court listened to testimony describing the means by which the federal government, through the process of allotment, took 2.5 million acres of Kiowa, Comanche, and Kiowa-Apache reservation land beginning in 1890, seven years before the expiration of the Medicine Lodge treaty signed by the tribes and the United States in 1867. Lone Wolf, a principal chief of the Kiowas, attempted to prevent the allotment of his reservation by referencing several articles of the 1867 Medicine Lodge treaty, in particular Article 12, which stated that no Indian land could be ceded without agreement by three-fourths of all adult males in the tribe. Ignoring the 1867 treaty, the federal government moved forward with allotment, claiming its authority to do so via a small group of native leaders who agreed to a new treaty in exchange for more favorable terms for themselves and their families. Until the filing of *Lone Wolf*, no Indian nation had attempted to sue the federal government for failing to live up to its treaty obligations. Lone Wolf, however, did not convince the Supreme Court. The Court decided that Congress had exercised plenary authority over the tribal relations from the beginning of the United States.⁶⁰ In other words, the Court concluded that Congress had never recognized tribal sovereignty over land.

⁵⁹ For more discussions of the many ways in which Congress diminished the ability of Indians to govern themselves see: Frederick E. Hoxie, *A Final Promise*; David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* (Lawrence: University Press of Kansas, 1995); and Luther Standing Bear, *My People, The Sioux* (Boston: Houghton Mifflin, 1928).

⁶⁰ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); Deloria and Lytle, *American Indians, American Justice*, 44.

Soon after the *Lone Wolf* decision, the Supreme Court reversed itself in *Winters v. US* (1908), establishing what is today known as the Reserved Rights Doctrine. The Reserved Rights Doctrine holds that if Congress did not specifically outlaw an action by an Indian tribe, then the tribe may perform the action. The *Winters* case involved the Gros Ventre tribe of Montana, which argued that it could use the water from the Milk River to irrigate and cultivate land as provided by its 1888 treaty with the United States. The US Court of Appeals for the Ninth Circuit sided with the Indians, granting the Gros Ventres access to the Milk River, because their right to the water actually pre-dated the creation of the state of Montana.⁶¹ The Gros Ventres victory was rare for American Indians, but it did not have much influence over the federal government, as Congress and the Bureau of Indian Affairs continued to infringe on tribal self-determination over land during the twentieth century. Taken together, the US Constitution, Marshall's Cherokee Nation decisions, *Lone Wolf*, and the Reserved Rights Doctrine formed the basis for Native peoples' legal challenge in asserting self-determination—until the day of the passage of the Midnight Rider.

One of the reasons the Bureau of Indian Affairs (BIA) did not respect Indian self-rule at the turn of the twentieth century is that in 1904, President Theodore Roosevelt made a move that deeply infringed on tribal sovereignty by appointing Francis Leupp, a former newspaperman and assimilationist, as commissioner of Indian affairs, and thus the head of the BIA. Leupp believed that assimilation was the only way forward for Indians, and that the federal government had practiced “misdirected paternalism” for many years.⁶² Assimilation, the complete erasure of native culture, language, and economy, was the goal of Congress and many federal officials in

⁶¹ *Winters et. al. v. United States*, 143 F. 740 (1906); Wilkins and Lomawaima, *Uneven Ground*, 130-131; Deloria and Lytle, *American Indians, American Justice*, 50; Duthu, *American Indians and the Law*, 105.

⁶² Hoxie, *A Final Promise*, 167.

the early twentieth century. Even so-called progressive leaders, among Indian nations, contended that Indians would be better off if they left the reservations and assimilated into American society. Leupp held that reservation land was too valuable to be set-aside for future Indian use. Roosevelt considered Leupp to be an expert in the field of Indian relations, and Leupp agreed with Roosevelt in identifying considerable paternalism in the BIA.⁶³

Congress encouraged Leupp to sell Indian land and resources for development without Indian consent. In 1906, Leupp called on Congress to allocate \$500,000 of the Uintah Tribe's own trust money for a \$200,000 acre irrigation project. Congress allocated \$600,000, and when residents of the Wind River Reservation in Wyoming protested the misappropriation of their money for irrigation projects against their will, the House Indian Affairs Committee cited the *Lone Wolf* decision, arguing the committee could do as it wished in regard to tribal money. Congress was convinced that irrigation would pay dividends for the tribes. In 1907, Congress gave Leupp the power to sell allotments belonging to Indians deemed incompetent by the BIA,⁶⁴ and in 1908 Congress allowed Leupp to negotiate long-term leases for the Fort Belknap, Uintah, and Wind River reservations. In May 1908, the BIA opened 2.9 million acres of the Standing Rock and Cheyenne River reservation for mineral leases. By 1919, Congress was issuing mineral leases on reservations held in trust by the BIA, with miners paying only five percent royalties to the tribes. As a result of Leupp's and Congress' policies, 4.5 million acres of Indian land were under lease by non-Indians by 1920.⁶⁵

⁶³ Ibid., 162-163, 167.

⁶⁴ Act of March 2, 1907, 34 Stat. 1221, 1907.

⁶⁵ Hoxie, *A Final Promise*, 164-170, 182, 185-187; Cohen, *Handbook of American Indian Law*, 196-198.

In 1924, the federal government declared all Indians within the borders of the United States to be citizens of the United States,⁶⁶ which served as a further move to assimilate Indians into the greater non-Indian population and dissolve the federal trust relationship with American Indians. Despite the federal government's assimilationist goal, Indians were still not allowed to vote in many states.⁶⁷ The federal government defended its stance on Indian citizenship even in 1972, as American Indians pressed the federal government on treaty rights. The federal government stated that due to the Citizenship Act, the federal government did not need to reopen treaty making with Indian nations due to the fact that indeed Indians were citizens of the United States.⁶⁸

Federal perceptions of what was best for American Indians eventually changed with the arrival of Franklin Delano Roosevelt's administration, but the federal government continued to interfere in tribal decisions about their land. The 1934 Indian Reorganization Act (IRA) was a major change of course from earlier assimilation policies. Under the terms of the Indian Reorganization Act, the secretary of the interior could use surplus land, not already allotted under the Dawes Act, to recreate reservations for the benefit of the tribes. Once tribes accepted the terms of the IRA, and held democratic elections to a tribally controlled body, the tribes stood ready to receive land from the federal government, along with access to federal funding for social projects and business charters.⁶⁹ Although the BIA, under Commissioner of Indian Affairs

⁶⁶ Indian Citizenship Act, U.S. Stat. 253 (1924).

⁶⁷ Today's Document from the National Archive, "Act of June 2, 1924," *National Archives*, accessed March 16, 2015, <http://www.archives.gov/historical-docs/todays-doc/?dod-date=602>.

⁶⁸ Deloria, *Behind the Trail of Broken Treaties*, viii.

⁶⁹ Deloria and Lytle, *American Indians*, 14-15; Steven A. Light and Kathryn R.L. Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise* (Lawrence: University Press of Kansas, 2005), 32; Parman, *Indians and the American West*, 97; Indian Reorganization Act, 25 U.S.C. § 461 et seq. (1934).

John Collier, was more willing to listen to tribal concerns, and encouraged self-governance more than under previous administrations, the IRA also infringed upon native customs, because it required tribes to earn Collier's approval of their reorganized tribal governments. Thus, new tribal government structures were based on Euro-American political culture, not necessarily tribal traditions. In addition, the federal government did not return previously allotted land to tribal ownership, and so the federal government did not truly restore most reservations. Fortunately for tribal self-determination, the federal government did not require tribes to accept the IRA, and seventy-seven tribes rejected the act.⁷⁰

The Supreme Court also revisited tribal treaties during the 1930s and the 1940s to see if the federal government owed money to tribes. The Supreme Court in *Seminole Nation v. United States* (1942) found that the federal government had made a mistake just after the Civil War when it paid \$28,922.64 directly to tribal creditors, at the direction of the tribal council. In addition, \$61,563.42 had been used to feed and clothe Indians after the Civil War. The money came from interest to the annual annuity, which was supposed to be held in trust by the federal government, based on the tribe's treaties of 1856 and 1866. The court reasoned that the federal government at the time knew full well that the Seminole government was in the habit of cheating its tribal members and should not have followed its directions as to where to pay trust funds.⁷¹

Congress soon set out to destroy the federal-Indian trust relationship that the court's decision in *Seminole Nation* upheld. During the Termination Era (1945-1970), Congress passed House Concurrent Resolution 108 (1953), which called for the end of the federal trust relationship based on treaties with tribes and an end to the federal government's funding for

⁷⁰ Deloria and Lytle, *American Indians*, 14-15; Light and Rand, *Indian Gaming and Tribal Sovereignty*, 32.

⁷¹ *Seminole Nation v. United States*, 316 U.S. 286 (1942).

programs on reservations. Claiming that the BIA had created a system of “dependency” on federal government handouts, Congress assumed that Indians would assimilate into American culture once federal funds were withdrawn. Tribes deemed “ready” to have their federal financial support taken away were placed on a list for termination.⁷²

Utah Republican Senator Arthur V. Watkins and Commissioner of Indian Affairs Dillon S. Meyer were leading proponents of termination, arguing that Indians could prosper more quickly without the federal government holding them back. Some tribal governing bodies, such as the Menominee Advisory Council, agreed.⁷³ Several joint sessions of the House and Senate worked quickly to push bills through Congress to terminate several tribes in the 1950s. The Klamaths of Oregon and the Menominees of Minnesota were the two largest tribes that voted for termination. Several smaller tribes were also on Congress’ list to be terminated, including an assortment of California reservations (referred to as Rancherias). Congress, however, could not convince the largest tribes with political savvy and long-standing treaties, such as the Osage Nation and Navajo Nation, to vote for termination.⁷⁴ Termination was the nadir of the federal government’s disrespect for the federal trust relationship and tribal self-determination in the twentieth century.

While termination was a choice for tribes, in reality it was difficult for some tribes to avoid, because the tribal voting process for termination was confusing for many Indians. Many members of the Menominees, for example, believed that the federal government did not manage their money well, and therefore, they wanted the federal government off the reservation. At a

⁷² Deloria and Lytle, *American Indians*, 16-17.

⁷³ Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (Albuquerque: University of New Mexico Press, 1986), 98, 110

⁷⁴ Deloria and Lytle, *American Indians, American Justice*, 18.

tribal meeting with Senator Watkins, a Menominee named Gordon Keshena argued that it would be difficult for the Menominees to manage their own affairs after 125 years of the federal trust relationship, but that the tribe was certainly able to do so. He knew that termination should be a gradual process, but many of the elders did not fully understand the full ramifications of the termination of the federal trust protection. Some Menominees thought that they were only voting to receive \$1,500 per person payments that the federal government offered if the tribe voted for termination. The result of the Menominees' confusion was that the Menominee Advisory Council approved a tribal resolution for termination in 1953 with a vote of 197 to 0. To make matters worse, the advisory council's vote was not representative of the entire tribe, considering that 3,059 tribal members owned 233,902 acres of land in trust.⁷⁵

President Eisenhower signed the cornerstone of termination law in August 1953, known to this day simply as Public Law 280. The statute allowed state governments both civil and criminal jurisdiction over Indian tribes in California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska, whether the tribes in those states had been terminated or not. PL 280 was a blatant attempt to overturn the long-standing federal trust responsibility to the tribes.

The decisions of the federal courts during the termination era mirrored the federal government's interest in termination of the federal trust responsibility. In *Federal Power Commission v. Tuscarora Indian Nation* (1960), the Supreme Court found it legal for the Federal Power Commission to condemn Indian lands from tribes that had not signed treaties with the federal government. The Federal Power Commission wanted to take the Tuscarora's land adjacent to the Niagara River in New York in order to build a storage reservoir for a hydroelectric power project. To cushion the blow to the tribe, the Federal Power Commission

⁷⁵ Fixico, *Termination and Relocation*, 94-98.

planned on paying the tribe for the land. The court held that the Federal Powers Act allowed for the federal government to take any bodies of water for use in developing electric power, whether Indians or non-Indians owned the lands.⁷⁶

Termination as federal policy officially came to an end when President Nixon ushered in the Self-Determination Era (1970-Present) on July 8, 1970. Nixon told Congress that termination was morally and legally unacceptable, and that it had produced negative results. Nixon argued that termination made Indians more dependent on the federal government, not less.⁷⁷ The new Self-Determination Era was intended to reverse the activities of the Termination Era and re-set United States-tribal relations. President Nixon, of course, was not acting on his own accord, but in response to Indian protests throughout the United States in 1969 and 1970. Indians fought for fair treatment and recognition of past treaties beginning with the occupation of Alcatraz on November 19, 1969. The Indians that occupied Alcatraz came from a variety of backgrounds, many from families that the federal government had relocated to San Francisco. The protests extended into 1970, when a group of veterans from Alcatraz took control of Fort Lawton near Seattle in March. Throughout 1970, Indian protestors occupied the BIA offices in Chicago, Cleveland, and Minneapolis, pushing for fair treatment by the federal government. Even after termination had ended as official federal policy, Indian activists continued to march and occupy. The American Indian Movement (AIM), led by Russell Means, an Oglala Sioux, and Dennis Banks, an Ojibwe, occupied the BIA headquarters in Washington D.C. for several days beginning on November 2, 1972. Three months later AIM went to Wounded Knee, South

⁷⁶ Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960); Federal Powers Act, 16 U.S.C. 814.

⁷⁷ President Richard Nixon, "Special Message to the Congress on Indian Affairs, July 8, 1970," *Public Papers of the Presidents: Richard Nixon, 1970* (Washington D.C.: U.S. GPO, 1971), 564-567.

Dakota, where they became enmeshed in a nine-week standoff with local officials. AIM was protesting the tribal government of the Oglala Sioux that was beholden to the federal government and not the tribal members.⁷⁸

The Self-Determination Era was initially highlighted by three pieces of legislation: The Indian Civil Rights Act (1968), the Indian Education Act (1972), and the Indian Self-Determination and Education Assistance Act (1975). The Indian Civil Rights Act negated Public Law 280. The Indian Education Act provided training for teachers, fellowships for Indian students, and basic research for Indian education. Lastly, the Indian Self-Determination and Education Assistance Act allowed tribes to give the BIA approval to administer programs on tribal lands, and the law gave the tribes the power to contract with the BIA to administer assistance programs. In the past, the BIA had administered programs without tribal consent.⁷⁹ The Self-Determination Era has seen tribes take part in federal programs and work alongside federal agencies such as the EPA, but, as we shall see, the EPA was beholden to environmental legislation that it holds above tribal self-determination.

There have been a several court cases during the Self-Determination Era that have helped define self-determination. *United States v. Shimer* (1971) provided the precedent for the operations of a federal agency to override state law. In *Shimer*, the Supreme Court had to decide whether the United States could recover \$4,000 from a US military veteran who defaulted on his United States Veterans' Administration (VA) loan, although according to Pennsylvania law, he did not have to pay back the loan. Excelsior, a mortgage company, bought Shiner's home at sheriff's auction for \$250. Shiner's lawyer argued that since the debt was paid according to state

⁷⁸ Frederick Hoxie, *This Indian Country: American Indian Activists and the Place They Made* (New York: The Penguin Press, 2012), 367-372.

⁷⁹ Deloria and Lytle, *American Indians, American Justice*, 22-24.

law, Shiner did not have to pay back the VA, and the US Court of Appeals for the Eastern District of Pennsylvania agreed. The appeals court upheld state law, stating that since the VA did not attempt to regain its losses in six months after the sheriff's sale, which was the time frame allotted under state law for such action, the VA could no longer recover its original loan amount. The Supreme Court disagreed with the appeals court, declaring that VA rules make clear that they were intended to create a uniform system for determining the Administration's obligation as guarantor, which in its operation would displace state law.⁸⁰ *Shiner* had great bearing on the modern era of federal-Indian relations, as the attempts of federal agencies to deal with Indians as each agency saw fit could not be curtailed by the states. Federal agencies, now, had the ability to operate alongside Indians on reservations without the interference of states, ultimately setting the stage for the EPA to assist the three tribes described in the following case studies.

Another case that upheld federal power over state power on reservations during the early Self-Determination Era was the Supreme Court's decision in *McClanahan v. Arizona State Tax Commission* (1973), where the court stated that Arizona could not tax Indians whose entire income was earned on their reservation. The state of Arizona had taxed a member of the Navajo Nation whose entire salary came from jobs within the Navajo Nation's boundaries. The court relied primarily on Marshall's *Cherokee* decisions for precedent, but also drew upon the Navajo Nation treaty of 1868, which provided for Navajo self-governance on their reservation under authority of the United States government.⁸¹

A third important case from the 1970s is *Santa Rosa Band of Indians v. Kings County* (1975), because the Federal Appeals Court for the Ninth Circuit judged federal law to take

⁸⁰ United States v. Shimer, 367 U.S. 374 (1971).

⁸¹ McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

precedence over state law in issues of Indian affairs. The case revolved around two members of the Santa Rosa Band of Indians living on the Santa Rosa Rancheria in King's County, California, who appealed to the BIA for new housing under its Housing Improvement Program. The Indians received the maximum federal grant of \$3,500 for housing. In addition, the Indian Health Service agreed to supply the houses with water and sanitary plumbing. After the plaintiffs purchased the mobile homes they learned that under county zoning ordinance section 402, they needed prior approval from the county before moving a mobile home to the land within an agricultural district. Adding more problems, local law stated that mobile homes could only be utilized for two years in agricultural districts, and county inspections and permits were needed for utility and plumbing hookups. The plaintiffs lacked the money to pay local fees, and therefore were not able to live in the mobile homes they purchased. In defense of their fee requirements, Kings County argued that under Public Law 280 the county had civil jurisdiction due to the assimilationist intentions of the law. The Ninth Circuit disagreed, stating that local jurisdiction over Indian reservations ran contrary to Congress' intent through the Indian Reorganization Act of 1934 for tribes to control reservation land. Furthermore, the court stated that Public Law 280 denied states the power to tax Indian land.⁸² Once again, federal power trumped state and local laws.

Several cases came to the courts in the 1980s that had Indian sovereignty as the central question, but ultimately left tribes in no better state of self-rule than before. In *Seminole Tribe of Florida v. Butterworth* (1981), the United States Court of Appeals for the Fifth Circuit upheld the lower court ruling that Florida did not have jurisdiction over the Seminole bingo casino, because Florida's statute in question was regulatory in nature. Sheriff Butterworth of Broward County had arrested Seminoles for violating Florida statute 849.093, which permitted bingo

⁸² Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (1975).

games to be played by certain qualified organizations subject to restrictions by the state. The Seminole Tribe made an agreement with a private limited partnership, unnamed in the court proceedings, to build and operate a bingo hall on the reservation in Broward County, Florida, in exchange for a percentage of the profits as management fees.⁸³ *Seminole* provided precedent for several more gaming cases, and it also set the stage for the landmark case that limited the scope of Public Law 280 and directly led to the Indian Gaming Regulatory Act, *California v. Cabazon Band of Mission Indians* (1987).

A few more gaming cases from the 1980s set the stage for *Cabazon*, as well. In *Oneida Tribe of Indians of Wisconsin v. Wisconsin* (1981), the Oneida Tribe contended that Wisconsin's bingo law could not be enforced on the reservation, because of the regulatory nature of Wisconsin's laws, which did not keep the general populace from playing bingo. The court relied on the precedent of *Butterworth* and agreed that Wisconsin's statute, like Florida's statute on gaming, was regulatory in nature, not criminal in nature, and thus could not keep the Oneidas from operating a card room.⁸⁴

In *The Barona Group of the Capitan Grande Band of Mission Indians v. Duffy* (1982), the Barona Tribe argued that California's bingo regulations, which stated that profits must be used for non-profit purposes, did not apply to tribes. The court held that the Barona Tribe, using profits from bingo for tribal improvements, fell within state code. The court also noted that the California public could play bingo "at will," making any California statute against bingo regulatory.⁸⁵ In *Mashantucket Pequot Tribe v. McGuigan* (1986), Connecticut tried to justify its regulation of all Indian activities, including gaming, under the Connecticut Claim Indian

⁸³ *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (1981).

⁸⁴ *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F.Supp. 712 (1981).

⁸⁵ *The Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (1982).

Settlement Act. The district court found Connecticut's bingo laws to be regulatory in nature, not criminal in nature, and thus the court applied the precedents set by *Barona Group*, *Seminole*, and *Oneida*, in which regulatory bingo laws did not apply to tribal reservation gaming. Therefore, Connecticut could not regulate Pequot bingo games on the reservation.⁸⁶

Barona Group, *Seminole*, *Mashantucket*, and *Oneida* led to *Cabazon*, where the US Court of Appeals for the Ninth Circuit found that California's laws against gaming card rooms were also regulatory in nature. The Cabazon Band of Mission Indians from Palm Springs helped to weaken the termination legislation of Public Law 280 by opening a card room, which was not a criminal offense in California, but the state initially treated it as one. The Ninth Circuit ruled in favor of the Cabazon and Morongo Bands of Mission Indians, because it said that California only outlawed casinos where the house banked money, not card rooms where money moved from player to player.⁸⁷

The result of *Cabazon* should have been that more tribes could profit from casinos, but President Reagan signed the Indian Gaming Regulatory Act (IGRA) in 1988, which limited the ability of tribes to profit from gaming. The IGRA classified Indian gaming into three categories. Class I games, social games and traditional tribal gambling, remained under the exclusive jurisdiction of the tribes. Class II games, bingo and non-banking card games (the casino does not pay out), also stayed under tribal authority, unless illegal in the state of operation. Class III games, banking games, had to be agreed to under a deal between the Indian tribe and the state.

⁸⁶ *Mashantucket Pequot Tribe v. McGuigan*, 626 F.Supp. 245 (1986).

⁸⁷ *Deloria and Lytle, American Indians, American Justice*, 18-19; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Initially, Indian tribes could sue to bring states to the table to make a deal.⁸⁸ That last provision was destroyed by the Supreme Court's decision in *Seminole Tribe v. Florida* (1996).

Seminole Tribe dealt with the question of whether a state could be sued by an Indian tribe under the Indian Gaming Regulatory Act (IGRA). The Supreme Court ruled that the Eleventh Amendment did not give Congress the power to make laws allowing Indian tribes to sue the federal government, which was a requirement to open Class III gaming operations under the IGRA. Today, state legislators do not have to allow Class III casinos because of the *Seminole* decision.⁸⁹ Ultimately, Indian tribes do not have the authority to run their own banking casinos without agreements by the state whose borders they live within, which is an infringement of the federal trust agreement and tribal self-determination.

There have been several cases after 1960 that have helped define the boundaries of federal agencies, and specifically the EPA's ability to make judgments on environmental law when Congress has left a gap in language for interpretation by the federal agency in charge of overseeing the application of the federal legislation. The courts have repeatedly allowed federal agencies to interpret federal law. In *Udall v. Tallman* (1965), the Supreme Court gave deference to the secretary of the interior on his decisions regarding lease applications, because the Mineral Leasing Act of 1920 gave the secretary the power to give lease rights. The case originated when two applicants for leases argued that they had the right to land on the Kenai National Moose Range in Alaska, even though one of the applicants had filed for their lease while the range was not open for leasing. The Supreme Court stated that the secretary of the interior could judge who could win the leases as long as he followed federal law, which in *Udall* was the Mineral Leasing

⁸⁸ Indian Gaming Regulatory Act, 25 U.S.C. 2701 (1988).

⁸⁹ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); Eleventh Amendment of the US Constitution.

Act of 1920.⁹⁰ Some modern court commentators and scholars believe that it was *Chevron v. Natural Resource Defense Council* (1984), described later, that set the precedent that a federal agency can interpret federal law, but it was really *Udall*.⁹¹

The power of federal agencies to interpret federal laws was next supported in *INS v. Jong Ha Wang* (1981), where the Supreme Court decided that the US Court of Appeals for the Ninth Circuit had incorrectly overturned a decision by the Attorney General acting for the Immigration and Naturalization Service (INS) when he said that a Korean family who had overstayed their permitted time as traders in the United States had to be sent home. The Ninth Circuit stated that under the Immigration and Naturalization Act, the Korean immigrants had illustrated severe economic hardship, and thus they did not have to leave the United States. The Korean husband and wife argued that their children, who did not speak Korean, would be denied a proper education in Korea, and that the family would be in economic hardship from the loss of their dry cleaning business if they had to return to Korea. The Board of Immigration Appeals denied the couple's appeal for extreme hardship. The Supreme Court decided that the Attorney General had the ability to judge what constituted extreme hardship. In other words, just because the Ninth Circuit did not agree with the Attorney General, that did not mean he was wrong.⁹²

The Ninth Circuit, in *Columbia Basin Land Protection Association v. Schlesinger* (1981), made a similar judgment to the *Jong Ha Wang* case, stating that the Bonneville Power Administration (BPA) had the expertise to make judgments within the power the federal

⁹⁰ *Udall v. Tallman*, 380 U.S. 1 (1965).

⁹¹ Sally Pipes, "Obamacare's 'Gobbledygook' Defense Sets a Bad Precedent," *Forbes*, March 9, 2015, accessed March 13, 2015, <http://www.forbes.com/sites/sallypipes/2015/03/09/obamacares-gobbledygook-defense-sets-a-frightening-precedent/>.

⁹² *INS v. Jong Ha Wang*, 450 U.S. 139 (1981).

government provided it. The case began when farmers from Franklin County, Washington wanted to stop the construction of a 500-kilovolt-power line across their lands by the BPA. The farmers had several complaints, but chief among them was the fact that the BPA had not performed an adequate cost analysis of all the routes that the agency could have utilized. Although the BPA might not have acted as the farmers wished, the court agreed with the BPA, an agency within the Department of the Interior, that it had properly filed its Environmental Impact Statement (EIS), which included a cost analysis. Although the agency could have chosen other routes for its power lines, the BPA filed the EIS properly, and therefore the Ninth Circuit decided that there would be no injunction against the BPA project.⁹³

The most famous case that still is associated with the power of federal agencies to make educated judgments on federal law is *Chevron USA Inc. v. Natural Resources Defense Council* (1984), where the Supreme Court allowed the EPA to issue permits allowing corporations to only fix one air polluting source, even though there were more sources of the pollution, as long as the total air pollution from the factory had not increased. The EPA's new allowance granted by the Supreme Court became known as the "bubble concept." The Court of Appeals for the District of Columbia decided that the EPA misconstrued Congress' intent in the Clean Air Act amendments of 1977. The Supreme Court overturned the appeals court ruling, holding that where Congress had left a "hole" in the legislation, the federal agency in charge could use its expertise to make a judgment.⁹⁴

The same rationale was applied to *State of Washington, Dept. of Ecology v. United States Environmental Protection Agency* (1985), where the US Court of Appeals for the Ninth Circuit

⁹³ Columbia Basin Land Protection Association v. Schlesinger, 643 F.2d 585 (1981).

⁹⁴ Chevron U.S.A. Inc. v. Natural Resource Defense Council, 467 U.S. 837 (1984).

decided that Washington could have control over all the federal hazardous waste programs in the state, but they could not regulate the federal hazardous waste programs on Indian reservations. The state argued that the Resource Conservation and Recovery Act (RCRA, 1976) allowed states to develop their own hazardous waste programs. The appeals court countered that while RCRA was not clear on that point, federal agencies had the ability to interpret federal statutes. By leaving a gap in the statute, Congress gave the EPA the ability to make a judgment as necessary.⁹⁵

The US Court of Appeals for the Tenth Circuit came to the same conclusion in *Emery Mining Corp v. Secretary of Labor* (1984). The Tenth Circuit found that the Federal Mine Safety and Health Review Commission (MSHR) had acted within the scope of the Federal Mine Safety and Health Act when it judged that the Emery Mining Corporation had violated the miner training requirements that required miners to get safety training every twelve months. Five miners had not received their refresher training within the required twelve-month period, instead receiving training at fifteen months. Emery interpreted the miner training clause to mean that miners had to be trained once a year, but it did not matter whether the training took place at the beginning or end of the year. In addition, Emery claimed that the MSHR agreed with Emery's training schedule. The court acknowledged deference to federal agencies in cases where federal agencies had superior knowledge, especially when the law was clear on the point. MSHR, in fact, issued a memo in 1981 to Emery that its miners needed to be trained no later than one calendar year from the time of their last training session.⁹⁶

⁹⁵ State of Washington, Department of Ecology v. US EPA, 752 F.2d 1465 (1985); Resource Conservation and Recovery Act, 42 U.S.C.S (1976).

⁹⁶ Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1415 (1984).

In another somewhat classic case on the abilities of federal agencies to interpret federal laws, the Supreme Court decided in *Chemical Manufacturers Association v. Natural Resources Defense Council* (1985) that the EPA could issue variances on pollutants. The Natural Resources Defense Council argued that the EPA, under the Clean Water Act (CWA), was not allowed to issue “fundamentally different factor” (FDF) variances for pollutants listed as toxic under the CWA. The Court found that the law was not clear on FDF variances, and the EPA had the expertise to make necessary decisions in areas where Congress was ambiguous. Under the CWA the EPA was required to set categories of waste, but in order to not unduly burden corporations, the EPA created FDF variance. Corporations could appeal to the EPA for a FDF variance if they found that they had been harshly categorized. The EPA allowed appeals, because not only was it difficult to accurately create categories of toxic waste producers, but the EPA had limited time to set the standards. The Court found that appeals did not run contrary to Congressional intent for the CWA.⁹⁷

Lastly, in *American Mining Congress v. Marshall* (1982) the US Court of Appeals for the Tenth Circuit found that the secretary of labor was able to interpret laws as long as his reasoning seemed rational to the court. The American Mining Congress (AMC) challenged the secretary of labor under the Federal Mine Safety and Health Act, arguing that the secretary misconstrued the regulations. The Coal Mine Health and Safety Act from 1976, renamed in 1977 to the Federal Mine Safety and Health Act, provided that each mining company should maintain an average concentration of dangerous respirable dust in the mine to no more than 2 milligrams per cubic meter of air. In 1980, the secretary of labor added a ruling to the legislation requiring the mining company to also take measurements within the non-working section of the mine, because recent

⁹⁷ *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

studies had indicated dangers to miners in non-working sections to the mine. The AMC argued that the secretary did not follow the original law when making his ruling. The court found that since the secretary had utilized a rational base for his additional requirements, the mining company had to follow them.⁹⁸

Cases such as *Chevron* and *American Mining Congress*, in which the federal courts provided leeway for federal agencies to interpret federal laws based on the expertise of the agency, provided precedent for a case that bears on the Osage case study in this dissertation. The US Court of Appeals for the Tenth Circuit, in *Phillips Petroleum Company v. U.S. EPA* (1986), decided that the EPA could regulate underground oil waste injection on the Osage Reservation. The Phillips Company challenged the EPA's ability to grant primacy to the Osage Nation because, according to Phillips, the Safe Drinking Water Act did not grant the EPA the ability to award primacy. Phillips argued that the SDWA only allowed the EPA to regulate on Indian reservations where the state did not regulate, and therefore, since states could not regulate on Indian reservations, neither could the EPA. The court decided that the SDWA was ambiguous on this point, allowing the court to interpret Congressional intent. The court found that there was no way the SDWA was meant to leave out application of clean water policies to Indian reservations, leaving a vast part of the United States unregulated. Furthermore, a general law made for the welfare of Americans was also meant for American Indians.⁹⁹ The federal courts had now made it clear that when prescribed by federal law the EPA could regulate environmental programs on

⁹⁸ *American Mining Congress v. Marshall*, 671 F.2d 1251 (1982); Coal Mine Health and Safety Act, 30 U.S.C. 801-960 (1976).

⁹⁹ *Phillips Petroleum Company v. U.S. EPA*, 803 F.2d 545 (1986); Safe Drinking Water Act, 42 U.S.C. § 300 (1974).

Indian reservations and the EPA could interpret federal laws where the laws were open to interpretation.

Other cases from the 1980s also need to be mentioned, since they show the development of court approved Indian self-determination, almost unthinkable thirty years prior. In *White Mountain Apache Tribe v. Bracker* (1980) the Supreme Court overturned the ruling of Arizona's appellate court that a non-Indian owned logging company, the Pinetop Logging Company, operating exclusively on the Fort Apache reservation, had to pay the state's motor carrier license tax and fuel tax. The key to *White Mountain Apache Tribe* was that the logging company's operations amounted to ninety percent of the White Mountain Apache's annual profits, therefore state taxes infringed on tribal profits. The company operated under federal supervision and employed tribal members. Timber on the reservation was owned by the federal government and kept in trust for the tribe, with the intent to help the tribe.¹⁰⁰

The Supreme Court in *Merrion v. Jicarilla Apache Tribe* (1982) decided that the Jicarillas could charge a severance tax for oil and natural gas extraction on tribal land leased by non-Indians, because charging taxes was an essential form of tribal self-government. The tribes' 1887 treaty with the federal government set aside tribal land with no special restrictions except it protected the rights of existing settlements. The Jicarillas reorganized in 1934, and the new tribal constitution allowed for ordinances, such as taxes, for the development of tribal land. The non-Indians signed their leases beginning in 1953, and the severance tax was enacted in 1976 with the approval of the Bureau of Indian Affairs.¹⁰¹

¹⁰⁰ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

¹⁰¹ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

In *Hoover and Bracken Energies Corp. v. US Department of Interior* (1983), the Tenth Circuit agreed with the Department of the Interior that the United States Geological Survey had the right to interpret federal regulations based on its expertise. The Hoover Bracken Company owed royalties to the federal government from oil and gas that came from land leases on Indian land, which should have included rebates from paying the Oklahoma severance tax. The Hoover Bracken Company disagreed that it owed the USGS more money, the the Tenth Cicuit disagreed with the Hoover Bracken Company.¹⁰²

It should be clear from Chapter One that Indian sovereignty has come under attack since the formation of the United States, and Indians have rarely been able to choose their own path, although they have tried. The three branches of the federal government have wavered between paternalism and assimilation, while sometimes sponsoring the destruction of tribes. What has often been lost in the various written histories of tribes is that the Indians themselves have continued to push back against the federal government, and the states, for greater tribal self-determination over their lands.

Chapter One also shows that the federal courts after 1970 have consistently supported the right of the EPA, and other federal agencies, to interpret federal law, as long as the agency in question was allowed to do so by the law. Therefore, during the self-determination era, federal agencies have had the ability to make determinations that support not only Indian self-government, as defined by the federal government, but also Indian self-rule as defined by the tribes.

¹⁰² *Hoover and Bracken Energies, Corp. v. United States Department of the Interior*, 723 F.2d 1488 (1983).

Chapter 2: The United States and Pueblo Sovereignty

The Pueblos believed they came from the North and came “up” to the air at a place called Shipapu by way of an underground lake. The “war chief” and his staff cleared the path for the people to travel. The Great Spirit came with them and guided them through many arduous tasks. For ages, the great people were led all over the continent before finally settling in the Four Corners area of southwestern Colorado, northwestern New Mexico, southeastern Utah and northeastern Arizona. The Pueblos migrated to their current areas at the behest of the Great Spirit, who kept them from annihilation by other tribes of the region.¹⁰³

The Great Spirit taught the Pueblos how to be self-reliant by planting and harvesting crops. He also taught them which indigenous plants were safe and useful. The Great Spirit warned the people to obey the laws of the environment, their chief, the war captains, and the cacique (spiritual guide). The cacique set Pueblo laws. The Pueblos trusted the cacique and the other leaders, because they believed that the One above guided Pueblo leaders.¹⁰⁴ They all were to obey the laws of the environment. The Pueblos had the leadership to show them how to use the land and how to respect what the environment had to offer them. The pollution of the Rio Grande by the city of Albuquerque was an affront to Pueblo traditions and teachings.

The Pueblos have lived in the American southwest for thousands of years and have survived the governmental incursions of the Spanish, the Mexicans, and the United States. The Pueblos, and especially the Isleta Pueblos, set the groundwork for the eventual bond with the EPA by pushing for control of their land. Chapter Two argues that the federal government rarely

¹⁰³ Sando, *Pueblo Nations*, 22.

¹⁰⁴ *Ibid.*, 24-25.

recognized Pueblo self-determination over their land before the EPA. For example, the Pueblo Lands Board during the 1920s, and the Interdepartmental Rio Grande Board during the 1930s, worked to provide more land for the Pueblos, but they did not recognize Pueblo decisions about tribal land.

The tribal histories of the Pueblos have been well covered by Indian historians, but issues of land and sovereignty, and especially the convergence of the two topics, have not been covered by scholars. In addition, historians have barely touched the Pueblo history of the twentieth century. To read the accounts of Pueblo history, it seems the Pueblos only have lived during periods when non-Pueblos interfere in the Pueblo world. The most heavily covered topic involving the Pueblos is the Pueblo Revolt of 1680. During the revolt the Pueblos rose up at Santa Fe and killed and expelled their Spanish colonizers. The Spanish regained New Mexico by the turn of the eighteenth century. The best work on the topic is David J. Weber's edited collection of essays called *What Caused the Pueblo Revolt of 1680?* (1999), which is meant for college classrooms, but it is also a tremendous resource for the historian who needs a quick introduction into the subject. The study covers several theories about the causes of the rebellion that range from Spanish Franciscan missionaries not respecting tribal religion to the fact that the priests overworked the Pueblos at the missions.¹⁰⁵

On the destruction of Pueblo society under the Spanish, the best work is Ramon A. Gutierrez's *When Jesus Came, the Corn Mothers Went Away: Marriage, Sexuality and Power in New Mexico, 1500-1846* (1991). Gutierrez showed the social changes that helped subjugate the Pueblos when the Spanish arrived. The Catholicism of the Spanish certainly did not peacefully coexist with the belief systems of the Pueblos. Gutierrez provided the view of the Spanish

¹⁰⁵ David J. Weber ed. *What Caused the Pueblo Revolt of 1680?* (New York: Bedford/St. Martins, 1999).

onslaught through the eyes of the conquered, making Pueblos active participants in the fight. Gutierrez provided a tremendous section on the Pueblo creation stories at the beginning of his book, which explained the Pueblos' connection to the land in their tribal histories that have been carried down from generation to generation. Using many Spanish sources, Gutierrez also analyzed Pueblo marriage and social structures to illustrate tribal change over time.¹⁰⁶

On the clash of cultures in the American Southwest, the definitive study is still Elizabeth A. H. John's *Storms Brewed in Other Men's Worlds: The Confrontation of Indians, Spanish, and French in the Southwest, 1540-1795* (1975). John's thesis was that Indians and Spanish communities evolved with each other into a somewhat peaceful state of existence at the dawn of the nineteenth century. John took the reader through a variety of tribal lives, intermixing war, trade, and culture into a narrative about tribal survival. The tribes were not merely acted upon, but they were powerful forces in the story of change in the Southwest. She analyzed each region of the Southwest while also keeping to a chronological order.¹⁰⁷

Another study that covered a wide range of territory and several peoples was Edward H. Spicer's *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533-1960* (1962), which illustrated how the tribes of the American southwest became subjugated under the foreign influences that entered their lives. He described tribes as influencers of conquering Europeans, not the other way around. Spicer mostly focused on religion and economics, but he barely touched on the important topic of the Pueblo Lands Act. His work was published several years before the Self-Determination Era, thus it would be unfair

¹⁰⁶ Ramon A. Gutierrez, *When Jesus Came, the Corn Mothers Went Away: Marriage, Sexuality and Power in New Mexico, 1500-1846* (Stanford, CA: Stanford University Press, 1991).

¹⁰⁷ Elizabeth A.H. John, *Storms Brewed in Other Men's Worlds: The Confrontation of Indians, Spanish, and French in the Southwest, 1540-1795*, 2nd ed. (Norman: University of Oklahoma Press, 1996).

to hold him accountable for topics of the last forty years. Nevertheless, the work still holds value as a general history of the American southwest.¹⁰⁸

In contrast to histories of the entire United States Southwest, Edward Dozier and Joe S. Sando focused on the history of the Pueblos themselves by attempting to tell the stories from the Pueblos' perspectives. Dozier's *The Pueblo Indians of North America* (1983) was a case study of Pueblo life and how they adapted over time to a variety of changing conditions. There was some judgment on the author's part about the fact that some Pueblos groups had not held on to tradition the way they should. It is debatable whether it is the historian's task to judge how a tribe deals with its traditions, but as a native Pueblo historian, Dozier spoke from experience. Dozier's book, still, has plenty to offer the historian, such as tables on government structure and population. Most importantly, Dozier described how the Pueblos continued to act on their own accord, which is something the Pueblo case study also does.¹⁰⁹ The following case study updates the Pueblo story of sovereign life, bringing new evidence to the table.

Another native Pueblo historian, Joe S. Sando, provided the reader with a history of the Pueblos from their perspective in *Pueblo Nations: Eight Centuries of Pueblo Indian History* (1992). Like Dozier, Sando showed how the Pueblos have survived through years of challenges from outside societies. Sando provided more discussion of the federal intervention into Pueblo lives than Dozier, but Sando's discussions of the events of the twentieth century were still brief in comparison to what is presented in the following case study. He barely discussed the Pueblos' ability to manage affairs of water and land.¹¹⁰ Overall, while scholars have written about the

¹⁰⁸ Edward H. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533-1960* (Tucson: University of Arizona Press, 1962).

¹⁰⁹ Edward P. Dozier, *The Pueblo Indians of North America* (Prospect Heights, IL: Waveland Press, 1983).

¹¹⁰ Joe S. Sando, *Pueblo Nations: Eight Centuries of Pueblo Indian History* (Santa Fe: Clear Light, 1992).

Pueblos at length, no study has focused on land problems and issues of land sovereignty, as does the case study that follows.

The histories of the Pueblos often overlap, and the federal government has often viewed Pueblos together, thus it is necessary to illustrate their connections to make sense of their unique world. First, the Pueblos are connected through language. As of 1500, the Pueblos spoke seven languages belonging to four language families, Tanoan, Keresan, Zuni, and Uto-Aztecan. The Tanoan language family included the Tiwa, Tewa, Piro, and Towa speakers who lived on the banks of the Rio Grande and tributaries. The Tiwa Pueblos of Taos and Picuris were at the northern edge of Pueblo settlements in 1500. The Northern Tewa were thirty miles to the southwest of the previously mentioned pueblos, which included San Juan de los Caballeros, Yugeuingge, Santa Clara, San Ildefonso, Pojoaque, Nambe, Cuyamunge, and Tesuque. Lying twelve miles southwest of present-day Santa Fe were the Southern Tewa (or Tano) Pueblos of San Marcos, Galisteo, San Lazaro, and San Cristobal. The Southern Tiwa Pueblos, of which Isleta is a part, lived near present-day Albuquerque. The Spanish explorers referred to a group of ten villages collectively as Tiguex. The Isleta Pueblos formed their village fourteen miles to the south of modern Albuquerque. To the east, on the eastern slope of the Sandia-Manzano Mountains were the pueblos of Chilili, Tajiue, Quarai, Abo, and Gran Quivira. The Piro Pueblos of Alamillo, Pilabo, Senecu and Trenaquel lived fifty miles south of Albuquerque. The Towa speaking Pueblo of Pecos was forty miles east of Santa Fe. Fifty miles west of Santa Fe on the Jemez River were the Pueblos of Giusewa and Amoxungua.¹¹¹ While the languages of the

¹¹¹ Gutierrez, *When Jesus Came*, xxv.

Tanoan branch are similar, they are mutually unintelligible. Within the Tiwa family, members of the Taos, Picuris and Isleta Pueblos had a difficult time communicating with each other.¹¹²

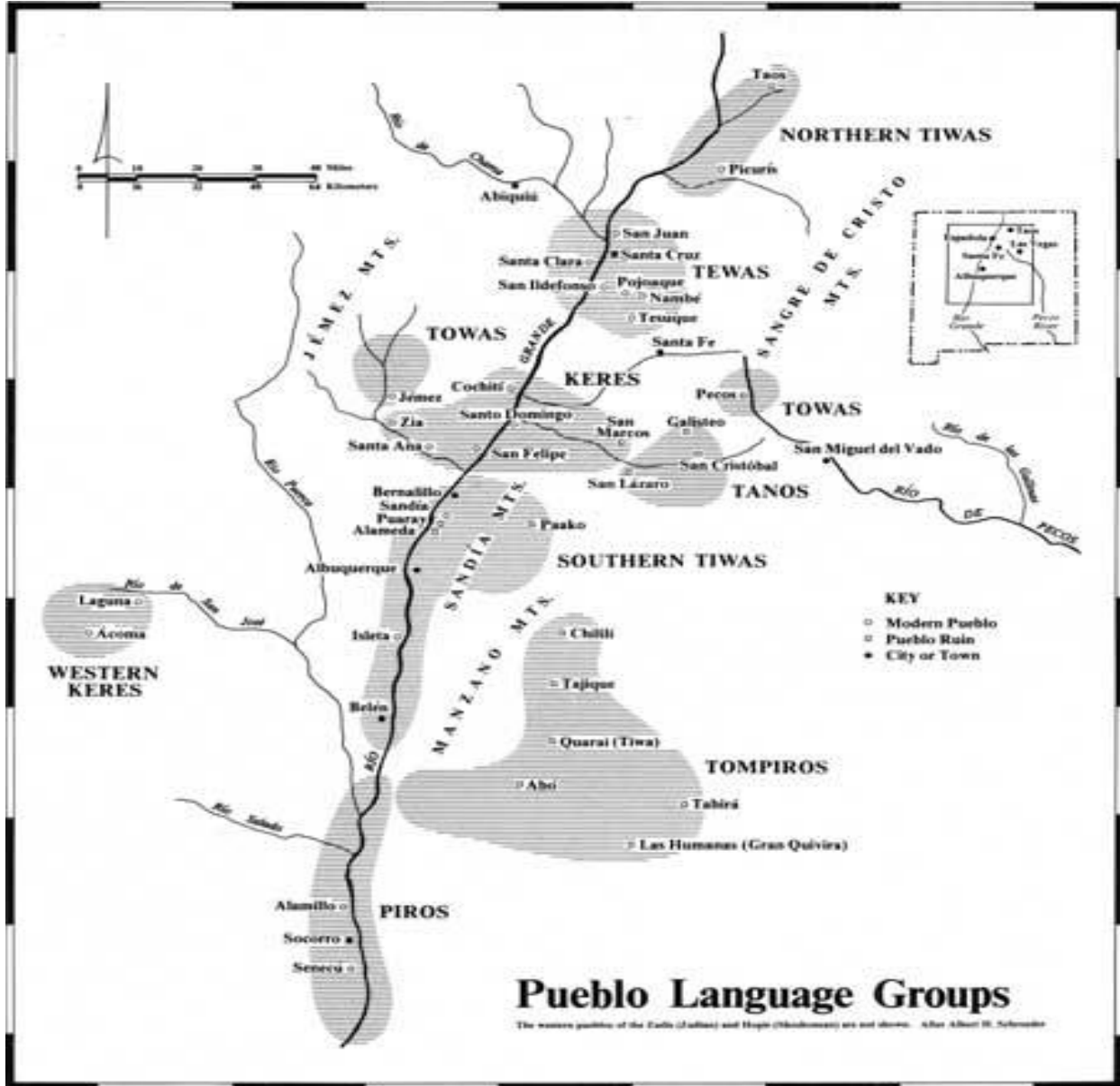


Figure 2.1 Pueblo Language Groups

(“Pueblo Language Groups,” National Park Service, accessed March 28, 2015, http://www.nps.gov/parkhistory/online_books/kcc/chap3.htm.)

¹¹² Dozier, *The Pueblo Indians of North America*, 37.

The Keresan speakers primarily lived on the Rio Grande, twenty-five miles southwest of Santa Fe. Cochiti was the northern most Pueblo. Down the river were Santo Domingo, San Felipe, Zia, and Santa Ana. Sixty miles west of Albuquerque sat Acoma Pueblo, the only Keres Pueblo in western New Mexico until Laguna Pueblo was founded in 1697.¹¹³

Far from the Rio Grande to the west was the Zuni language family, which occupied pueblos seventy miles northwest of Acoma. The Zuni language family, from east to west, were Kiakima, Matsaki, Halona, Kwakina, Kechipauan and Hawikuh. The Spanish thought that they had discovered the mythical Seven Cities of Cibola when they came across the Zuni pueblos in 1539. Archeologists have found ruins of six pueblo cities in the area.¹¹⁴ In northeastern Arizona, two hundred miles northwest of the Zunis, lived the Uto-Aztecan speaking Hopis. Seven Hopi villages existed in 1540 on four adjacent mesas. Kawaiokuh and Awatobi were situated on Jeddito Mesa, the easternmost mesa. Walpi was on First Mesa, while Mishongnovi, Shipaulovi, and Shungopovi were on Second Mesa, and Oraibi was on Third Mesa.¹¹⁵

The Pueblos have lived on their land for thousands of years and have operated distinct communities for thousands of years, yet the federal government has not recognized the Pueblos as sovereign communities. The federal government also has not abided by the Treaty of Guadalupe Hildago (1848) that ended the Mexican-American War. The treaty called on the federal government to respect the land grants of the former Mexican citizens, including the Pueblos. On July 4, 1687, Spanish King Charles II approved Pueblo land grants of 17,712 acres for each pueblo, which included the Catholic Church that stood at each location. By the time the United States took over the area, the majority of the pueblos had been invaded by non-Indian

¹¹³ Ibid., xxv.

¹¹⁴ Ibid., xxv-xxvi.

¹¹⁵ Ibid., xxvi.

settlers, leading to land disputes.¹¹⁶ Thus, the Pueblos maintain actual towns called pueblos that constitute their land holdings in the United States, but through a series of court cases and federal laws, the federal government has eroded Pueblo self-rule over the many years since the signing of the Treaty of Guadalupe Hildago. The following discussion outlines how the federal government has not recognized Pueblo sovereignty.

Pueblo history in North America began some 11,000 years ago, in what is today the southwestern United States, where there was a savannah with trees, not desert with cactus. Here the Anasazis, the ancestors of the Pueblos, could hunt large game such as Columbian mammoths, the less woolly brethren of their northern neighbor, the woolly mammoth. When a climate shift occurred about 9,500 B.C., the Anasazis turned to hunting smaller prey and gathering various plants for survival. About 2,000 B.C. the Anasazis first planted maize, beans, squash, and cotton. With agriculture, came the sited village that the federal government later so deeply admired as a Pueblo quality. The Pueblos were farmers well before the United States was established. By the end of the first millennium A.D., the Anasazis had built elaborate personal homes, the first at the famous Chaco Canyon in northwestern New Mexico. Around 1250 A.D. the Anasazis abandoned their homes, most likely due to over-cultivation and water shortages, but some scholars blame diseases and factionalism for the move. The Pueblos, however, have explained the change otherwise. They say the serpent, the deity of rain and fertility, mysteriously departed. The people felt helpless, so they gathered up their possessions and tried to follow the serpent to the river. Of course, migratory life was normal in the southwest from 1250 to 1540 A.D.¹¹⁷

¹¹⁶ Ibid., 107.

¹¹⁷ Ibid., xx-xxi, xxviii, 42.

The Spanish attempts at conquest of the Pueblo began with the ramblings of Francisco Vázquez de Coronado in 1540. The 29-year-old governor of Nueva Galicia visited the Eastern Pueblos, and perhaps the Pueblos of Isleta, while seeking the mythical Seven Cities of Gold. Coronado's men asked the Pueblos for more and more supplies, challenging the well-run system of resource allocation the Pueblos maintained. When the Pueblos tried to force the Spanish soldiers from the area, Coronado's three hundred soldiers captured two hundred Pueblos and killed them.¹¹⁸ News of Coronado's brutality spread across the lands of the Pueblos and created the underlying mistrust that would be problematic for the duration of the relationship between the two cultures.¹¹⁹

In 1595, King Phillip II of Spain awarded conquistador Don Juan de Oñate a contract to colonize what was known to the Spanish in Mexico as New Mexico. Over the next three years, with his four hundred colonists, including mostly soldiers, ten Franciscan missionaries, and some Indian servants, Oñate received agreements of "submission" from the Pueblos in exchange for a dubious protection that the Pueblos did not know they were receiving.¹²⁰ When Oñate encountered resistance at Acoma Pueblo in 1598, his soldiers killed numerous Acomas and burned the Pueblo. As further punishment, Oñate's men amputated one foot from all Pueblo men over twenty-five years old. Oñate forced all men and women over twelve years old into twenty years of service to the new conqueror and took Pueblo land for the Spanish crown.¹²¹ At the time

¹¹⁸ Spicer, *Cycles of Conquest*, 155.

¹¹⁹ Dozier, *The Pueblo Indians*, 45.

¹²⁰ Spicer, *Cycles of Conquest*, 156.

¹²¹ Dozier, *The Pueblo Indians*, 47.

the Spanish invaded the area, there were thirty to forty thousand Pueblos who inhabited seventy-five to eighty permanent towns.¹²²

The Spanish created a mission system in what became New Mexico, which caused great distress among the sovereign Pueblo communities of the region, and was one of the root causes of the Pueblo Revolt of 1680. The Spanish friars quickly baptized the Pueblos. Father Alonzo de Benavides, who directed the missionary program in the early seventeenth century, documented in 1630 that 60,000 Pueblo Indians had been converted and ninety chapels had been built.¹²³ The Franciscans did not understand native religions and usually did not try to understand. The missionaries enforced compulsory attendance at mass and destroyed native religious materials, such as masks. The missionaries also interfered in Pueblo ritual activities that were orchestrated to help the growing season as well as provide a deeper sense of community. The intensity by which the missionaries tried to restructure Pueblo religious life was at the heart of the Pueblos' revolt against the Spanish.¹²⁴

The other primary cause of the Pueblo Revolt was that the Spanish institutionalized a system of theft of Pueblo land. The Spanish governors and missionaries required large forces of Pueblos to collect salt, piñon nuts, and hides. The encomienda system, imposed by Oñate as part of the colonization system, gave land grants to soldiers who participated in the conquest of New Mexico. A soldier, also known as an encomendero, received the right of repartimiento, which

¹²² Henry Warren Bowden, "Spanish Missions, Cultural Conflict, and the Pueblo Revolt of 1680," in *What Caused the Pueblo Revolt of 1680?*, ed. David J. Weber (New York: Bedford/St. Martin's, 1999), 25.

¹²³ Dozier, *The Pueblo Indians*, 47.

¹²⁴ Bowden, "Spanish Missions," 29-30.

was the right to enslave Indians living on the land grant. The produce from Indian labor went partly to the king and partly to the encomendero.¹²⁵

The final reason for the Pueblo Revolt was that the Spanish could not offer protection from the drought and Plains tribes that intertwined to threaten Pueblo existence. The extended drought that began in 1672 led to Pueblo crop failures and massive starvation. At the same time, disease and raiding tribes invaded the region. The Navajos and Apaches also suffered from the drought, and they raided the Pueblos for what little supplies the sedentary people had left. The Spanish failed to protect the Pueblos from the raids, which was the only reason the Pueblos had tolerated the Spanish in the first place. By 1675, at least six pueblos had been destroyed through raids. The Pueblo response to the destruction of the pueblos was rebellion against the Spanish.¹²⁶

On August 10, 1680, led by Popé, a San Juan medicine man, the Pueblos defeated the Spanish at Santa Fe, which the Pueblos held under siege for nine days.¹²⁷ The Spanish were genuinely confused at how they could have been attacked and why they deserved such treatment by the Pueblos. They thought that they had done nothing wrong. The Spanish Governor of New Mexico, Antonio de Otermín, learned from an 80-year old Pueblo named Pedro Nanboa that the Pueblos had been plotting for seventy years to attack the Spanish, because the Spaniards were cruel and had destroyed the Pueblos' religious objects. The Spanish forced the Pueblos to work and beat them when they disobeyed. The Franciscans, however, believed that the only thing they were guilty of was caring for the Pueblos.¹²⁸

¹²⁵ Spicer, *Cycles of Conquest*, 158-160.

¹²⁶ Van Hastings Garner, "Seventeenth-Century New Mexico," in *What Caused the Pueblo Revolt of 1680?*, ed. David J. Weber (New York: Bedford/St. Martin's, 1999), 66.

Bowden, "Spanish Missions," 31.

¹²⁷ Gutierrez, *When Jesus Came*, 130-144; John, *Storms Brewed*, 105.

¹²⁸ Gutierrez, *When Jesus Came*, 136-137.

Pope's reign was short, since his promises of bounty were hollow. The rain did not come and the crops neglected to grow. His demands for women and tribute of crops were too much for the Pueblos. The Tewas and Tanos deposed Popé in late 1681. What followed was more war, as the Pueblos fought amongst themselves, while the Utes and Apaches also attacked the Pueblos.¹²⁹ All the while, the Spanish were planning to re-conquer Santa Fe and the Pueblos. In 1692, Diego de Vargas, a Spanish general, recruited 100 Pueblo refugees from Isleta, Senecu, and Socorro to re-conquer Santa Fe. Vargas and his troops camped outside Santa Fe on September 13, 1692. After asking to enter the city peacefully and being refused, Vargas and his soldiers attacked the city on December 28. By December 30, the Pueblo warriors had surrendered. Vargas had seventy Pueblo warriors executed and he gave 400 woman and children to Spanish colonists to be used as slaves. By the end of the re-conquest in 1698, Isleta stood as the lone surviving southern Tiwa-speaking pueblo.¹³⁰

The 1700s saw the Spanish missionaries somewhat change the way they related to the Pueblos. The Franciscans did not force an end to Pueblo religious practices or ceremonial painting. Governor Francisco Cuervo y Valdez appointed Captain Alfonso Rael de Aguilar as protector general of the Pueblos at a meeting on January 6, 1706, which was attended by many Pueblo and Spanish leaders. The goal of having a protector general was to cement positive relations with the Pueblos. Furthering relations in 1714, Governor Flores Mogollón declared that the Pueblos had the right to arm themselves, as arms provided an advantage against raiding Indians from the surrounding territories that were not Pueblos. The Franciscan friars supported arming the Pueblos.¹³¹

¹²⁹ Ibid., 139.

¹³⁰ Gutierrez, *When Jesus Came*, 145; John, *Storms Brewed*, 105, 121, 146, 155-156.

¹³¹ Dozier, *The Pueblo Indians*, 72.

In the eighteenth century, what the Franciscan friars did not support was the open practice of Pueblo religion, but the friars no longer had the ability as they once did to stop the rituals. The Spanish governors did not support the friars in their attempts to force Pueblos to adhere to Catholic ritual, as to do so was counter productive to the overall need of survival for Spanish colonists in the region. The Pueblos disliked the harsh church discipline, and with the friars unable to stop Pueblo rituals, the Pueblos practiced a few rituals in the open. One of the Pueblo rituals the friars disliked the most was the scalp dance, which was done in remembrance of those who died trying to fight the Spanish. The friars referred to it as a ritual of vengeance. The Pueblos did not let the Spanish see other dances that they knew would be particularly disconcerting to outside peoples, especially in areas where the Spanish element was heaviest. The only recourse the friars had was in church, when they would enforce strict rules. They also tried to force the Pueblos to church, but with little success. The Spanish government was more concerned with having a partnership with the Pueblos that could keep the raiding tribes of the surrounding regions, such as the Comanches, Apaches, and Utes, at bay. Thus, to support strict Catholic adherence would be counter productive to the Spanish government.¹³² The previous century of rebellion by the Pueblos had finally started paying dividends in the eighteenth century, as the Spanish governors had to view the Pueblos as allies, instead of enemies and slaves.

The Spanish finally lost New Mexico at the completion of the Mexican Revolution in 1821, which marked a change for the Pueblos, as the Mexican government initially respected the Pueblos' abilities to make land decisions. The problem for the Pueblos was that with the ability to sell land came the threat that Mexican government officials would try to buy the land at

¹³² Ibid., 74-78.

bargain prices, which they did. Mexican administrators and politicians falsified documents to swindle Pueblos out of their land. The Mexican courts were overrun with cases of illegal land occupation. The Mexican government, generally, ignored the Pueblos' plight, as the officials in Mexico City were more concerned with keeping the United States from taking New Mexico and its northern territories.¹³³

The United States ultimately took control of Pueblo land after victory in the Mexican-American War, and at first, the US respected the Pueblos' sovereignty over their land as outlined in the Treaty of Guadalupe Hildago in 1848.¹³⁴ The federal government proceeded to create the territory of New Mexico in 1850,¹³⁵ and the federal Act of December 22, 1858, approved land title for all Pueblos to land granted by the Spanish and recognized by the Mexican government.¹³⁶ The United States did not initially consider the Pueblos to be Indians. Thus, unlike the vast majority of Indians living in America, the Pueblos held communal fee-simple title to most of their land.¹³⁷ The Supreme Court upheld the Pueblos' right to land ownership in *United States v. Joseph* (1876), which involved an American who faced a fine of \$1,000 from the territory of New Mexico for illegally settling on land belonging to the Taos Pueblos. The court reasoned that the Pueblos' right to their land was superior to that of the United States, because Pueblo land grants were made by Spain prior to the United States owning the territory, and protected in the

¹³³ Sando, *Pueblo Nations*, 84.

¹³⁴ Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford: Oxford University Press, 2007), 811; Dozier, *The Pueblo Indians*, 107.

¹³⁵ *Ibid.*, 821.

¹³⁶ *United States v. Joseph*, 94 U.S. 614 (1876).

¹³⁷ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10709 (May 2, 1931) (statement of Judge R.H. Hanna, American Indian Defense Association); Act of Dec. 22, 1858, 11 Stat. 374 (1858).

Treaty of Guadalupe Hildago. In addition, federal law, as of December 22, 1858, approved title for all Pueblos to land granted by the Spanish and recognized by the Mexican government, therefore Joseph would have to buy Pueblo land.¹³⁸ The United States briefly recognized the Pueblos' sovereignty over their land, due to the Pueblos' history as first occupants.

Federal recognition of the Pueblos land titles was brief, as 1913 saw the Supreme Court overturn the *Joseph* decision in *United States v. Sandoval* (1913). The court decided that the Pueblos were under the protection of the federal government, and therefore Congress could make judgments on all land within the borders of the United States. The case involved a Mexican-American named Felipe Sandoval whose lawyers argued that alcohol sales were legal on Pueblo lands, because Pueblos owned their lands outright, since the King of Spain granted the Pueblos title in 1689. Officials of the Territory of New Mexico arrested Sandoval under the Act of January 30, 1897, which made it a felony to introduce liquor into Indian Country, and under the New Mexico Enabling Act (1910), which stated that Pueblos lived in Indian Country and did not hold their land in fee simple.¹³⁹ The Supreme Court went the opposite direction of the *Joseph* court and stated that the Pueblo Indians “are always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are a simple, uninformed and inferior people.”¹⁴⁰ In addition, the Supreme Court reasoned that since public

¹³⁸ *United States v. Joseph*, 94 U.S. 614 (1876).

¹³⁹ Act of January 30, 1897, 29 Stat. 506, c. 109 (1897); New Mexico Enabling Act, 36 Stat. 557, c. 310 (1910).

¹⁴⁰ *United States v. Sandoval*, 231 U.S. 28 (1913).

money had been spent on the Pueblos for schooling and agriculture training, Pueblo land belonged to the United States, not the Pueblos, who were wards of the federal government.¹⁴¹

The *Sandoval* decision was a product of the changing legal nature of Indian sovereignty in the United States. The Supreme Court leaned heavily on its decision in *United States v. Kagama* (1886) to rule on *Sandoval*. In *Kagama*, the court decided that the US had legal jurisdiction over the case of an Indian who killed another Indian in federal territory, even though the Indian Appropriation Act (1885) stated that Indians who committed violent crimes were subject to the territorial courts.¹⁴² The federal-tribal trust relationship, as outlined in the Constitution, and defined by Chief Justice John Marshall, now applied to the Pueblos. The United States would no longer recognize the Pueblos' sovereignty over their land.

The Supreme Court went a step further in *United States v. Candelaria* (1926). The Supreme Court relied on the precedence of its decision in *Sandoval* to judge that the Pueblos held fee-simple titles to their various lands of each independent Pueblo, but they were subject to the trust relationship of the United States. The case involved a Mexican-American named Jose Candelaria who made claims to Pueblo land, which New Mexico recognized, and the district court upheld. The United States brought suit against Candelaria to keep him from fencing Laguna Pueblo land for himself. The Supreme Court stated that the fiduciary duty, or adherence to the trust relationship, alone belonged to the federal government.¹⁴³ Ultimately, the implication of *Sandoval*, *Kagama*, and *Candelaria* on Pueblo sovereignty was that they would not be able to decide land issues on their own.

¹⁴¹ Ibid.

¹⁴² *United States v. Kagama*, 118 U.S. 375 (1886); Indian Appropriation Act, 23 Stat. 385 (1885).

¹⁴³ *United States v. Candelaria*, 271 U.S. 432 (1926).

The example of the Pueblo Lands Board also illustrates the federal government's unwillingness to recognize the Pueblos' ability to make land decisions. The Pueblo Lands Act of 1924 called for investigations of land claims by non-Indians on Pueblo lands through the creation of the Pueblo Lands Board. The federal government was to pay the Pueblos for lands lost to illegal settlers. Congress's intention was to put the Pueblos on solid economic ground, make them independent of the federal government, and address past injustices. Congress promised large payouts under the Pueblo Lands Act, since non-Indian settlers had taken as much as 90 percent of the Pueblos' land at places like San Ildefonso Pueblo.¹⁴⁴

In practice, the Pueblo Lands Board rarely gave fair market value to the Pueblos for their stolen land. Republican Herbert J. Hagerman, the territorial governor of New Mexico from 1906-1907, chaired the Pueblo Lands Board. Congress referred to his decisions as "decidedly hard-boiled"¹⁴⁵ and Congressmen thought that he held considerable sway over the other two members of the board. His character was questioned by Congress, as he never appeared at Senate hearings in 1931 to defend himself on charges that he did not adequately perform his duties as chair of the Pueblo Lands Board. Some Senators believed that he purposely dodged the hearings, although Hagerman said he had the flu.¹⁴⁶

Hagerman was a controversial choice to lead the Pueblo Lands Board, since his background as territorial governor of New Mexico gave ample warning of his questionable leadership. Hagerman was embroiled in controversy involving the circumvention of New Mexico

¹⁴⁴ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10707 (May 2, 1931) (statement of Judge R.H. Hanna, American Indian Defense Association).

¹⁴⁵ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10712 (May 2, 1931) (statement of Judge R.H. Hanna, American Indian Defense Association).

¹⁴⁶ *Ibid.*

Territory land law that only allowed 160-acre land grants. Hagerman allowed workers of the Pennsylvania Development Company, the Santa Fe Central Railway, and the New Mexico Fuel and Iron Company to purchase 160-acre plots. The workers then turned the plots over to the corporations, allowing the three companies to acquire massive quantities of land. Hagerman's controversy provided the perfect reason for President Theodore Roosevelt to remove Hagerman from office. Roosevelt asked for Hagerman's resignation on April 1907. Although Hagerman managed to pass an anti-gambling law, an irrigation law, and a land law during his brief tenure as territorial governor of New Mexico, he had alienated Republicans in New Mexico prior to Roosevelt's move. Hagerman had fired Holm O. Bursum from his post as superintendent of the penitentiary, even though Bursum was the chairman of the Territorial Republican Committee.¹⁴⁷

The Pueblo Lands Board consistently shortchanged the Pueblos. The board appointed appraisers to figure the cost of the lost Pueblo land, but it paid the various Pueblos \$600,000 less overall than judged fair by the appraisers. The courts did not challenge the decision of the board, arguing the board's decision was the one that mattered. The burden of proof fell to the Pueblos, even though they were not responsible for the loss of their land. The federal government did not allow the Pueblos to hire attorneys on their own, nor could they afford attorneys. The commissioner of Indian affairs appointed Judge R.H. Hanna as the Pueblos' attorney.¹⁴⁸ Judge Hanna was a longtime New Mexico Democrat who served in a number of capacities. He was a justice of the New Mexico Supreme Court from 1912-1919 and served as chief justice in 1917. He was a candidate for New Mexico governor in 1920 and a candidate for the United States

¹⁴⁷ New Mexico Office of the State Historian, "Hagerman, Herbert James," accessed August 5, 2013, <http://www.newmexicohistory.org/filedetails.php?fileID=23590>.

¹⁴⁸ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong. 10711-10721* (May 2, 1931) (statement of Judge R.H. Hanna, American Indian Defense Association).

Senate in 1921.¹⁴⁹ In December 1925, Hanna asked the board to furnish him the Spanish land titles for review, but it declined due to cost and the lack of a Photostat machine.¹⁵⁰ The board had no interest in being critiqued by Hanna.

The Pueblo Lands Board left the Spanish land records open for Hanna to view, but his office was sixty-five miles from the board's Santa Fe headquarters, and Hanna knew that he could not get to the records in time. He had just sixty days to review all the records before his hearing with the board. In contrast, the board furnished copies of the deeds to the Board of Indian Commissioners in Washington, D.C., and also to the secretary of the interior, the attorney general, the clerk for the United States District court, and the clerk for the Pueblo Lands Board.¹⁵¹ Thus, it was obvious that Hagerman was not cooperating with Hanna.

To make matters worse for Judge Hanna and the Pueblos, the Pueblo Lands Board was not clear in their report on how they arrived at their decisions. Therefore, it was difficult for the Pueblos and Hanna to counter the board's decisions without understanding their rationale. The board stated in a letter to Hanna, dated December 14, 1925, that it would not give him a defense of its reasoning on cases. Hanna sent a letter of complaint to the attorney general and the secretary of the interior, but neither responded. Hanna believed that the federal government would not cooperate with him because he was not federally appointed, but the Pueblos' chosen

¹⁴⁹ Lawrence Kestenbaum, Political Graveyard, "Index to Politicians: Hanna," accessed August 5, 2013, <http://politicalgraveyard.com/bio/hanna.html>.

¹⁵⁰ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10711-10721 (May 2, 1931) (statement of Judge R.H. Hanna, American Indian Defense Association).

¹⁵¹ *Ibid.*

attorney.¹⁵² Hanna's stance was odd since the commissioner of Indian affairs had actually appointed Hanna.¹⁵³

The Pueblo Lands Board picked a team of three appraisers, who did not appraise Pueblo land properly, although Hanna initially believed that the appraisers were qualified.¹⁵⁴ For instance, the appraisers did not go to all the Pueblos; they went only when a large amount of land was at stake.¹⁵⁵ Another problem was that the Pueblos could not counter the appraisals, which they needed to do, because not only were the appraisals low, generally just \$80 an acre, but the Pueblo Lands Board then awarded only \$35 an acre. After the appraisers gave the Isletas their appraisal at about \$80 an acre, non-Indians sold twenty-six lots just south of their pueblo at \$200 to \$300 an acre.¹⁵⁶ It was clear that the Pueblo Lands Board did not give the Pueblos a fair deal.

Water rights were also at stake for the Pueblos in the fight to receive their land back. In Hagerman's opinion, the Pueblos would not lose their water rights if they lost land to the Pueblo Lands Board, but Hanna disagreed with the Lands Board's stance. It was impossible for Pueblos to lose access to land, yet still take water from land they lost. Hagerman judged raw land without water to be only \$5 per acre. Land with water was only worth about \$25 per acre to Hagerman, even though the federal government had just spent \$90 an acre for land with water when it

¹⁵² Ibid.

¹⁵³ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong. 10734-10735 (May 2, 1931)* (statement of Judge R.H. Hanna, American Indian Defense Association).

¹⁵⁴ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong. 10740 (May 2, 1931)* (statement of Judge R.H. Hanna, American Indian Defense Association).

¹⁵⁵ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong. 10766 (May 8, 1931)* (statement of Charles H. Jennings, Pueblo Lands Board).

¹⁵⁶ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong., 10740 (May 2, 1931)* (statement of Judge R.H. Hanna, American Indian Defense Association).

purchased land for the Elephant Butte, New Mexico, irrigation project south of Isleta Pueblo.¹⁵⁷ Obviously, Hagerman was not interested in paying the Pueblos for their water that they lost or returning land with water access.

Hagerman believed that he did right by the Pueblos. He defended himself to the Santa Fe Kiwanis Club on March 3, 1931, arguing that several of the Pueblos received proper rewards. For instance, the Isletas held 188,661 acres of land because the Pueblo Lands Board had added 21,414 acres and had taken away just 500 acres. He hypothesized, that by fencing and properly grazing the land, the Isletas could earn an extra \$50,000 a year, since they were industrious and good farmers. In contrast, he considered the Sandia Pueblos to be lazy, and he was convinced that most of the money awarded to them had gone to bootleggers.¹⁵⁸ Hagerman's personal judgments on race played a part in his decisions. He certainly did not believe that the Isletas were a sovereign nation that could make decisions about Isleta land.

The Pueblo Lands Board misinterpreted its duty, also leading to it not recognizing the Pueblos' land rights. Charles Jennings, the United States attorney general's representative on the Pueblo Lands Board, also defended the board's decisions, contending it followed the federal statute in regard to what constituted possession of land, which was twenty-two years.¹⁵⁹ Jennings was known as a deliberate official who created the tract-by-tract abstracts and tax statements for non-Indian claims. Along with Hagerman, he was a consistent member of the three-person

¹⁵⁷ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10745 (May 2, 1931) (statement of Judge R.H. Hanna, American Indian Defense Association).

¹⁵⁸ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10750-10753 (May 2, 1931) (evidence, H.J. Hagerman, special Indian commissioner, speech to Santa Fe Kiwanis Club, March 3, 1931).

¹⁵⁹ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10789-10790 (May 8, 1931) (statement of Charles H. Jennings, Pueblo Lands Board).

Pueblo Lands Board.¹⁶⁰ Hanna argued that the Indians held title for more than twenty years. Jennings admitted, under oath, that the board never took into consideration the value of land for the years that the Pueblos had lost title to it, in defiance of the federal statute. The board's view was that it simply would account for financial loss amounting to the value of land at the time non-Pueblos took the land.¹⁶¹ Senator Wheeler of Montana told Jennings that the board's methods were the wrong way to carry out the Pueblo Lands Act, since the act stated compensation must be given to Indians for value lost.¹⁶² In addition, Jennings told Congress that the board never awarded the Pueblos more than \$35 an acre, even if the appraisers said that land was worth \$100 an acre, because it was the board's estimation that the Indians never did the work to make the land worth \$100 an acre. Jennings assumed the land was never under cultivation by the Indians.¹⁶³ Ultimately, the board thought that the Pueblos were lazy, even though the board presented no evidence to that point. It was simply the board's opinion. Again, they did not believe that the Pueblos held sovereignty over their land.

Ultimately, the Pueblo Lands Board and the federal government did not recognize the Pueblos' ability to take care of their land, and the board actually took land from the Pueblos. The board took 20,000 acres of land from the Pueblos. The Isletas lost the largest tract of land at 14,700 acres. The Pueblos gave up 39,000 additional acres for an average compensation of just

¹⁶⁰ G. Emlen Hall, *Four Leagues of Pecos: A Legal History of the Pecos Land Grant, 1800-1933* (Albuquerque: University of New Mexico Press, 1984), 245-247.

¹⁶¹ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10789-10790 (May 8, 1931) (statement of Charles H. Jennings, Pueblo Lands Board).

¹⁶² *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10793 (May 8, 1931) (statement of Burton K. Wheeler, US Senator, Montana).

¹⁶³ *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* 10798 Cong. (May 8, 1931) (statement of Charles H. Jennings, Pueblo Lands Board).

\$15.57 per acre. Hanna argued that the irrigated land was worth \$125 an acre, while Senator Burton Wheeler of Montana believed that there was no land in northern New Mexico worth more than \$15 per acre. At Isleta, the appraised value of land was \$3,998.67, but the Pueblo Lands Board awarded the Isletas only \$3,218.21. At San Ildefonso Pueblo, the appraised value of land was \$52,128, but the Pueblo Lands Board awarded San Ildefonso just \$29,090.53. At Picuris Pueblo, the appraised value was \$71,898.14, but the board awarded the Picuris \$47,132.90. The board assumed that whatever was growing on the land (alfalfa and other various crops) was not to the credit of the Pueblos, thus, the Pueblos did not deserve to be awarded full value.¹⁶⁴ While it was obviously beneficial that the board gave land back to the Pueblos, the federal government did not recognize the Pueblos' ability to improve their land and make other decisions about their territory.

Congress granted several Pueblos more access to water with the creation of the Middle Rio Grande Conservancy District in 1925 as a political subdivision of New Mexico. Congress granted flood control and land reclamation to the Cochiti, Santa Domingo, San Felipe, Santa Ana, Sandia, and Isleta Pueblos. Congress concluded that the reclaimed land would provide about 15,000 more acres for cultivation, but in actuality, the Pueblos had to use the money they earned from the reclaimed land to repay the government for the money it invested in the Conservancy District. Congress estimated the total improvements to Pueblo land would be \$1,593,311, while improvements to non-Pueblo land would total \$10,235,689.¹⁶⁵ In 1965, Congress updated the act to allow the secretary of the interior to contract with New Mexico for

¹⁶⁴ Ibid.

¹⁶⁵ Conservation, Irrigation, Drainage, and Flood Control for the Pueblo Indian Lands in the Rio Grande Valley, New Mexico, S. 700, Senate Report 104, at 2 (Jan. 17, 1928).

more charges involving the Middle Rio Grande Conservancy District.¹⁶⁶ Thus, Congress continued to allow improvements to the Pueblos' land and water situation, albeit through the BIA and not under the control of the Pueblos.

The federal government further improved Pueblo access to water with the Rio Grande Conservancy Act of March 13, 1928.¹⁶⁷ The Rio Grande Conservancy Act provided conservation, irrigation, drainage ditches, and flood control for the Pueblos in the region, including Isleta Pueblo. The act prioritized Pueblo irrigation rights over those of non-Pueblo land owners, but it gave the secretary of the interior the final say on all cases, thus the federal government did not recognize Pueblo self-determination.¹⁶⁸

The BIA also did not allow the Pueblos to be part of the equation for saving rangeland, illustrating that the federal government still did not recognize the Pueblos' ability to manage their land. The lack of federal recognition did not stop the Isletas from trying to use the range how they saw fit, which was illustrated by the case of a rancher named Bibian Cordova. At the end of 1933, the Isletas agreed to permit grazing on the Isleta Land Grant for three years beginning January 1, 1934, for no more than 3,200 head of sheep, but at the last moment, the Isleta Tribal Council decided that the range could hold 4,500 head and balked at the deal. The BIA told the Isletas that the range could not carry more sheep, but the Isleta Tribal Council held firm. Finally, they made a deal for 200 head of cattle to graze the grant along with the 3,200 head

¹⁶⁶ *Hearing on H.R. 7103, Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives*, 95th Cong. 1-2 (June 17, 1965).

¹⁶⁷ Rio Grande Conservancy Act, 45 Stat. 312 (1928).

¹⁶⁸ *Ibid.*

of sheep. A non-Pueblo rancher, Bibian Cordova, won the bid to graze his sheep, and another non-Pueblo rancher, Robert Sanchez, agreed to graze his cattle on the range.¹⁶⁹

The BIA did not recognize the Isletas' ability to manage the range and did not recognize the Isleta Tribal Council's deal with Cordova. First, Lem Towers, the superintendent for the Southern Pueblo Agency branch of the BIA, wrote to Cordova informing him the price of the lease had been increased from \$1,636 to \$1,836, due to an accounting error.¹⁷⁰ Cordova paid the money without incident.¹⁷¹ Then on December 31, 1935, the BIA cancelled Cordova's permit for his sheep in order to make room for cattle, so the range could be conserved in the BIA's estimation. The BIA believed that sheep destroyed the range, but approved of grazing 1,100 head of cattle. Additional sheep, the BIA argued, would be beyond the carrying capacity of the range. The BIA's experts also thought that the range could handle only 1,750 head of cattle. Cordova was out of luck, as were the Isletas. Cordova's 3,200 head of sheep, along with the 200 head of cattle co-owned by Cordova and Sanchez, were the equivalent of 1,000 head of cattle according to the BIA, which would make for a total of 2,100 head of cattle, if the Isletas' 1,100 head were added to the range. The BIA reserved the right to cancel any grazing permit with compensation to the lessee.¹⁷² Yet, if the Isletas' traditional knowledge had been taken into consideration, a greater profit could have been commanded from the range, because Cordova could have been

¹⁶⁹ Lem A. Towers, Southern Pueblo Agency Superintendent, to John Collier, Commissioner of Indian Affairs, December 27, 1933, RG 75, Box 346, Folder 301.31, United Pueblo Agency General Superintendent Decimal Files, 1922-1955, National Archives and Records Administration, Denver, Colorado (hereafter UPAGS Files).

¹⁷⁰ Towers to Cordova, July 9, 1934, RG 75, Box 346, Folder 301.31, UPAGS Files.

¹⁷¹ Towers to Pacual Albeita, Governor of Isleta, July 9, 1934, RG 75, Box 346, Folder 301.31, UPAGS Files.

¹⁷² E.R. Fryer, Director of Land Use Activities, United Pueblo Agency, to S.D. Aberle, Superintendent United Pueblo Agency, Oct. 31, 1935, RG 75, Box 346, Folder, 301.31, UPAGS Files.

allowed to graze his cattle along with the Isleta's cattle and sheep. That is not the way the BIA viewed the situation, however, since it was interested not only in the Isletas grazing their own cattle on their own range, but also conserving the range for what the BIA judged as the long-term health of the herd and the range. The BIA's stance did not stop the Isletas from pressuring the BIA for control of the range.

BIA officials, clearly, did not understand ranching. Oscar L. Chapman, assistant secretary of the BIA, sent a letter to Cordova on November 14, 1935, to inform him that he had to move his stock by December 31, 1935.¹⁷³ Chapman did not understand the sheep and cattle industry, since it would prove difficult to quickly find another range for the stock to graze on. Cordova could not immediately find a range for his sheep and cattle, and had to gain permission to keep the cattle on the Isleta range until February 1. E.R. Fryer, the director of land use activities for the BIA's United Pueblo Agency, granted permission.¹⁷⁴ The BIA's interjection into the range lease agreement was making a mess of the Isletas' plans.

The Isletas, then, worked a deal behind the scenes with Cordova. At the end of January 1936, Fryer learned Cordova had come to an informal agreement with the Isletas to graze his cattle on their land. Fryer was livid. The BIA did not allow the Isletas to make deals without the approval of the BIA.¹⁷⁵ Fryer could not keep the Isletas from exerting control over their land, even without federal approval.

Another federal program that refused to recognize tribal knowledge was the Land Program of the Federal Emergency Relief Administration, which originated in 1934 and lasted

¹⁷³ Oscar L. Chapman, to Bibian Cordova, Nov. 14, 1935, RG 75, Box 346, Folder, 301.31, UPAGS Files.

¹⁷⁴ E.R. Fryer to Franciso Jiron, Governor of Isleta Pueblo, December 21, 1935, RG 75, Box 346, Folder, 301.31, UPAGS Files.

¹⁷⁵ Fryer to Cordova, January 28, 1936, RG 75, Box 346, Folder 301.31, UPAGS Files.

until 1942. The overall goal of the program was to bring agricultural production, land use, and farm income into a sustainable relationship, while also integrating rural people into American society. The federal government originally planned to acquire twenty million acres of farm land and grazing land for parks, shelter belts, and wildlife refuges. Many of the New Deal scientists did their work within the Land Program and the Land Policy Section of the Agricultural Adjustment Act.¹⁷⁶ Thus, although New Dealers sympathetic to the plight of American Indians ran the Agricultural Adjustment Act, they still did not recognize Pueblo land rights.

The Land Program began with promise in 1934, due to the large amount of funds dedicated to the project by the federal government. John Collier, commissioner of Indian affairs, and BIA officials submitted plans for fifty-one projects, with the hope of adding two million acres to Indian farm and grazing land. The largest of the projects was for the purchase of four hundred thousand acres of land for the Pueblos. Several cattlemen and cattle companies were anxious to sell their land to Collier for two to three dollars per acre, since cattle prices had fallen during the Great Depression. The federal purchase project organized the land into nine sites named after the adjacent Pueblos. At the northern New Mexico Rio Grande watershed were Zia-Santa Ana, Jemez, Cochiti-Santa Domingo, Isleta, and Tewa Basin. Tewa Basin covered the Pueblos around Santa Fe: San Juan, Tesuque, Picuris, San Ildefonso, Santa Clara, Pojoaque, and Nambe. Four projects were in the west: Laguna, Acoma, Zuni, and Gallup-Two Wells. The Navajos were to use the land at Gallup-Two Wells. Problems arose, however, based on long-standing cultural divisions between Indians and non-Indians.¹⁷⁷

¹⁷⁶ David H. Dinwoodie, "Indians, Hispanos, and Land Reform: A New Deal Struggle in New Mexico," *The Western Historical Quarterly* (July 1986), 291-294.

¹⁷⁷ *Ibid.*, 295-299.

Many non-Pueblo cattlemen opposed the project due to the projected loss of grazing land and the interference of the federal government in their affairs. The New Mexico Wool Growers Association were convinced that giving land to Indians would damage the county and state tax base, thus hurting wool growers as well.¹⁷⁸ Hispanics, who lived off the land in northern New Mexico, detested the fact that Commissioner Collier was giving Pueblos land at the expense of the Hispanics. Interior Secretary Harold Ickes and Agriculture Secretary Henry Wallace somewhat solved the problem with creation of the Interdepartmental Rio Grande Advisory Committee in 1936, which changed its name to the Rio Grande Board in 1938.¹⁷⁹ The Interdepartmental Rio Grande Advisory Committee consisted of the commissioners from the BIA, the Division of Grazing, the General Land Office of the Interior Department, the Forest Service, the Soil Conservation Service, and the Resettlement Administration, which changed its name to the Farm Security Administration in 1937 as part of the Department of Agriculture. From 1935 to 1937, the Interdepartmental Rio Grande Advisory Committee discussed shared land use and fair land allocation for the Pueblos and Hispanics.¹⁸⁰

On May 19, 1936, the Interdepartmental Rio Grande Advisory Committee divided 460,000 acres somewhat equally among Pueblo and Hispanic peoples, providing access to each group for certain purchases. The Soil Conservation Service developed management plans for the land. The idea was to help all rural residents, not just the Pueblos, as Commissioner Collier had

¹⁷⁸ John A. Adams, Secretary, Interdepartmental Rio Grande Committee, to Walter V. Woelke, Chairman, Rio Grande Committee, February 12, 1938, RG 75, Box 12, Folder General Correspondence 1/1/38-3/31/38, Interdepartmental Rio Grande Board, Correspondence, Reports, and Other Reports, 1937-1942, National Archives and Records Administration, Denver, Colorado (hereafter cited as IRGB reports).

¹⁷⁹ Dinwoodie, "Indians, Hispanos, and Land Reform," 303-304.

¹⁸⁰ Department of Agriculture and Department of the Interior, Interdepartmental Rio Grande Committee, "Report and Recommendations," Washington D.C., October 1937, RG 75, Box 1, Folder 10/31, IRGB reports.

originally envisioned.¹⁸¹ Legal custody of the land remained in the Resettlement Administration, which worked to fix rural isolation during the New Deal. Small stock farmers in the West were not pleased. They complained that they were being forced from their homes by the Pueblos.¹⁸²

The Interdepartmental Rio Grande Advisory Committee was interested in Pueblo prosperity as long as it aligned with what the committee deemed fit for the health of the land. On November 30, 1937, the committee proposed a federal land use adjustment program for the Upper Rio Grande Watershed. The purpose of the program was to protect and restore the soil and water and to help the rural residents of the area, both Pueblo and non-Pueblo. On September 30, 1937, the committee purchased 701,100 acres of depleted and eroded grazing lands for the Pueblos as part of the program to rehabilitate Indian populations, as outlined in the National Industrial Recovery and Emergency Relief Appropriations Act of 1935. According to the federal government, the Pueblos would not be able to decide the number of animals that could graze on the depleted and eroded grazing lands.¹⁸³

The Interdepartmental Rio Grande Advisory Committee did not give rural residents the opportunity for ownership, or use of land, when it judged that the environment, and the resource needs of rural residents, could be better provided for under federal ownership. For instance, on January 19, 1937, the committee transferred 8,000 acres of forest near the Santa Fe National Forest, known as the Galbadon Grant, to the Forest Service. The committee believed that the

¹⁸¹ Interdepartmental Rio Grande Committee, "Recommendation of Transfer of Jurisdiction, Allocations of Use-Rights and Administration of Resettlement Administration's Indian Land-Purchase Projects in New Mexico," Nov. 30, 1937, RG 75, Box 1, Folder 10/31, IRGB reports; Dinwoodie, "Indians, Hispanos, and Land Reform," 304.

¹⁸² Dinwoodie, "Indians, Hispanos, and Land Reform," 304.

¹⁸³ Interdepartmental Rio Grande Committee, "Recommendation of Transfer of Jurisdiction, Allocations of Use-Rights and Administration of Resettlement Administration's Indian Land-Purchase Projects in New Mexico," Nov. 30, 1937, RG 75, Folder 10/31, IRGB reports.

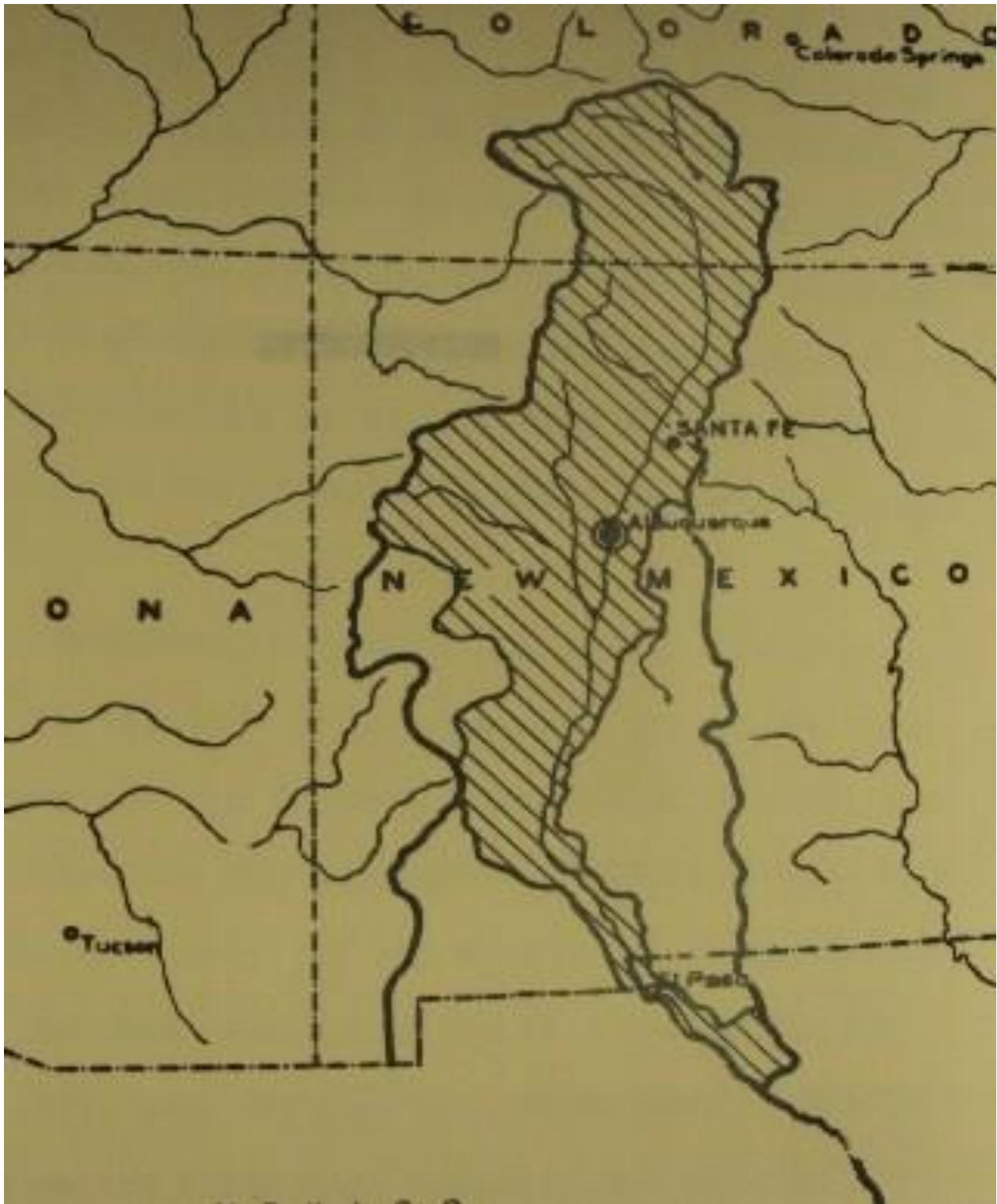


Figure 2.2 The Upper Rio Grande Watershed

(Department of Agriculture and Department of the Interior, Interdepartmental Rio Grande Committee, "Report and Recommendations," Washington D.C., October 1937, RG 75, Box 1, Folder 10/31, IRGB reports.)

Forest Service could protect the water and timber, while regulating the water for the benefit of the Tesuque Pueblos and non-Pueblos of the area.¹⁸⁴

The Forest Service was to only allow the Tesuque Pueblos the use of dead timber and downed timber for firewood, as well as standing green timber for other projects.¹⁸⁵ The first priority for the committee was the protection of the land; the second priority was Pueblo usage. The committee did not give the Pueblos a choice in what timber they could use.

The federal government had several branches involved in conservation of the range, to the chagrin of the BIA, to the detriment of Pueblo control of their range land, and to the disappointment of non-Pueblo stockmen. The Grazing Service worked to grant grazing rights to both Pueblos and non-Pueblos in Grazing District Number Seven in northwest New Mexico.¹⁸⁶ The non-Pueblo stockmen of the area were concerned that there were different rules for the new grazing district, contrary to those of the Taylor Grazing Act. The stockmen believed that the federal government gave the Navajos, and the Pueblos, special privileges, when the point of the Taylor Grazing Act, according to the non-Indian stockmen, was to stabilize the range, not help local tribes.¹⁸⁷

¹⁸⁴ Memorandum of Understanding between the Resettlement Administration and the US Forest Service, Department of Agriculture, and the Bureau of Indian Affairs, Department of the Interior, Galbadon Grant, RG 75, Box 1, Folder 310.2, Galbadon Grant, United Pueblo Agency General Superintendent Decimal Files, 1922-1955, National Archives and Records Administration, Denver, Colorado (hereafter cited as UPA files).

¹⁸⁵ Vivian A. Brophy, Special Attorney for the Pueblos, to E.R. Smith, District Manager, Soil Conservation Service, October 13, 1936, RG 75, Box 1, Folder 310.2, UPA files.

¹⁸⁶ H.W. Naylor, Regional Grazer, to Mr. Hartman, San Juan County Wool Growers Association, January 1940, RG 75, Box 347, Folder 301.13, Grazing District 7, UPA files.

¹⁸⁷ M.K. McCarty, Jr. Range Examiner, to Ted Formhals, BIA Field Service, Feb. 5, 1940, RG 75, Box 347, Folder 301.13, UPA files.

Another infringement of Pueblo sovereignty occurred when the Grazing Service Advisory Board investigated and judged the legitimacy of Pueblo land use. The Pueblos and non-Pueblos had sometimes grazed their stock on common land over the years. The Grazing Service Advisory Board moved to stop common grazing, but Congress had not charged the Grazing Service with the responsibility of judging Indian affairs.¹⁸⁸ The Grazing Service held that the Pueblos needed to graze cattle and sheep, at least during 1940 and 1941, on their own land, based on the premise that the Grazing Service could not legalize the use of non-Pueblo land by Pueblos.¹⁸⁹ Ted Formhals of the BIA office in Albuquerque disagreed with the Grazing Service, because only he was to judge Indian land. Furthermore, argued Formhals, if Pueblos could not use non-Pueblo land, then the Grazing Service should not be able to approve non-Pueblo use of Pueblo land.¹⁹⁰ The BIA was supposed to be the sole judge of Indian land disputes.

S.D. Aberle, the United Pueblo Agency superintendent, was furious that the Grazing Service Advisory Board did not approve the applications of nine Puertocito Indians for allotments. His argument was that the Grazing Service Advisory Board--established under the Taylor Grazing Act of 1934 to advise the regional grazing manager and the secretary of the interior on matters of the Grazing District--had no business judging allotment applications. The applications were made under the Dawes Act of 1887. Special Allotting Agent William Williams received the applications in 1912, but he never filed them in the land office. The Pueblos went ahead and improved the land, believing they owned the land. Thus, the Pueblos were on the land before the establishment of Grazing District Seven on September 1, 1939, and the Grazing

¹⁸⁸ Ted M. Formhals, to S.D. Aberle, Superintendent United Pueblo Agency, April 10, 1941, RG 75, Box 347, Folder 301.13, UPA files.

¹⁸⁹ McCarty to Formhals, April 21, 1941, RG 75, Box 347, Folder 301.13, UPA files.

¹⁹⁰ Formhals to Aberle, April 22, 1941, RG 75, Box 347, Folder 301.13, UPA files.

Service had no jurisdiction to disallow the allotments.¹⁹¹ Aberle was fighting for the BIA's role in rulings on Indian affairs and the BIA's function as the federal department to enforce the federal-Pueblo trust relationship. The Pueblos' ability to manage their own land was not the main concern of Grazing Service Advisory Board and the BIA.

H.W. Naylor, the regional grazer manager, responded to Superintendent Aberle. Naylor contended that the Grazing Service Advisory Board judged that the Puertocito range could hold only 595 sheep, even though the Puertocitos had applied for 1,402 head, thus it did not approve the eight applications from the Puertocitos. The Grazing Service asked the Interior Department for permission to create a six-year grazing improvement plan for the district. The plan was for the Grazing Service to eventually allow Pueblo requests for more stock once the range was in shape for more sheep.¹⁹² Naylor argued that the Grazing Service was not unsympathetic to the needs of the Pueblos in question, but was more concerned about the health of the range. It is not clear whether Aberle was primarily concerned about keeping his power to make decisions for Pueblos, or whether he was more interested in Pueblo stock. Historians, especially Donald Parman, have established that the federal government, including the BIA, did not understand the cultural significance of keeping sheep on the range, even malnourished sheep, since it meant subsistence that did not involve market forces.¹⁹³

Eventually, the Grazing Service left the Interdepartmental Rio Grande Advisory Committee, due, in part, to opposition from the BIA. World War II marked the end of the committee, which had changed its name to the Rio Grande Board in 1938. The federal

¹⁹¹ Aberle to H.W. Naylor, District 7 Grazing Manager, April 23, 1941, RG 75, Box 347, File 301.13, UPA files.

¹⁹² Naylor to Aberle, May 5, 1941, RG 75, Box 347, File 301.13, UPA files.

¹⁹³ Donald Parman, *The Navajos and the New Deal* (New Haven: Yale University Press, 1976), 63.

government decided the projects in New Mexico were not worth financing due to the high cost of war. The Grazing Service also left the committee, because the Grazing Service had a disagreement with the rest of the committee members on the Rio Pecos project, which provided land use for Hispanics at the Zia and Jemez Pueblos. The BIA opposed the Grazing Service on the Rio Pecos project, believing that the Grazing Service should not have a say in Indian affairs.¹⁹⁴ Overall, the Pueblos saw the Interdepartmental Rio Grande Advisory Committee place recognition of Pueblos' ability to manage their own land a clear second to what the committee trumpeted as proper land use practices.

Ultimately, the Pueblos persevered in the face of three foreign governments—Spain, Mexico, and the United States—that each refused to recognize the Pueblos' ability to govern themselves and their right to their land without interference from foreigners. Once the United States created the territory of New Mexico, the federal government briefly recognized the Pueblos' land rights, but only because the Supreme Court did not recognize the Pueblos as Indians, opening the land to all types of squatters and settlers. Eventually the federal government attempted to give land back to the Pueblos, as well as money, to compensate for lost land to non-Indian settlers. The Pueblo Lands Board came up short in its assigned job, thus Congress investigated the board's actions, but ultimately did not award the land or money that the appraisers judged to be fair.

The Interdepartmental Rio Grande Advisory Committee, based upon Commissioner of Indian Affairs John Collier's Lands Program, held some promise to provide more land for the Pueblos, but disagreements on the federal level, along with protests from non-Pueblo ranchers, led to less land allocation for the Pueblos. Despite the lack of federal recognition of Isleta

¹⁹⁴ Dinwoodie, "Indians, Hispanos, and Land Reform," 304-306.

sovereignty, the Isletas signed grazing contracts on their terms, to the dismay of federal officials. Native peoples in New Mexico, overall, continued to push for more land and for federal recognition of their sovereignty.

The Isletas perseverance served them well, because the next challenge for the Isletas to overcome came from the city of Albuquerque, which released sewage waste into the Rio Grande. At first the sewage was treated, but the growing population of Albuquerque during the twentieth century pressured the water treatment system to a point that it could not treat all the sewage. Untreated sewage thus floated down the Rio Grande to Isleta Pueblo. Albuquerque's pollution set the stage for the next era of Isleta history, when the tribe would take primary control (primacy) of writing water treatment standards. While some thought the Isletas were the model of environmental self-determination in the 1990s, the EPA did not truly recognize the Isletas' right to self-rule.

Chapter 3: The Isleta Pueblos Write Water Quality Standards

The city of Albuquerque, New Mexico released millions of gallons of wastewater every day toward the Isleta Pueblo during the twentieth century, with 55 million gallons of wastewater being released by 1991. Because of the high concentration of pollution in the river, the Isletas could not grow squash and corn, eat fish, or celebrate traditional religious practices, which they had been doing for centuries. The Isletas' religious practices were, and still are, a major unifying force for them.¹⁹⁵ Isleta Governor Alex Lucero stated in 1991 that water “is more important to the people of Isleta for religious and traditional reasons. It is vital for our ceremonies and our religion. It is the essence of life.”¹⁹⁶

Chapter three argues that in late 1992 the EPA approved the Isletas' water quality standards for the Rio Grande River, not because the EPA was an enlightened government agency that recognized tribal sovereignty, but because the EPA was interpreting the guidelines of the Clean Water Act as the EPA saw fit. The Isletas had to fulfill the EPA's guidelines, and therefore, the Isletas could not write water quality standards as they wished. Fortunately for the Isletas, they agreed with the EPA's water quality standards.

Albuquerque tried to treat its sewage, but its efforts were not enough to protect the Isletas. Albuquerque installed its first sewers in 1891, which carried sewage into the Rio Grande River. The city government soon realized it was affecting people downstream with its waste and

¹⁹⁵ US Census Bureau, “State and County Quick Facts: Albuquerque, New Mexico,” accessed November 10, 2011, <http://quickfacts.census.gov/qfd/states/35/3502000.html>; Jason Lenderman, “A Tiny Tribe Wins Big on Clean Water,” *High Country News*, February 2, 1998; Vernia J. Williamson, Pueblo of Isleta tribal member, to Alex Lucero, Governor of the Pueblo of Isleta, August 20, 1991. (In author's possession)

¹⁹⁶ Pueblo Hearing on Water Quality Standards, Pueblo of Isleta Tribal Offices, Bernalillo, New Mexico, August 7, 1991. (Testimony of Isleta Pueblo Governor Alex Lucero).

began chemically treating the sewage in 1907. The first sewage treatment plant was located at 2nd and Anderson, and the first water reclamation plant was located at 2nd and Rio Bravo in Albuquerque, but ultimately the sewage treatment plant did not work, and the river could not handle the load of waste. The Albuquerque Bernalillo County Water Utility Authority claimed that since the 1970s it was concerned with protecting the environment down stream. It stated that strict regulations were developed, and it tried to recover methane gas from waste to produce electricity. The utility agency also recovered wastewater for non-drinking water uses such as irrigation of golf courses.¹⁹⁷ The city's recycling processes did not do enough to protect the Isletas from the pollution.

Sewage in the Rio Grande was, and still is, particularly disastrous for Isleta land, because of the high water table. The high water table allows pollution from the river to stretch into adjacent farm lands, damaging crops. A soils report produced in the 1960s by the federal government stated that 3,616 acres, of the Isletas' 6,183 irrigated acres, had high salinity and poor drainage. In addition, the water table was between three to five feet the majority of the time, and occasionally as low as thirty inches.¹⁹⁸ Thus, the pollution would not just seep into farm land, but would also fail to drain from farm land.

In 1972, Congress called on the EPA through the Federal Water Pollution Control Act (known as the Clean Water Act) to regulate the cleanliness of water within the borders of the US. The EPA specifically used Section 402 to set effluent (sewage discharge) limits on an industry-

¹⁹⁷ Albuquerque Bernalillo County Water Utility Authority, "A Brief History of Sewage Treatment in Albuquerque," Tuesday, December 23, 2008, accessed November 10, 2011, <http://www.abcwua.org/content/view/196/480/>.

¹⁹⁸ Bureau of Indian Affairs, "Soils Report for Six Pueblos in the Middle Rio Grande Conservancy District," RG 75, United Pueblos Agency, General Correspondence, 1936-1977, Box 38, Folder 1, Soil Report, National Archives and Administration District, Denver, Colorado.

wide basis and on for water-quality standards. Companies that wanted to discharge pollutants had to obtain a National Pollutant Discharge Elimination System (NPDES) permit. The Clean Water Act allowed the EPA to give states the power to issue NPDES permits, but the EPA still had oversight responsibilities.¹⁹⁹ The EPA reduced pollutant discharges into waterways, financed municipal wastewater treatment facilities, and limited polluted runoff in streams and rivers. Early efforts focused on “point source” facilities, such as sewage treatment plants and industrial facilities. In more recent years, the EPA paid attention to runoff from streets, construction sites, and farms.²⁰⁰ After 1972, the Isletas stood a chance to see clean water in the Rio Grande.

The 1987 amendment to the Clean Water Act allowed the EPA to award Indian tribes “treatment as a state” (TAS) status for the purpose of controlling water pollution. Treatment as a state status meant that tribes could write water quality standards for water on their land with the oversight of the EPA. The Isletas took advantage of the opportunity and created water quality standards for the city of Albuquerque that were more stringent than those of New Mexico and the EPA, in regard to a host of toxins, such as mercury.²⁰¹ The EPA revised Albuquerque’s NPDES permit in 1992 to reflect the Isletas’ more stringent water pollution standards. On October 12, 1992, while revisions were in the process of completion, the EPA awarded TAS status to the Isletas. The EPA delayed Albuquerque’s permit until it approved the Isletas’ water quality

¹⁹⁹ Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 et seq. (1972); US EPA, “National Pollutant Discharge Elimination System (NPDES): Clean Water Act,” August 12, 2011, accessed October 17, 2011, http://cfpub.epa.gov/npdes/cwa.cfm?program_id=45.

²⁰⁰ US EPA, “Watershed Academy Web: Introduction to the Clean Water Act,” September 12, 2008, accessed October 17, 2011, <http://www.epa.gov/owow/watershed/wacademy/acad2000/cwa/>.

²⁰¹ Pueblo of Isleta, “Pueblo of Isleta: Surface Water Quality Standards,” Amended March 18, 2002, Tribal Resolution 02-064 (1992), 1; Clean Water Act, 33 U.S.C. §1377, (e) (1987); Lenderman, “A Tiny Tribe Wins Big on Clean Water.”

standards on December 24, 1992. Then the EPA prepared a NPDES permit for Albuquerque that reflected the Isletas' water quality standards for the Rio Grande and New Mexico's water quality standards for the Rio Grande. Albuquerque unsuccessfully sued the EPA in response to the new standards in *City of Albuquerque v. Browner* (1993).²⁰² Ultimately, the EPA recognized limited Isleta self-determination to write water quality standards in line with the amendment to the Clean Water Act. The EPA did not actually recognize the Isletas sovereignty, though, since they could not act on their own accord, and could not impose water quality standards as they wished.

The federal government was not simply willing to recognize the Isletas water quality standards without the tribe following EPA regulations. According to the Clean Water Act, a tribe had to prove its worthiness in order for the EPA to consider the tribe to be a state, and thus set water quality standards, equal or more stringent, than those of the EPA. First, the tribe had to request a letter from the secretary of the interior certifying that the federal government recognized the tribe. Then, the tribe issued a statement that the current tribal governing body actually governed the tribe. Third, the tribe had to illustrate that it had the bureaucratic authority structure to regulate water quality. Fourth, the tribe was required to prove that it had the ability to administer a water quality program by using professional environmental officers. Lastly, the EPA could request additional documentation from the tribe to prove the required steps were completed. Once the regional EPA administrator received the documentation, he notified the federal government, and regional agencies, of the application. The regional EPA administrator then received comments from the public for thirty days on the tribe's assertion of authority. If any entity challenged the tribe, the EPA administrator and the secretary of the interior met to

²⁰² *City of Albuquerque v. Browner*, 865 F. Supp. 733 (1993).

determine if the tribe was ready for authority under the Clean Water Act.²⁰³ Tribes essentially had to, and still have to, illustrate to the EPA that they deserve recognition to write water quality standards, which in itself means that the EPA does not recognize tribal self-determination. The Isleta government's willingness to submit the paperwork to pass the steps to get permission from the EPA to write water quality standards for the Rio Grande illustrates the Isletas' incredible persistence in the face of continued federal refusal to recognize the Isletas' ability to regulate their land and water.

Tribes could not write water quality standards based on tribal standards and evidence. Once the EPA approved a tribe for treatment as a state status, the tribe could submit water quality standards to the EPA for approval. The tribal standards were based on the EPA's effluent limitations guidelines and water quality standards. Effluent limitation guidelines were uniform scientific standards, promulgated by the EPA, restricting the quantities, rates, and concentrations of specific substances discharged into water. The tribal water quality standards were not based on pollution technologies, but detailed the condition of a waterway. The tribal water quality standards also supplemented the technology-based standards, so that more numerous sources could be regulated. Furthermore, the tribal water quality standards also had three elements: one or more uses (such as a recreation area), pollutant levels, and anti-degradation provisions.²⁰⁴ The EPA provided states and tribes substantial guidance when they were drafting water quality standards. Section 304 of the Clean Water Act required the EPA to use the latest science and provide its data to states and tribes, which could use the most scientifically modern data to write

²⁰³ *City of Albuquerque*, 865 F. Supp. at 738; Water Quality Handbook, Requirements for Indian Tribes to Qualify for the WQS Program, 40 C.F.R. §131.8.

²⁰⁴ *City of Albuquerque*, 865 F. Supp. at 738; Water Quality Handbook, Requirements for Indian Tribes to Qualify for the WQS Program, 40 C.F.R. §131.8; Clean Water Act, 33 U.S.C. §1311, 1314 (1987).

their standards. Before adopting a standard, the states or tribes had to provide notice and a public hearing. Once tribes or states wrote their new water standards, the EPA reviewed the standards. If the EPA found tribal standards to be inconsistent with EPA standards, the EPA had ninety days to notify the state or tribe and provide specific areas to correct. If the state or tribe did not respond with a correct standard, then the EPA had to issue a definitive standard within ninety days of the proposal.²⁰⁵ Thus, the EPA only recognized the Isletas' ability to write water quality standards as defined by the EPA.

The Isletas authored water quality standards as stringent as those of the EPA. Isleta Governor Alex Lucero stated that the cleanliness of the Rio Grande was extremely important to the Isletas, thus their standards were strict. In addition, other tribes have also shown that they want strict water quality standards. In a similar case in the late 1990s, the Penobscots authored water quality standards for the Penobscot River more stringent than those of the EPA. The EPA, however, concluded in the Penobscot case that the science did not warrant the stronger standards, and therefore, the EPA did not agree to the Penobscot water quality standards for the Penobscot River. The Penobscots still had to follow federal water quality standards, just like the Isletas.

In accordance with the Clean Water Act, the Isletas published notice of their water quality standards in the *Albuquerque Journal*, and the Isletas invited representatives of Albuquerque to a public hearing on August 7, 1991. All comments submitted to the tribe during the comment period were passed on to the EPA administrator for the region. Furthermore, the

²⁰⁵ *City of Albuquerque*, 865 F. Supp. at 738-739; Water Quality Handbook, Requirements for Indian Tribes to Qualify for the WQS Program, 40 C.F.R. §131.10; Clean Water Act, 33 U.S.C. §1311, 1313, 1314 (1987).

EPA administrator required sixty days to approve state or tribal standards.²⁰⁶ The Isletas complied with all the EPA requirements for water quality standards.

Ultimately, Albuquerque did not agree to the Isletas' water quality standards, because the city judged that the standards were too stringent. Albuquerque did not blame the Isletas for writing such tough standards. Instead, the city sued the EPA for *allowing* the Isletas to write them. The case became *City of Albuquerque v. Browner* (1993). After Albuquerque, the EPA, and the Isletas signed the NPDES permit in 1992, Albuquerque filed a complaint in federal district court on January 25, 1993. Albuquerque followed up on February 2, 1993, asking the court for a temporary restraining order and a preliminary injunction, but Judge Edwin L. Mechem denied the request. On March 16, 1993, Albuquerque amended its complaints, and it renewed its motion for a preliminary injunction on July 23, 1993. Albuquerque alleged that the EPA failed to follow procedure during the approval of new standards, misinterpreted two areas of the Clean Water Act, and approved water quality standards for the Rio Grande that were unconstitutional. Albuquerque also charged that the EPA failed to include a mechanism to resolve "unreasonable consequences" resulting from the new strict standards that were applied by two separate entities, the state and the tribe. In addition, Albuquerque argued that the EPA violated the Clean Water Act by failing to ensure the Isleta standards were stringent enough to protect the Rio Grande. Lastly, Albuquerque claimed that the Isletas' standards had no basis in science. The district court, however, found the EPA to be clear of any incorrect application of law.²⁰⁷

²⁰⁶ *City of Albuquerque*, 865 F. Supp. at 739; Pueblo Hearing on Water Quality Standards, Pueblo of Isleta Tribal Offices, Bernalillo, New Mexico, August 7, 1991.

²⁰⁷ *Ibid.*

Further illustrating that the EPA did not recognize the Isletas' ability to write water quality standards, the district court in *Albuquerque* referenced *Arkansas v. Oklahoma* (1992), a similar case involving the EPA. In *Arkansas* the Supreme Court found that the EPA could require compliance greater than allowed by Congress. *Arkansas* was a similar case to *Albuquerque* since upstream and downstream water quality standards had to match the Clean Water Act. The district court understood the Clean Water Act applied equally to upstream pollution dischargers, such as Albuquerque, and a downstream tribe, thus the EPA properly recognized the Isletas' authority to develop water quality standards more stringent than the agency's, since Albuquerque was also subject to those standards.²⁰⁸ But the EPA, not the Isletas, were ultimately responsible for the Isletas' water quality standards.

Each of Albuquerque's complaints against the EPA further illustrated that the EPA did not recognize the Isletas' ability to write water quality standards. Albuquerque claimed that the Isletas' standards would lead to unreasonable consequences for the city, but the district court found that the EPA met the requirements of the Clean Water Act when allowing the standards to stand. For human contact with treated water, the court judged that the Isleta standards had to just "resemble" a fishable/swimmable standard, not the drinkable water quality standard Albuquerque argued it required. Humans needed to ingest a large volume of water to force a drinkable water quality standard.²⁰⁹ Furthermore, the Safe Drinking Water Act covered drinking water provisions and the Isletas were not drinking water from the Rio Grande.

Further illustrating that the EPA had the power to accept and reject standards, the district court did not accept Albuquerque's argument that by allowing the new water quality standards,

²⁰⁸ *City of Albuquerque*, 865 F. Supp. at 740; *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

²⁰⁹ *City of Albuquerque*, 865 F. Supp. at 740.

the EPA had violated the Constitution's Establishment Clause. Albuquerque charged that by allowing stringent water quality standards the EPA had upheld the Isletas' religious ceremonies as more important than Albuquerque's finances. It was clear to the court, however, that the EPA approved the new standards, because they met the requirements of the Clean Water Act. The court also decided that the new regulations were not unconstitutionally vague, because once the EPA released the NPDES permit for publication, Albuquerque knew exactly what standards to follow.²¹⁰

Albuquerque also claimed that the Isleta water quality standards were unattainable. The district court judged that the EPA lacked the authority to reject harsh standards on the grounds that they were financially difficult for the city to follow. The EPA had only the authority to declare whether the water quality standards were stringent enough to fulfill the Clean Water Act. The Isletas were successfully able to document the reasons behind the new standards, but Albuquerque still argued that during low-flow periods, the standards should be lowered. The Isletas countered Albuquerque's statement, replying that during low-flow periods, tribal members used the Rio Grande as often as during high-flow periods,²¹¹ because religious ceremonies were not based on flow rates.²¹² Overall, the court did not reference the Isletas' sovereignty, or their ability to write water quality standards, but the implications were clear: the EPA, alone, was responsible for the water quality standards authored by the Isletas.

The reality that the EPA was responsible for the Isletas' water quality standards was driven home upon Albuquerque's appeal to the United States Court of Appeals for the Tenth

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Vernia J. Williamson, Pueblo of Isleta tribal member, to Alex Lucero, Governor of the Pueblo of Isleta, August 20, 1991. (In author's possession)

District, which covered New Mexico, Kansas, Oklahoma, Colorado, Utah and Wyoming.

Although Albuquerque, the Isletas, New Mexico, and the EPA agreed to a new four-year NPDES permit on April 15, 1994, Albuquerque still appealed the summary judgment granted in favor of the EPA by the district court. Albuquerque believed that the new NPDES permit made the district court's decision moot. The circuit court held that the case was not moot, because a "live" issue was still being decided. Under the new settlement, the EPA had not withdrawn its approval of the Isleta water quality standards, thus a "live" controversy still existed, since the parties still disagreed. In addition, a decision of moot could not be applied, because it was obvious that Albuquerque hoped to have the district court's decision overturned. The district court declared that a court decision becomes moot by happenstance, not through direct actions by the parties in question. Albuquerque consciously signed the new NPDES permit. Furthermore, if the appeals court did find the case moot, Albuquerque might come back and file suit against the EPA again, which was also not the point of a case being decided as moot. The courts were not necessarily protecting tribal self-determination, as much as they were essentially upholding the EPA's right to interpret the Clean Water Act²¹³

Albuquerque also argued that the EPA could not judge the Isletas as a state, but that was problematic in light of *Chevron USA Inc. v. Natural Resources Council* (1984). In *Chevron* the Supreme Court ruled that the EPA was correct in allowing states to issue permits allowing corporations to fix just one air polluting source, as long as the total air pollution from the factory did not increase. Federal law allowed the EPA to make a judgment based on its science.²¹⁴ In the case of the Clean Water Act, the EPA could interpret the act to fulfill its mission of protecting

²¹³ City of Albuquerque v. Browner, 97 F.3d at 415 (1996).

²¹⁴ Chevron U.S.A. Inc. v. Natural Resource Defense Council, 467 U.S. 837 (1984).

the environment and public health. The court reasoned that Congress desired for the states to have a major role in keeping waterways clean, and the 1987 amendment to the Clean Water Act clearly allowed the EPA to judge tribes as states.²¹⁵

The appeals court went a step further than the district court and made a statement about tribal self-determination. The appeals court stated that while Congress did not include tribes specifically in the Clean Water Act, Congress's oversight did not mean that tribes could not exercise limited self-determination over their land by creating water quality standards more stringent than state and federal standards. The appeals court also reasoned that "under the statutory and regulatory scheme, tribes are not applying, or enforcing their water quality standards beyond reservation boundaries."²¹⁶ Thus, the EPA could recognize the Isletas' water quality standards and the Isletas would be allowed to administer those standards within the boundaries of their land.

The appeals court again upheld the EPA's role as an administrator for the Isletas when Albuquerque unsuccessfully argued that the EPA made informal rules in regard to Isleta water quality standards, in violation of the Administrative Procedures Act. Albuquerque contended that the EPA did not provide a basis and purpose for Isleta actions, or a review period for public notice and comment, even though Congress intended for states and tribes to initiate public notices and comment periods. The appeals court reference *National Resources Defense Council v. US EPA* (1993), where the US Appeals Court for the Fourth Circuit found that Congress clearly intended for the EPA to have a limited role in establishment of water quality standards, with states and tribes holding primary roles, but the Clean Water Act gave the EPA sole

²¹⁵ *City of Albuquerque v. Browner*, 97 F.3d 415 (1996).

²¹⁶ *City of Albuquerque*, 97 F.3d at 420.

judgment of federal standards. Congress also provided the EPA sixty days for approval, and ninety days for disapproval, of water quality standards proposed by states and tribes. There was no way Congress could have expected the EPA to conduct notice and comment periods within sixty to ninety days. Congress intended for the EPA to have a limited role. Even New Mexico officials agreed with Congress's approach, stating:

Not only would the expansive EPA review of tribal water quality standards sought by the City duplicate the lengthy process already undertaken by the tribe itself in adopting the standards, it is doubly unnecessary because of the notice, comment, and hearing process entailed in issuance of NPDES permits. As it was, there was full opportunity for notice, comment and hearing both for adoption of the Isleta standards (conducted by the Pueblo) and for issuance of the City's NPDES permit (conducted by the EPA). To require yet another detailed notice, comment and hearing process by the EPA would be to inject more bureaucracy, delay and expense into an already lengthy process that allows ample opportunity for public comment.²¹⁷

Thus, even New Mexico officials did not want to get in the way of the direct federal-tribal trust relationship, thus upholding the federal government's ability to issue the NPDES permit on its terms and without further notice. Again, the appeals court upheld the EPA's ability to recognize the Isletas' water quality standards.

The appeals court also upheld the EPA's power to approve the Isleta scientific rationale which, according to Albuquerque, made the water quality standards difficult to follow. Albuquerque argued that the new standards were unattainable and lacked scientific grounds, yet

²¹⁷ *City of Albuquerque*, 97 F.3d at 425; Administrative Procedure Act, 5 U.S.C. § 553 (1966); Clean Water Act, 33 U.S.C. §1313 (1987); *National Resources Defense Council v. EPA*, 16 F.3d (1993).

sections 1341 and 1342 of the Clean Water Act stated that the EPA could allow a state or tribe to uphold a more stringent standard than the EPA itself would follow on the federal level. The Isletas' standards were based on probable drought conditions, the need to protect the elderly and young, and primary contact during ceremonial use involving incidental ingestion of water. The appeals court agreed with the district court that Albuquerque's claim that tribal usage fell under the Safe Drinking Water Act seemed "farfetched." Instead, the court held that the Isletas' usage resembled a fishable/swimmable standard.²¹⁸ Once again, the appeals court judged the EPA's approval of the Isletas' water quality standards to be legal.

The appeals court judged the EPA's arbitration process for Isleta water quality standards to be correct, as well. Albuquerque claimed the dispute resolution process installed by EPA was wrong, contending there should have been a way for a third party to initiate the process, not just the state or tribe. The appeals court found that under the Clean Water Act, the EPA's choice to use mediation and non-binding arbitration was within the scope of the law, but the state and the tribe could certainly invite third parties into the process.²¹⁹ The arbitration provision allowed the Isletas more possibilities for support of the water quality standards and further supported the EPA's power over the decision making process.

The appeals court decided that the EPA could only judge Isleta water quality standards within secular goals, but that the Isletas could have religious reasons for their standards, as long as they worked within the EPA's secular goals, once again illustrating that the Isletas were beholden to the EPA's standards. Albuquerque argued that the Establishment Clause of the Constitution was infringed upon by the EPA, because the Isletas defined primary contact

²¹⁸ *City of Albuquerque*, 97 F.3d at 427; Clean Water Act, 33 U.S.C § 1341 and 1342 (1987).

²¹⁹ *City of Albuquerque*, 97 F.3d at 427; Clean Water Act, 33 U.S.C. §1377 (1987).

ceremonial use as religious or traditional. The EPA was interested only in the secular goal; the Isletas use of water for ceremonies was irrelevant. The EPA was not advancing religion, just the goals of the Clean Water Act. Furthermore, according to the appeals court, the EPA's approval of the Isletas' strict standards was not based on any particular religious belief, although the EPA followed the goals of the American Indian Religious Freedom Act, which stated that "it shall be the policy of the United States to protect and preserve for American Indians their inherent rights of freedom to believe, express, and exercise the traditional religions of American Indians."²²⁰

Finally, the appeals court rejected Albuquerque's argument that the standards of the Isletas were vague, and therefore the EPA deprived Albuquerque of due process. Albuquerque complained about the usage of phrases such as "impart unpalatable flavor to fish" and "nutrients produce objectionable algal densities." Under the Clean Water Act, the EPA could allow standards to be defined by narrative descriptions. In addition, Albuquerque argued that it was not notified of the changes in the NPDES, but the city had been notified of the changes, thus the appeals court could not agree with the city.²²¹ Of course, the Isletas could not truly write water quality standards any way they wished. The standards still had to make sense to the EPA and match the EPA's requirements. Ultimately, the EPA's science and the Isletas' science meshed.

As more evidence that the EPA aided the Isletas in their efforts to keep the Rio Grande clean, in 2007 the EPA awarded the Isletas \$110,000 to develop and manage their environmental

²²⁰ *City of Albuquerque*, 97 F. 3d at 428.

²²¹ *City of Albuquerque*, 97 F. 3d at 429; Water Quality Handbook. Requirements for Indian Tribes to Qualify for WQS, 40 C.F.R. §131.11.

programs. At the time, the tribe planned to train staff, develop an outreach program on environmental issues, and develop a dredging program with the grant.²²²

The case of the Wall Colmonoy Facility is another example of how the Isletas tried to control environmental pollution, yet had to be approved by the EPA. The Pueblos created the Pueblo Office of Environmental Protection in September 1991 through a Superfund Memorandum of Agreement with nineteen Pueblo governors and EPA Region VI. The Pueblo Office of Environmental Protection was part of the All Indian Pueblo Council, which represented nineteen Pueblo communities, as allowed by each of the Pueblo governors and tribal councils. In 1993, the Pueblo Office of Environmental Protection helped the Isletas with pollution removal under Superfund, yet the EPA was also under control.²²³

The EPA encouraged the Isletas' negotiations with the Wall Colmonoy Facility under CERCLA guidelines, thus forcing the Isletas to negotiate for the amount of pollution present in their soil. The Wall Colmonoy Facility, located on the Isletas' lands, was a metal plating facility that contaminated the soil with chromium and nickel, both judged to be carcinogenic by the EPA. The Isletas negotiated with Wall Colmonoy soil standards of total chromium as 100 parts per million (ppm), total nickel as 200 ppm, and hexavalent chromium as 10 ppm. The toxic metal levels were well below what the facility owners offered, as well what was done at other facilities

²²² Dave Bary, "EPA Awards Over \$100,000 to the Pueblo of Isleta," US EPA, Dec. 14, 2007, accessed, Jan. 13, 2011, <http://yosemite.epa.gov/opa/admpress.nsf/0/83e5a8d514e5913b852573b100533956?OpenDocument>.

²²³ C.M. Sanchez, et. al. "The Pueblo Superfund Program-A Indian Perspective on Cultural Impacts and Environmental Equity under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)," (Albuquerque: All Indian Pueblo Council/Pueblo Office of Environmental Protection, 1993), 3-5.

around the country, but within the scope of CERCLA.²²⁴ Similar to the case of *City of Albuquerque*, the EPA allowed the Isletas to make a deal with Wall Colmonoy to release reduced toxins into the soil as outlined in CERCLA. The Isletas' experiences, however, were not unique to the entire Pueblo community.

The Acoma Pueblos set their own water quality standards in 1998 under provisions of the Clean Water Act. The Acoma Pueblo, which lies just southwest of Albuquerque, used the waters of the Rio San Jose and Acomita Lake for a variety of purposes, such as religious ceremonies.²²⁵ The Acomas did not face the same set of challenges that the Isletas faced from a major city, so the story is not as controversial, with no ensuing court case. Nevertheless, like the Isletas, the Acomas expanded their ability to protect their environment, but had to rely on the EPA to allow them to do so. The EPA awarded the Acomas \$107,244 in 2007 and \$291,769 in 2009 to support their water quality program. The Acomas said they would use the funds for sampling data for surface water quality assurance. The data would also be used in the watershed management program.²²⁶ The Acomas used the EPA standards as a guide for setting toxicity standards and the Acoma Water Office worked in accordance with the EPA and New Mexico.²²⁷ Similar to the

²²⁴ Ibid; "Chromium in Drinking Water," EPA, accessed March 31, 2015, <http://water.epa.gov/drink/info/chromium/index.cfm>; Pamela Walker McNamara, et al., "An Exposure and Risk Assessment for Nickel," Arthur D. Little Inc. and Acurex Corporation, EPA Contract 68-01-6017, April, 1981, 1.

²²⁵ Acoma Pueblo, *Pueblo of Acoma Water Quality Standards*, Acoma, New Mexico, 2005.

²²⁶ Dave Bary, "EPA Awards over \$100,000 to the Pueblo of Acoma to Support Water Pollution Control Program," News Releases from Region VI, EPA, December 11, 2007, accessed July 23, 2013, <http://yosemite.epa.gov/opa/admpress.nsf/e8f4ff7f7970934e8525735900400c2e/f31735a15e000d92852573ae005c6dd8!OpenDocument>; Albuquerque Journal, "EPA Awards \$291,769 to Acoma Pueblo," *Albuquerque Journal*, Oct. 14, 2009.

²²⁷ Acoma Pueblo, *Pueblo of Acoma Water Quality Standards*, Acoma, New Mexico, 2005.

Isletas' experience, the EPA recognized the Acoma water quality standards, but the Acomas had to write water quality standards in accord with those of the EPA.

In conclusion, the EPA supported the Isletas' water quality standards, because they followed the amended Clean Water Act, and the EPA continued to provide money to the tribe to help it regulate water quality in the Rio Grande River. The EPA recognized Isleta water quality standards since they were at minimum as stringent as those of the EPA, in accordance with the Clean Water Act. As in years past, the Isletas pushed the federal government to work with them on land and water issues, but ultimately the federal government only recognized limited tribal self-determination over their land.

Through the National Pollution Discharge Elimination System, the EPA brokered an agreement between Albuquerque and the Isletas. Albuquerque challenged the agreement, but the Supreme Court would not hear the case, and therefore, the city could not change the agreement. The federal courts found it constitutional for the EPA to approve the Isletas' water quality standards as long as the standards followed the provisions of the Clean Water Act and were in agreement with science supported by the EPA.

Summary of Section One

In Chapter Two and Chapter Three it is apparent that the Isletas exercised self-determination with the United States, pushing the federal government to recognize that they could make decisions about land and water. All the way back to the Pueblo revolt, the Pueblo people have not quietly followed the foreign government that has claimed control over their territory. The federal government has often pushed back, forcing the Pueblos to adhere to federal regulations, which do not recognize tribal sovereignty. But, the Pueblos have continued to make

decisions in the face of a federal government that has not been willing to recognize Pueblo self-determination to choose the Pueblo path of life.

Chapter 4: The Quapaw Tribe and Self-Determination before the EPA

The Quapaws' connection with the land goes back centuries and is intertwined in their traditional belief system. The central force of the universe for the early Quapaws was Wah'Kon-Tah, who was in all entities of the environment and who was part of man, therefore the Quapaws believed that they had a connection to the earth. The Quapaws thought that they were related to rocks, clouds, and animals, thus the Quapaws respected the animate and inanimate. The sun and the moon were especially important. The Quapaws had numerous deities that they believed moved everyday life, such as Ke-Jan-Qa, a small water tortoise, whose tail could not be lifted unless they wanted rain. The Quapaws also had sacred objects that held their manitou (sacred spirit), which the Quapaws blamed for good and bad fortunes. The Quapaws were appreciative of the environment and thanked Wah'Kon-Tah for a successful corn harvest.²²⁸ The early Quapaws passed their stories to each other teaching that their future was intertwined with the land. They were sovereign over the land, because they were the land. The federal government has not recognized the Quapaws' abilities to make decisions involving the land. Thus, the Bureau of Indian Affairs allowed large mineral leases on Quapaw land during much of the twentieth century, but did not recognize the Quapaws' will involving the mineral leases.

Even though the federal government did not recognize the Quapaws sovereignty, the Quapaws remained on their land, setting the ground for their eventual work with the EPA. The United States sponsored treaties in the nineteenth century to move the Quapaws to what is today extreme northeast Oklahoma. At the turn of the twentieth century, mining companies asked the

²²⁸ W. David Baird, *The Quapaw Indians: A History of the Downstream People* (Norman: University of Oklahoma Press, 1980), 17-19.

BIA to mine Quapaw land. The BIA did not recognize the Quapaws' sovereign right to issue mining contracts for their land. The BIA and the mining companies deemed the Quapaws inferior to "improve" the land and write the leases. The Quapaws received financial royalties from the mining operations, but often could not choose the royalty figure or what company could sign the lease. The Quapaws lack of control over their leases did not stop individual Quapaws from fighting for better leases.

Historians have not written about the Quapaws nearly as much as the Osages or Pueblos. There are few book-length studies of the Quapaws, with the best probably being W. David Baird's *The Quapaw Indians: A History of the Downstream People* from 1980. The purpose of the study was simply to tell the story of how the tribe handled challenges from non-Indians and endured. His general history of the tribe covered the early years of the Quapaws, but barely touched the twentieth century history of the tribe. He devoted little attention to the land issues of the tribe, but his work is still useful for understanding struggles of allotment and treaties during the nineteenth century. This dissertation improves on Baird's work by bringing the history of the Quapaws in to the modern era and focusing specifically on what could be considered the most tumultuous challenge to the tribe, the Tar Creek Superfund site.

The second important book about the Quapaws is Larry Johnson's *Tar Creek: A History of the Quapaw Indians, the World's Largest Lead and Zinc Discovery, and the Tar Creek Superfund Site* (2008). Johnson's thesis was that the Quapaws and the mining corporations lost the principle of cooperation and the unity of purpose through enlightened self interest during the nineteenth and twentieth century, and thus northeastern Oklahoma has suffered. Johnson blamed the breakdown of the family unit on the Quapaws, as well as in America, as one of the problems that have led to disaster for people. He also blamed the Quapaws for individually separating the

wealth of the ore mines, instead of keeping the wealth in common, thus individual Quapaws became poor once the ore ran out.²²⁹ This dissertation shows that it is incorrect to blame the tribe for individual leases when the secretary of the interior orchestrated those leases. Ultimately, ideas of sovereignty and self-government are absent from Johnson's book, although Johnson did illustrate the tribe's cultural persistence in the early years of European invasion, but only because it served as a way to blame the tribe for its later problems. In contrast, the following case study focuses on how the federal government did not recognize Quapaw sovereignty and how the federal government orchestrated land leases to their benefit and that of corporations.

To establish evidence for the federal-Indian trust relationship between the Quapaws and the United States, it is important to first detail the Quapaw's path to the self-determination era. The Quapaws slowly moved to mineral-rich land through a series of treaties with the federal government. Like numerous other tribes, the Quapaws handed over thousands of acres of land in exchange for protection from non-Indian encroachment, yet the federally sponsored treaties could not truly protect the Quapaws from non-Indian settlers.

Scholars trace Quapaw roots in America to the Ohio Valley on the banks of the Wabash River and Ohio River, settling in their current home in Northeastern Oklahoma before European invasion, giving the tribe an argument that their sovereignty should be recognized by the US as first peoples.²³⁰ Sometime prior to the arrival of the French in the seventeenth century, the tribe had moved from the Ohio Valley down the Mississippi River in modern day Arkansas, displacing the Tunica and Illinois Indians. The Tunicas and Illinois called the Quapaws "Ugaxpa," which meant "the downstream people." The Quapaws settled where the Mississippi

²²⁹ Larry G. Johnson, *Tar Creek: A History Of the Quapaw Indians, the World's Largest Lead and Zinc Discovery, and the Tar Creek Superfund Site* (Mustang, OK: Tate), 274.

²³⁰ Vern E. Thompson, "A History of the Quapaws," *The Chronicles of Oklahoma* 33 (Autumn 1955), 360.

River meets the Arkansas River, due to the nutrient-rich soil, before separating into four villages at the mouth of the Arkansas River.²³¹

The first Europeans the Quapaws encountered were the French. French explorers Jacques Marquette and Louis Joliet first went to Lake Michigan, then the Wisconsin River, before reaching the Mississippi River in June of 1673. The two explorers reached Kappa, the northern most village of the Quapaws, in July. The Frenchmen stayed only two days before heading back up the Mississippi, as the Quapaws were friendly, but did not provide the evidence of wealth that the Europeans desired. In addition, the Frenchmen were horribly outnumbered and the Quapaws held a distinct military advantage. The next fur traders to go to the region were part of the exploration party of Robert Cavalier Sieur de la Salle in 1682. His band of men also found the Quapaws to be welcoming, but knew that they had to return with more Frenchmen and establish forts in order to take full advantage of the prosperous trade that awaited them. La Salle's own men, rather than the Quapaws, killed him in late 1686. The Quapaws were, in fact, anxious to trade with La Salle.²³² In contrast to the Spanish explorations in New Mexico, farther to the east, the French were not looking for full scale missionary activity, and the Indians of the region were not looking to rid the area of the Europeans, since the French were not seeking to stop traditional Indian practices.

The French built their first fort in the region at Biloxi in 1699. Governor Pierre Le Moyne d'Iberville established a trading system in the region. The soldiers of Le Moyne traded for a variety of animal pelts and products with guns, utensils, metal tools, and alcohol. The Quapaws cemented their trading relationship with the French in 1713, when the tribe helped the French

²³¹ Quapaw Tribe of Oklahoma, "History," accessed July 19, 2012, <http://www.quapawtribe.com/index.aspx?nid=85>.

²³² Baird, *The Quapaw Indians*, 23-25.

defeat the English in Queen Anne's War, by fighting the Chickasaws in America. The French were able to keep Louisiana in their hands in no little part through the help of the Quapaws.²³³

The Quapaws remained aligned with the French throughout the eighteenth century, maintaining self-rule up to the time the French lost the continent to the British after the Seven Years War in 1763. The Quapaws even served as an effective means of curtailing Spanish trade with New Mexico across the region. Some bands of the Quapaws strayed from French loyalty, as the French could not help defend the tribe from the raiding Osages and other tribes. Thus, Governor Kerlerec brought more French soldiers to the Arkansas Post in response to some Quapaw warriors joining British-aligned Chickasaw warriors, who then raided a party of French-aligned Illinois tribe in 1754. For the most part, though, the Quapaws did well in a colonial world. Ultimately, the Quapaws had to adjust to a new world of British domination of the continent, especially once the American colonies defeated the British in the Revolutionary War in 1783.²³⁴

After President Jefferson sealed the Louisiana Purchase in 1803, non-Indian settlers flocked to the region during the early nineteenth century, beginning the time of Quapaw removal. William Clark negotiated treaties with the Quapaws that would allow for an expanding United States and would create the basis for the federal-Quapaw trust relationship. The first official meeting between the United States and the Quapaws occurred in November 1816, when Clark asked the tribe to send a delegation to St. Louis to talk treaty.²³⁵ Clark finally got his wish on August 24, 1818, when the Quapaws signed a peace treaty, giving the federal government all the

²³³ Ibid., 28-29.

²³⁴ Ibid., 36-38.

²³⁵ Ibid., 50-55.

land to the west bank of the Mississippi River and to the north bank of the Arkansas River. In total, the tribe gave up 30 million acres and kept just 2 million acres.²³⁶

The federal government immediately made the region taken from the Quapaws available for white settlers, further dispossessing the tribe. The Quapaw land cession was a critical component of the federal government's greater Indian Removal Policy.²³⁷ President James Monroe created the Territory of Arkansas on March 2, 1819 and non-Indian settlers built the town of Little Rock on the west side of the Quapaw Reservation in the spring of 1820. In the fall of 1820, Little Rock became the capital of the Territory of Arkansas.²³⁸

The Quapaws needed protection from non-Indian settlement, even though that meant relying on another tribe or the federal government. The Quapaws ceded the rest of their land to the federal government in 1824 and agreed to join the Caddoes on the Red River.²³⁹ The Caddoes and the Quapaws were supposed to join as one tribe, but the Caddoes refused. Instead of sharing Caddo land with the Quapaws, the federal government agreed to a new treaty in 1833, setting aside the Quapaw Reserve, in what eventually became Ottawa County, Oklahoma.²⁴⁰ The Quapaws lived in desperate conditions for over thirty years, until on February 9, 1867, they agreed to sell 7,600 acres for \$1.25 an acre to non-Indian settlers, as well as 18,522 acres, the western fourth of their reservation, to the Peoria Indians for \$1.15 an acre. The Peoria Treaty sat unsigned by Congress due to President Andrew Johnson's impeachment proceedings, and by March 1869, the Quapaws were still struggling to survive. Finally, in 1872, Congress

²³⁶ Treaty with the Quapaw, 1818, 7 Stat. 176 (1818); Baird, *The Quapaw Indians*, 56-57.

²³⁷ Baird, *The Quapaw Indians*, 56-57.

²³⁸ Treaty with the Quapaw, 1824, 7 Stat. 232 (1824); Thompson, "A History of the Quapaws," 366-367.

²³⁹ Treaty with the Quapaw, 1824, 7 Stat. 232 (1824).

²⁴⁰ Treaty with the Quapaw, 1833, 7 Stat. 424 (1833).

appropriated \$25,801.24 to pay for the ceded area.²⁴¹ The Quapaws were left with a small reservation and were definitely not protected from non-Indian encroachment, despite several treaties that were supposed to provide for their protection by the federal government.



Figure 4.1 The Quapaws in Extreme Northeast Oklahoma

(Family Search.Org, “Tribes and Bands of Oklahoma,” accessed August 9, 2013, <https://familysearch.org/learn/wiki/en/File:Okterritory.png>.)

Federal allotment of reservations beginning in 1887 further disposed the Quapaws. Allotment involved the federal government parceling Indian land for farming by individual Indians and their families.²⁴² In 1893, Congress proposed 200-acre allotments for each enrolled member of the Quapaws,²⁴³ and by the end of 1894, 234 Quapaws received 240 acres allotments.

²⁴¹ Baird, *The Quapaw Indians*, 107-108, 110-111.

²⁴² Indian General Allotment Act, 25 U.S.C. § 331 (1887).

²⁴³ Allotment of Lands to Certain Indian Tribes, H.R. 10223, House Report 2256, at 1 (January 17, 1893).

After the Quapaws received 200 acres each, 12,000 acres of Quapaw land remained undivided, thus Congress further divided the reservation into 40 acre tracts.²⁴⁴ It did not take the federal government long to force the Quapaws into signing mining leases. The Quapaws signed the first leases on September 23, 1895, which stated that the Quapaws were incompetent and could not improve their allotments. The BIA justified allowing non-Quapaws to mine the land, because it judged the Quapaws to be incompetent.²⁴⁵ The BIA's lack of tribal sovereignty recognition did not stop the Quapaws from pressuring the BIA for answers on mining problems for the next one hundred years, but the federal government still did not recognize the Quapaws' ability to manage their own land.

Mining on Indian land was not easy for the federal government to regulate, although it managed to maintain control over the Quapaws land at the turn of the twentieth century. In 1906, Commissioner of Indian Affairs Francis Leupp began cancelling mining leases when he thought that the Indians who signed them were incompetent.²⁴⁶ But Commissioner Leupp and the commissioners of Indian affairs that followed, found ways for corporations to stay in the mines.²⁴⁷ In 1907, mine operators and owners, including Kansas Governor Samuel Crawford, organized through the Baxter Springs Mining Exchange, sought a relaxation of leasing

²⁴⁴ Baird, *The Quapaw Indians*, 141-142.

²⁴⁵ Mining Lease, James A. Newman, Quapaw, September 23, 1895, RG 75, Miami Agency, Records Relating to Leasing and Productions, Mining Leases, 1892-1898, Box 1, National Archives, Fort Worth, Texas; Mining Lease, Alphonsus Vallier, Quapaw, September 23, 1895, RG 75, Miami Agency, Leasing and Productions, Box 1; Mining Lease, Annie E. Dardenne, September 23, 1895, RG 75, Miami Agency, Leasing and Production, Box 1, Mining Lease, Ettie Hammitt, September 23, 1895, RG 75, Miami Agency, Leasing and Production, Box 1, Mining Lease.

²⁴⁶ Allotments of Indians of Quapaw Agency, H.R. 25570, House Report 7615, at 1 (Feb. 14, 1907).

²⁴⁷ Baird, *The Quapaw Indians*, 184; A. M. Gibson, "Leasing of Quapaw Mineral Lands," 341-343.

restrictions and general government control.²⁴⁸ The Quapaws, now experienced in mining issues, asked the Interior Department and the BIA to at least recognize mining leases that could help the tribe. Vern Thompson, one time lawyer for the Skelton Lead and Zinc Company, argued in his article, “A History of the Quapaws,” that a Quapaw delegation appealed to Congress and secured passage of an act on March 3, 1921, giving the secretary of the interior and the commissioner of Indian affairs supervisory care and control over the income of the Quapaws. But, in *Whitebird v. Eagle Picher Lead Company* (1930), Quapaw heirs fought unsuccessfully to have the secretary of the interior ask Quapaw heirs for their permission before agreeing to leases.²⁴⁹ Thus, not all Quapaws were in the same camp in regard to allowing federal control of mining leases, but many Quapaws were trying to steer the interior secretary to approve leases with large profits for the tribe.

The Interior Department allowed the Quapaws to receive only a small percentage of mining profits, thus Quapaw hope for advantageous leases was often not fulfilled. Non-Quapaw mining companies, from 1906 to 1920, pulled ore valued at \$19,503,459 from Quapaw lands and gave the Quapaws a royalty of just \$1,307,627, at a rate of 6.7 percent. From 1921 to 1929, non-Quapaw mining companies mined \$92,147,072 of ore on Quapaw land and gave the Quapaws a royalty of \$8,784,424, for a rate of 9.5 percent. One quarter of the ore produced in the tri-state

²⁴⁸ A.M. Gibson, “Leasing of Quapaw Mineral Lands,” *The Chronicles of Oklahoma* 39 (Autumn, 1957), 342.

²⁴⁹ *Hearing Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* (Nov. 17, 1930) (written statement of Vern Thompson, Lawyer for the Skelton Lead and Zinc Company); Thompson, “A History of the Quapaws,” 379; Act of March 3, 1921, 41 Stat.1225 (1921).

district since 1891 came from Quapaw lands.²⁵⁰ All royalties after 1921 were nearly 10 percent. Before 1921 there was a sliding scale, from roughly 7 1/2 percent to 15 percent, which was based on market prices for ore.²⁵¹ In 1928, the Federal District court in Tulsa decided that Secretary of the Interior Albert Fall had made fair contracts involving ten Quapaws who saw \$30,000,000 in ore removed from their land by the Eagle Picher mining company and its sub-lessees.²⁵² The Interior Department and the BIA did not let the Quapaws set the rates for royalties on tribal land.

The Interior Department was sitting on profitable mines and determined that it could not allow the Quapaws to control such a business. The Quapaws' lands provided two-thirds of Oklahoma's zinc and lead ore, which meant large profits, and the interior secretary generally approved leases on the Quapaw lands for ten years, or as long as minerals could be mined.²⁵³ Sometimes the Quapaws' BIA agent auctioned leases to gain a bonus for the Quapaw land owner.²⁵⁴ The largest bonus ever received in payment for a Quapaw tract went to John Quapaw. The Kansas Explorations Company paid Quapaw \$105,000 in 1926 for the use of just six acres of his allotment.²⁵⁵ Large payouts to native peoples were rare, though, as the interior secretary's primary concern was to ensure large profits for mining companies and small profits for the tribe.

²⁵⁰ *Hearing Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* (Nov. 17, 1930) (C.F. Williams, District Mining Supervisor, to H.L. Smith, Chief Mining Supervisor, United States Geological Survey, Miami, Oklahoma, Nov. 15, 1930).

²⁵¹ *Ibid.*

²⁵² Gibson, "Leasing of Quapaw Mineral Lands," 343-344.

²⁵³ *Ibid.*, 340.

²⁵⁴ To Amend Section Six, Indian Appropriation Bill, 1922, H.R. 5935, H. Rep. 1422, at 2 (Feb. 10, 1925).

²⁵⁵ Gibson, "Leasing of Quapaw Mineral Lands," 340.

In contrast, the Quapaw land owners were primarily concerned with earning market based profits, and were willing to pressure the federal government for a fair deal.²⁵⁶

The interior secretary's motives to protect mining company profits were well illustrated by the case of the Skelton Lead and Zinc Mining Company, which in the late 1920s made a cut over (illegal mining on someone else's tract of land) from the land of six Quapaw heirs. Dr. L.S. Skelton purchased the lease to the land known as the Mary Calf tract from the Welch Mining Company, which was illegal, although Skelton stated he did not know it was illegal. Secretary of the Interior John Barton Payne set a hearing over the case and decided to allow Skelton to purchase the lease for ten years, a standard time frame. Skelton paid the Quapaws a total of \$125,000 for leases and the Welch Company paid an additional \$125,000. Skelton also had signed a lease for the tract of land adjoining the land south of the Calf tract owned by the Lucky Kid Mining Company. To bring ore from one tract to the other, the Skelton Company made a cut-over on the land of Mrs. Clara Showalter.²⁵⁷

The Skelton Company admitted that they had made a cut-over and offered to pay for the ore they took, but not the full value. It offered just 10 percent on the ore it had stolen, instead of the entire cost, which equaled \$15,000 less than what the Quapaw heirs had requested. Then, in July 1930, the Skelton Company offered to lease the land for the standard ten years, in addition to the current lease, which ran out in September 1930. Assistant Secretary of Indian Affairs Joseph Dixon agreed to the Skelton offer after an open bid period where the Skelton Company was allowed to match any lease offers from other companies. It is unclear why Dixon was

²⁵⁶ *Hearing Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* (Nov. 17, 1930) (statement of Mrs. Clara Showalter, Quapaw Heir).

²⁵⁷ *Hearing Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* (Nov. 17, 1930) (statement of Vern Thompson, Lawyer for the Skelton Lead and Zinc Company).

involved with the Skelton deal, because the interior secretary was in charge of approving leases. Clara Showalter thought that to accept the Skelton offer would be unfair, because the Skelton Company had an advantage against other mining companies, since a new mining company in that mine would have had to pay the Skelton Company \$200,000 for milling equipment that was only worth about \$75,000. Therefore, other bidders were convinced not to bid, and the Quapaw heirs could not receive the maximum amount of money for their land. Assistant Secretary Dixon was protecting the Skelton Company and he did not consult with any of the Quapaw heirs about the lease. Showalter and four other unrestricted heirs (Indians who owned the land outright) did not agree to the lease.²⁵⁸

The Skelton Company also offered a \$10,000 bonus if the Quapaw heirs signed the lease, but the Skelton offer was still not an acceptable offer for the Quapaws. While the Skelton offer seemed profitable, a Mr. Perry of Washington, D.C. offered \$100,000 for the lots, but Assistant Secretary Dixon did not accept the superior Perry offer.²⁵⁹ Dixon's justification was that if the companies had to pay too much for mining leases, they would not mine the land at all, and the Quapaws would not receive any profit.²⁶⁰ The Quapaws, thus, could not stop Dixon from awarding the lease to the Skelton Mining Company. Dixon refused to recognize the Quapaws' ability to choose who could mine their land, but the Quapaws continued to ask the federal government to approve the leases the Quapaws deemed fit.

²⁵⁸ *Hearing Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* (Nov. 17, 1930) (statement of Clara Showalter, Quapaw land owner).

²⁵⁹ *Hearing Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* (Nov. 17, 1930) (statement of D.H. Showalter, Quapaw land owner).

²⁶⁰ *Hearing Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* (Nov. 17, 1930) (statement of Vern Thompson, Lawyer for the Skelton Lead and Zinc Company).

The Quapaws continued to face challenges in the 1930s, as they saw mining royalties reduced. Roughly sixty-five percent of the ore had been mined and it was estimated that only eight more years were left for ore mining on restricted Indian land.²⁶¹ The best ore mines were no longer producing and the ore companies moved to more marginal deposits, which cost more to extract. Mining companies used a process known as commingling, which used a central shaft and single milling location to pull ore from several mines. Commingling is a common process today, but at the time, all ore was milled on the same location from where it was extracted. The milling process involved separating and cleaning the ore, then preparing it for the smelting process. Commingling ensured that companies could still work in the mines, although the tribal profits were lower.²⁶² The secretary of the interior, again, chose to approve consistent profits for the Quapaws and mining companies, instead of allowing the Quapaws to choose whether the ore from their land would be comingled.

The courts also protected the mining companies at the expense of tribal profits and self-determination. The case that set the precedent for the protection of mining companies was *Whitebird v. Eagle Picher Lead Company* (1930). The United States Circuit Court of Appeals for the Tenth Circuit decided in *Whitebird* that the secretary of the interior could sign mineral leases without the consent of the tribal heirs. The case stemmed from the claim of Quapaw heirs, in 1922, that Secretary of the Interior Albert Fall signed fraudulent leases without the approval of tribal heirs. The circuit court found no direct evidence of fraud and upheld the Act of 1921, allowing the secretary of the interior to make leases without Quapaw consent.²⁶³

²⁶¹ *Hearing Before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71st Cong.* (Nov. 17, 1930) (statement of C.F. Williams, District Mining Supervisor).

²⁶² Gibson, "Leasing of Quapaw Mineral Lands," 344-345.

²⁶³ *Whitebird v. Eagle-Picher Lead Company*, 40 F. 2d 479 (1930).

Problems with mines began for the Whitebirds with the allotment of the Quapaw reservation. On September 26, 1896, the Interior Department allotted 200 acres to Eudora Whitebird, Mary Whitebird, and Joseph Whitebird. The appellants in *Whitebird* were all heirs to one of the original Whitebird allotments and all members of the Quapaw Tribe. S.C. Fullerton and George W. Beck Jr. acquired leases to the land in 1912 from the heirs, and leases to adjacent land, for ten years at a royalty of five percent. Fullerton turned around in 1913 and subleased the land to the Eagle Picher Company at a royalty of 12½ percent. After World War I, the Eagle Picher Company subleased the land to twenty-seven mining companies, at forty acres apiece, for a royalty of 17½ percent. The Eagle Picher Company and its sub-lessees operated twenty-six lead and zinc concentrating plants on the lands, and the Quapaws had little control over how the company operated.²⁶⁴

In 1920, the Eagle Picher Company faced losing its lease based on market forces and the involvement of Quapaw owners, but the federal government came to the company's rescue. A rival company owned by Fullerton, W.W. Dobson and Beck, and their sub-lessees, devised a plan to sign leases from the Quapaw heirs at 7½ percent, then to sub-lease to the mining operators at fifteen percent. In *Whitebird*, Vern Thompson, lawyer for the sub-lessees, brought evidence in front of the court that royalties in Oklahoma ranged from 5-20 percent. Why could the sub-lessees not give higher rates to the Quapaws? Commissioner of Indian Affairs Charles E. Burke recommended that Secretary of the Interior John Barton Payne not approve the leases until the Indians received 15 percent royalties. In response, Secretary Payne recommended to Congress the Act of March 3, 1921, which ultimately allowed the secretary of the interior to approve all leases and extended regulations against alienation of the Quapaw heirs for another

²⁶⁴ *Whitebird*, 40 F.2d at 480.

twenty-five years.²⁶⁵ According to the United States Circuit Court of Appeals for the Tenth Circuit, the secretary of the interior did not have to recognize the Quapaws' ability to govern their own land.

The Act of March 3, 1921 called on the BIA to levy royalties based on market conditions, which held the minimum royalty rates low for the Quapaws. When the price of ore concentrates dropped to less than \$50 per ton, the royalty was 7½ percent. The royalties were ten percent when ore was \$50 to \$60 per ton, 12½ percent for \$60 to \$70 per ton, and fifteen percent for over \$70 per ton. Fullerton, Dobson, and Beck made an offer at the new rate, but with bonuses of \$10,000 for the Eudora Whitebird tract, \$16,000 for the Mary Whitebird tract, and \$14,000 for the Joseph Whitebird tract. Eagle Picher made offers for land, but with no bonuses. Eagle Picher protested the Fullerton, Dobson, and Beck lease offer. On March 20, 1922, Commissioner Burke recommended that a commission be sent to settle who should receive the lease.²⁶⁶ The commission, which investigated the case from March 22 to June 5, 1922, consisted of John E. Dawson, who worked in the Indian Office; T.B. Roberts, a representative of Commissioner Burke, and O.K. Chandler, superintendent of the Miami Agency. Burke asked M. Van Siclen, a mining engineer from the Bureau of Mines, and Mr. Siebenthal, a geologist from the United States Geological Survey, to assist the commission. They recommended the leases be given to the Eagle Picher Company, which meant that the Quapaws would receive a lower rate. Chandler filed a minority report stating the leases should be given to the highest bidder.²⁶⁷

Fullerton, Dobson, and Beck continued to offer better deals for the Quapaws than the Eagle Picher Company, but Commissioner Burke backed the Eagle Picher Company. Overall,

²⁶⁵ *Whitebird*, 40 F.2d at 480-481.

²⁶⁶ *Whitebird*, 40 F.2d at 481-482.

²⁶⁷ *Whitebird*, 40 F.2d at 482-483.

the Interior Department received twenty-two bids to mine the Whitebirds' land, but Commissioner Burke still backed the Eagle Picher Company's offer. Thus, the lawyers for the appellants argued that Commissioner Burke colluded with the Eagle Picher Company, but the lawyers for the defense argued that the market for lead and zinc nose-dived after World War I, because surplus lead and zinc was thrown on the market. Since the price fell from \$135 to \$20 per ton, the Eagle Picher Company argued that they adjusted to price deflation by offering a lower royalty for the next lease. Van Siclén believed that the mining royalty ultimately would be better for the Quapaws if the Eagle Picher Company won the lease because Fullerton, Dobson, and Beck were speculators, and thus their offer was inflated and not tied to the actual price of ore. Van Siclén told Burke that a larger royalty, and bonus, could lead to the closing of weaker mines and the mining of only rich ore in order for an operator to pay a larger royalty and bonus. Thus, according to Van Siclén, the Quapaws would receive nothing from mines not in operation. For instance, the Fullerton, Dobson, and Beck bid of 15 percent with a \$50,000 bonus would lead to the closing of unprofitable mines and the working of more profitable mines. Van Siclén argued that the total from the lease paid to the Quapaws by the Fullerton, Dobson, and Beck stood to be a quarter to a third less than the lease offered by the Eagle Picher Company. Therefore, the poorer heirs with the less profitable mines would probably receive little payment. Van Siclén further argued that the Eagle Picher Company would operate with more expertise, because it was more established than the Fullerton, Dobson, and Beck Company. The circuit court finally decided that the Act of March 3, 1921 clearly provided the secretary of the interior the power to approve leases and that Congress would not provide Indians the power to approve leases.²⁶⁸ The case illustrated how the appeals court protected corporations at the expense of

²⁶⁸ *Whitebird*, 40 F.2d at 485-486.

greater profits for the Quapaws, with the justification that the Quapaws were at least receiving a profit from their mines. In addition, the circuit court upheld the 1921 law that gave the secretary of the interior power over all leases, thus providing more protection for the companies, and no federal recognition of the Quapaws ability to decide who would receive leases to mine their land. The Whitebirds continued to push for control of their land, and increased royalties from mining leases on their land, even though the federal government did not recognize the Whitebirds' ability to decide who could be awarded leases on their land.

Many wealthier Quapaws accepted the power of the mining corporations, because it brought some Quapaw land owners wealth. In a show of self-determination, the Quapaws rejected by vote reorganization under the Indian Reorganization Act of June 18, 1934, which would have provided the tribe a reservation in exchange for a new tribal government system based on federal preferences. However, many of the wealthiest Quapaws did not vote for reorganization, because they knew it would infringe on their personal freedoms and wealth.²⁶⁹ If the tribe would have accepted reorganization the federal government also would have indefinitely extended trust restriction for tribal land, but since mining companies were operating on the land anyway, the Interior Department restricted leases, whether the Quapaws agreed to reorganization or not.²⁷⁰

After World War II, mining companies operating on the reservation were slowing production, which meant lower royalty payments to Quapaws, because the federal government encouraged development in other countries. United States mining companies countered foreign mining with commingling, but the Peruvian and Mexican companies did not have a tariff to pay,

²⁶⁹ Baird, *The Quapaw Indians*, 203.

²⁷⁰ Further Extending the Period of Restrictions on Lands of the Quapaw Indians, Oklahoma and for Other Purposes, S 887, S. Rep. 91-793, at 3 (April 23, 1970).

and were guaranteed six cents a pound for lead and zinc above the United States market price.²⁷¹ Then, on May 7, 1954, the Quapaws received a dose of federal cash that served as a replacement for mining profits. The Indian Claims Commission offered the Quapaws \$927,668 based upon money the federal government did not pay the tribe in treaties. The tribe created a new government structure and a business committee. When faced with a vote on termination of the federal trust relationship, tribal members voted to keep the relationship, despite the recommendations of the business committee, which thought that termination would aid with self-determination. Congress had been trying to terminate tribes from federal funds in order to make the tribes self dependent. Termination was disastrous for many tribes across the country. Termination would have ended the tribe's relationship with the federal government and it would have taken away access to federal money.²⁷² While the Quapaws chose to continue the federal trust relationship, they also chose to keep working toward their goal of self-dependence.

Mining on Quapaw land, the primary financial spur, continued to slow. During 1956, just thirty-one Quapaw mineral leases, out of 172 tracts covering 16,054 acres, produced ore. The Eagle Picher Company, the largest operator in the district, controlled sixteen of the Quapaw leases and paid \$252,508 to Quapaw land owners. The largest royalty received by a land owner was \$56,000. The smallest royalty was just \$2.69. The Muskogee Area Office for Indian Affairs paid royalties and approved all leases as of 1949, although by the Act of March 3, 1921, Congress allowed only the secretary of the interior to approve leases. By 1957, the mining companies had virtually abandoned the Quapaw lands.²⁷³ All of Oklahoma saw lead mining reduced considerably from 1948 to 1957. The average per year from 1948 to 1952 was 23,979

²⁷¹ Gibson, "Leasing of Quapaw Mineral Lands," 345-346.

²⁷² Baird, *The Quapaw Indians*, 209-215.

²⁷³ Gibson, "Leasing of Quapaw Mineral Lands," 346.

tons of lead concentrate. Mining companies pulled just 10,198 tons of lead concentrate in 1957, with the Eagle Picher Company leading the way.²⁷⁴

In the 1950s, the BIA approved leases for “chat” sales on Quapaw lands, but the federal government did not recognize the Quapaws ability to sell chat. Mining companies produced chat through ore processing done either through dry gravity separation or wet separation. The dry process produced chat. The wet process produced “tailings” that ended up in tailing ponds. Chat generally ranged in size from ¼ to 5/8 inch. Although tailings were, and still are, generally considered more dangerous, chat is also dangerous for human contact, because it contains harmful metals such as lead, cadmium, zinc, and a variety of other metals. If children are around chat dust, their brain development can be affected. If female adolescents play on chat piles, they may encounter problems with future pregnancies, and their children may suffer health problems. Lead exposure also causes problems for adults such as high blood pressure, anemia, and damage to the nervous system and kidneys.²⁷⁵

The Quapaws still needed federal approval to sell chat, and thus the federal government continued to not recognize the Quapaw’s ability to make decisions involving federal resources. In 1955, E.E. Lamb, the Quapaw BIA agent, approved a lease to sell the chat from the land of Robert A. Whitebird to the Oklahoma Paving Company for use in construction by the Oklahoma Turnpike Authority, at a price of \$.0375 per cubic yard. The Oklahoma Paving Company planned to leave a pit for Whitebird to use for a stock pond, which allowed the BIA to justify a

²⁷⁴ Peter Grandone, William E. Ham, and Lavenia M. Edwards, “The Mineral Industry of Oklahoma,” in Bureau of Mines, *Minerals Year Book 1957* (Washington D.C.: GPO, 1959), 871.

²⁷⁵ US EPA, “Tri-State Mining District-Chat Mining Waste,” (Washington D.C.: GPO, 2007), 2.

small price. While the chat was dangerous, Lamb sold the chat for profit, and not a move to clean Whitebird's land.²⁷⁶

In the 1960s, the federal government began to address pollution from mining. The Bureau of Mines in 1966 completed the first phase of a nationwide study of the reclamation and restoration problems (the cleaning of land) posed by surface mining. The Bureau of Mines also studied acid mine draining, which was its primary concern with the mines, and planned to find ways to treat acid water from mines. Pollution from mining received a single paragraph in a twenty-seven page Bureau of Mines summary for 1966. Problems such as stockpiling uranium for military use were higher on the federal agenda.²⁷⁷

Although by 1970 corporate mining was not as intense as it once was on Quapaw land, Congress extended the restrictions for Quapaw land for twenty-five years.²⁷⁸ Senator Henry Bellmon of the Committee on Interior and Insular Affairs stated that the BIA had problems collecting rents and reasoned if Quapaw land became unrestricted the Quapaws would have little chance of collecting rent. Bellmon's view was similar to that of the secretary of the interior and mining engineers of bygone years. Bellmon believed that it was better for the Quapaws to earn small royalties, then for Congress to recognize the Quapaws' ability to choose more profitable leases with the chance they would ultimately have no value. At the time, 107 Quapaws held seventy-nine allotments with an aggregate acreage of 12,459.05 acres. There were nine leases for lead and zinc mining amounting to 1,679.40 acres and nine leases for chat removal totaling

²⁷⁶ E.E. Lamb, Quapaw Agent, to Paul L. Fickinger, Area Director, Muskogee Office, August 10, 1955, RG 75, Miami Agency, Records Related to Leasing and Productions, Mining and Other Leases and Royalty Accounts, 1940-1960, Box 1, National Archives, Fort Worth, Texas.

²⁷⁷ Warren E. Morrison, *Minerals Yearbook 1966: Metals, Minerals, and Fuel*, Vol 1-II (Washington D.C.: GPO, 1967), 22-24.

²⁷⁸ Quapaw Indians of Oklahoma, Land Restriction Extension, Public Law 91-290 (1970).

691.60 acres, but no oil or gas leases. There were also sixty-four agricultural leases, four business leases, and 620 leases for town lots owned by Quapaws.²⁷⁹

The Senate based its vote on land sale restrictions for the Quapaws, partially on the vote of the Quapaw Tribal Business Committee. The Quapaw Tribal Business Committee passed a resolution for land sale restrictions on April 5, 1967, because tribal town lots were located in various small towns of northeast Oklahoma and were, therefore, difficult to police. Assistant Secretary of the Interior Harrison Loesch admitted that collection of rents was difficult, but that as of 1970, 85 percent of rents were collected. Still, the BIA had to watch for trespassers who dumped trash and cars, since salvage was a popular use of the land.²⁸⁰ By 1970, a vote by a small faction of the Quapaws had been reflected in the vote by the Senate, but the Senate did not recognize Quapaw sovereignty.

By 1970, mining on Quapaw lands was virtually finished, so the stage was set for the cleaning of the poisoned soil left from mining. The mines contained toxic water, and chat piles left on the surface were filled with toxic metals. The EPA took the lead in soil remediation in the coming years, with the Quapaw tribe also involved in feasibility studies, which was a major change from the vast majority of the twentieth century when the Quapaws had little voice in mining leases or chat removal. The EPA would recognize the Quapaws abilities to help with cleaning their land on a limited basis, in accordance with the Safe Drinking Water Act.

In conclusion, the federal government has rarely, if ever, recognized the Quapaws' abilities to make judgments about their land. The federal government pushed the Quapaws to a

²⁷⁹ Further Extending the Period of Restrictions on Lands of the Quapaw Indians, Oklahoma and for Other Purposes, S 887, S. Rep. 91-793, at 3 (April 23, 1970).

²⁸⁰ Ibid.

small section of what became northeast Oklahoma through a series of treaties imposed upon the tribe through years of non-Indian encroachment on the Quapaws' lands. Beginning in 1895, the Interior Department allowed mining leases on Quapaw land, since it deemed Quapaw land owners incompetent to farm or work the land. Although the Quapaws signed the leases, they could not choose the amount of royalty from their mines. The Interior Department awarded mining leases during the twentieth century without input from heirs who owned the land. The secretary of the interior, as prescribed by federal law, had the power to award leases to companies based upon what he deemed the best interests of the Quapaws, which often meant keeping established mining companies in the field for the sake of secure royalties, but not the highest royalties. The Quapaws, still, pressured the Interior Department for greater input on their leases and for greater royalty rates. Later in the century, the BIA removed toxic chat from Quapaw land, but with the intention of generating profits, not removal of pollution. It was not until the 1960s that the federal government began to address mine pollution around the country. The EPA would address mine pollution on Quapaw land in 1981.

Chapter 5: The Quapaw Tribe and CERCLA

During the middle of the twentieth century, in extreme northeastern Oklahoma—once the center of the American Lead Belt—children played on piles of toxic dirt in school yards and in their backyards at home. Toxic dust floated through the air and sinkholes opened in the towns without warning. The federal government eventually moved residents due to the toxicity of the land, a remnant of the once profitable mining industry. Once the mines no longer offered ore to the mining companies, they sat vacant, filling with water. The water was infused with toxic metals released by years of mining, which leached to the surface and into surrounding aquifers and lakes. The EPA began cleaning the Quapaws' land through remediation processes of removing soil in 1981, and eventually the Quapaws had a small role to play in the process, but the EPA never recognized the Quapaws' ability to take the lead on cleaning their land. Much like the previous years, the federal government did not recognize Quapaw self-determination.

The EPA only allowed the Quapaws to be involved in the process to the extent that Congress outlined roles for Indian tribes in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as Superfund, due to the massive amount of money that Congress earmarked for the cleaning of toxic land under the law. The EPA did not simply give the Quapaws the money and teach the Quapaws how to clean the land themselves. In contrast to the Isleta case, Congress had not amended CERCLA to include a provision for treatment as a state status. Thus, the Quapaws' involvement in the Tar Creek Superfund was limited to what was known as investigations and feasibility studies, not actual removal of toxic soil (remediation), nor the writing of standards for clean land.



Figure 5.1 Tar Creek's Stained Water

(James S. Aber and Susan W. Aber, "Picher, Oklahoma: Legacy of Mining," accessed August 9, 2013, <http://www.geospectra.net/kite/picher/picher.htm>.)

The Tar Creek Superfund Site encompassed residential, commercial, and industrial areas within the towns of Picher, Quapaw, Commerce, Cardin, and Miami in extreme northeastern Oklahoma. Several rural districts also received water from the Roubidoux Aquifer. Approximately 19,500 people lived near the mining area before the federal government began moving residents. Tar Creek flowed through the center of the site and released into the Neosho River, south of the site, which discharged into Grand Lake in southern Ottawa County. Toxic well water was present in both the Boone Aquifer and Roubidoux Aquifer. Mostly private wells tapped the Boone Aquifer, while the Roubidoux Aquifer provided drinking water for the towns.²⁸¹

The environmental destruction left by mining companies on the Quapaws' land was immense. Mining companies produced more than 500 million tons of waste in the tri-state area of Oklahoma, Kansas, and Missouri. Although companies removed more than 75 percent of mining waste, more than 100 million tons of chat, or dry waste, remained in the tri-state area by the 1980s.²⁸² The companies left tailings, another form of dry waste, in unlined flotation ponds near the surface, where the chemicals could seep into the ground.²⁸³ During the early to mid twentieth century, the mines often had problems with flooding, which mining companies usually controlled with pumps. When the mines ceased operations, the companies left underground cavities of 100,000 acre feet. In addition, mining companies left approximately 100,000 exploratory holes, used to explore for ore, in just the Picher field alone. There were 1,064 mine

²⁸¹ CH2M Hill, Contract Number 68-W6-0036, "Five Year Review Report: Third Five Year Review Report for the Tar Creek Superfund Site, Ottawa County, OK." September 2005, 5; US EPA, "Tar Creek Superfund Site: Tri-State Mining District-Chat Mining Waste," (Washington D.C.: GPO, 2007), 1.

²⁸² US EPA, "Tri-State Mining Waste," 1.

²⁸³ The Quapaw Tribe of Oklahoma et al. v. Blue Tee Corp et al. N.D. OK, Case 03-CV-0846-CVE-PJC, at 2 (2008).

shafts on the Oklahoma side of the field and mining companies had abandoned numerous wells.²⁸⁴

The mining companies had pumped large amounts of water out of the ground to be able to mine the underground rock formation, leaving the ground open for pollution. Once the companies completed mining, they filled the mines with sulfide materials that had been oxidized through air exposure. The metallic sulfide materials leached into the ground and lowered the pH in the groundwater. By 1979, acidic water had discharged through several locations at the abandoned mines, and the groundwater contained lead, zinc, and cadmium, each dangerous for human consumption. Further, wind blew dust from the chat piles throughout the region. Once rain came in contact with the chat, poisonous metals leached into the ground.²⁸⁵ Although some Quapaws had profited from the mines, the mining companies had made the most profit, and now they were gone, leaving the tribe to clean the mess.

Frank Keating, the governor of Oklahoma, formed the Tar Creek Task Force in 1980 in response to the discovery of a large ditch, seventy-five feet wide and seventy-five feet deep, which formed southwest of the town of Picher. The task force was comprised of twenty-four local, state, and federal agencies, charged with investigating the effects of acid that drained into water sources of northeast Oklahoma. Based upon the findings of Keating's task force, the EPA placed the Tar Creek site on the National Priority List on July 27, 1981. The EPA used the

²⁸⁴ CH2M Hill, "Third Five Year Review," 6.

²⁸⁵ Myron O. Knudson, "Five Year Review, Tar Creek Superfund Site, Ottawa County, OK" Region VI, US EPA (Washington D.C. GPO, 2000), iii; Frank Keating, "Tar Creek Superfund Task Force. Report of the Natural Resource Damages Subcommittee: Alternatives for Assessing Injuries to Natural Resources at the Tar Creek Superfund Site," July 21, 2000, 4.

National Priority List to identify sites to be cleaned with money from the massive federal fund created under CERCLA.²⁸⁶

The cleaning of a Superfund site, both then and now, involved several steps, which need to be explained in order to fully understand how the EPA attempted to clean the Tar Creek Superfund area, and in order to understand the terms used in the rest of the chapter. First, the EPA conducted a remedial investigation and feasibility study (RI/FS), which the EPA allowed the Quapaws to do as prescribed by CERCLA. The remedial investigation included data collection and site characterization, which was often performed in unison with the feasibility study, thus defining possible remedies. The remedial investigation also involved sampling and monitoring. The next step for the EPA was to select the proposed remedy and to present the plan to the public. Finally, the EPA reviewed the public comments and consulted with the state on the most productive plan. The final recommendation was presented in a Record of Decision (ROD) showing all the facts of the proposed process. The EPA often divided a complex remedial action into operable units (OUs).²⁸⁷

The EPA signed a cooperative agreement with the Oklahoma State Department of Health, on June 16, 1982, to clean Tar Creek, but the Quapaws had little to do with the initial process.²⁸⁸ The EPA began the restoration of Operable Unit 1 (OU 1) on June 6, 1984, which included water diversion, plugging wells, and monitoring of groundwater and surface water.²⁸⁹ The ROD for OU 1 addressed the poisoning of Tar Creek by acidic water from the mines and downward migration of acidic water from the Boone Aquifer to the Roubidoux Aquifer that had occurred through

²⁸⁶ Knudson, "Five Year Review," 4.

²⁸⁷ *Blue Tee Corp.*, at 2-3.

²⁸⁸ Knudson, "Five Year Review," iv.

²⁸⁹ *Blue Tee Corp.*, at 4.

wells connecting the two aquifers. The solution was to reduce surface recharge of the Boone Aquifer through dikes and diversion structures, designed to keep water from entering two collapsed mine shafts identified at points where tainted water seeped into the ground water. The EPA plugged sixty-six abandoned wells, which stopped the transfer of acid water to the Roubidoux Aquifer. All told, the EPA plugged eighty-three wells.²⁹⁰ The state of Oklahoma completed the ROD for OU 1 by 1986 and the EPA continued to monitor the groundwater in compliance with the ROD for OU 1. The EPA had no further plans for Tar Creek by 1991 and the Quapaws were not participating in remedial or feasibility studies in 1991.²⁹¹

The EPA conducted its first five-year review in 1994, still without requesting assistance from the Quapaws. The EPA tested for lead, arsenic, cadmium, and zinc at busy areas such as parks and schools.²⁹² The EPA also sampled soil at residences beginning on March 21, 1996. The EPA found that contamination had occurred due to the wind blowing soil, but not chat, and began soil remediation at residences in September of 1996.²⁹³ The EPA installed four new monitoring wells in 1997 and one additional monitoring well in 2000 to monitor the Roubidoux Aquifer. Soil removal and backfilling of residential yards became the ROD for Operable Unit 2, because the EPA considered soil removal to be more important than chat removal. The Army Corps of Engineers remediated 1,300 yards of soil from January 1998 to July 2000 and then hired private contractors to finish the work.²⁹⁴

²⁹⁰ Knudson, "Five Year Review," iv.

²⁹¹ *Blue Tee Corp*, at 5.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ CH2M Hill, "Third Five Year Review," 33.

Although entrenched in the Self-Determination Era, the EPA only recognized a limited role for the Quapaws in the Tar Creek Superfund. In September 1998, in the middle of the remediation process, the EPA went into a cooperative agreement with the Inter-Tribal Environmental Council of Oklahoma (ITEC) and the Quapaw Tribe, with the goal of enhancing tribal involvement in the Superfund. Initially, the ITEC was to conduct remediation studies for two industrial properties owned by the Quapaws,²⁹⁵ and the ITEC provided technical support, training, and environmental services in a variety of environmental disciplines to the tribes that were members of ITEC.²⁹⁶ The EPA awarded about \$122,000 to the ITEC for the program, as well as “assistance funding” to the Quapaws, but did not state a total amount of aid in the second five-year plan. In early 1999, the EPA awarded the ITEC and the Quapaws an undisclosed amount of money to conduct a remedial investigation and feasibility study on mining waste affecting Beaver Creek, which flowed through the Quapaws’ campgrounds and powwow grounds.²⁹⁷ The tribe complained that the EPA withdrew the funds once the plan was drafted, thus limiting the Quapaws’ ability to even help with remedial investigations, which was not even a major part of the Superfund process.²⁹⁸ Later in 1999, the EPA awarded approximately \$36,000 to the ITEC and another undisclosed amount of funding dollars to the Quapaws. In 1999 the EPA also awarded Oklahoma \$150,000 to address tailings at the site, including restriction of chat usage and dust suppression, along with erosion control.²⁹⁹ Although the EPA awarded money to the Quapaws, it was not for the purpose of operating their own soil remediation, but was only for

²⁹⁵ Knudson, “Five Year Review,” 28.

²⁹⁶ Ursula Lennox, Remedial Project Manager, Tar Creek Superfund, email to author, October 19, 2011.

²⁹⁷ Knudson, “Five Year Review,” 28.

²⁹⁸ *Blue Tee Corp.*, at 6.

²⁹⁹ Knudson, “Five Year Review,” 28.

studying the region. The EPA only allowed the Quapaws to study the region, because CERCLA did not require the EPA to recognize tribal sovereignty. The EPA, alone, held final responsibility for remediation of Indian land under CERCLA.³⁰⁰

In the early 2000s, the Quapaws left the ITEC and created their own environmental department, attempting to govern their own land. The EPA awarded the Quapaw Tribal Environmental Office Superfund Management Assistance Program \$1,981,667 to ensure the tribe's "meaningful and substantial involvement" in the Superfund process. They were involved with the OU 4 remedial activity in accordance with the ROD. They also helped with the OU 2 residential remediation on tribal land. The Quapaw Tribal Environmental Office also provided oversight to tribal chat project sales operations to ensure that they were in compliance with their Site Operating Plan. Quapaw officials hired consultants to provide assistance in understanding CERCLA-related activities and to aid tribal environmental staff in review of technical documents related to OU 2, OU 4, and OU 5. The consultants were retained to map land ownership on the reservation, ensuring that the EPA properly identified property rights.³⁰¹ The Quapaws had to work within the framework of CERCLA, but also continued to exert their self-determination. The EPA encouraged Quapaw involvement through financial support, as long as the Quapaws remained bound to the role prescribed them in CERCLA.

Shortly after the EPA recognized the Quapaws' ability to function in a limited role in the Tar Creek Superfund process, the EPA ruled in 2000, without the input of the Quapaws, that the site was too polluted to be completely cleaned. Prior to the EPA's ruling, the Oklahoma Water Resources Board (OWRB) concluded that impacts from pollution to Tar Creek were irreversible,

³⁰⁰ Ursula Lennox, email to author, October 19, 2011; 42 U.S.C. § 9626 (1988).

³⁰¹ Lennox, email to author, October 19, 2011.

so the OWRB made Tar Creek a secondary recreation (human ingestion is limited) water body and lowered fishing status to “habitat-limited.” The EPA agreed with the OWRB’s assessment of Tar Creek³⁰² and decided that in order to clean Tar Creek it would have to drain the federal Superfund coffer. In other words, it was virtually impossible to meet the water quality standards for surface water in Tar Creek.³⁰³ For the EPA to not be able to clean Tar Creek was amazing, given the fact that the Superfund account received \$1.7 billion annually until 1995, when the tax on corporations, producing chemicals and oil, expired.³⁰⁴

In 2002, the Quapaws turned to the state of Oklahoma for help. Due to the federal trust relationship, states are not supposed to operate programs on Indian land, and Indian tribes have worked since the early 1830s and the Cherokee Cases, to keep it that way. The Oklahoma Department of Environmental Quality (ODEQ) conducted a study of the fish in the Neosho River and Spring River in 2002 and 2003. ODEQ found that fish from the rivers were safe for consumption. The tribes in the region asked for the testing, because traditional customs involved eating whole local fish. The ODEQ concluded that skinless fish filets could be consumed at a rate of up to six eight-ounce meals per month, but bones from fish, whether whole-eviscerated or whole-uneviscerated, were not safe.³⁰⁵ Oddly, in 2002 the EPA judged samples taken from the Roubidoux Aquifer to be safe for human consumption, although five wells of the twenty-one sampled failed the secondary drinking water standard for iron, and one of the five failed the secondary standard for sulfate. Secondary standards were not health-based, but were based

³⁰² Knudson, “Five Year Review,” vi-viii.

³⁰³ CH2M Hill, “Third Five Year Review,” 31.

³⁰⁴ Earl Blumenauer, “Superfund,” Earl Blumenauer, Representing Oregon’s Third District, accessed August 4, 2013, http://blumenauer.house.gov/index.php?option=com_content&view=article&id=1664.

³⁰⁵ CH2M Hill, “Third Five Year Review,” C.

instead on aesthetics, taste, and odor.³⁰⁶ The Quapaws continued to push the federal government for survival in Northeast Oklahoma, even turning to Oklahoma for judgments supporting tribal desires.

The Quapaws also questioned the EPA's efforts, especially at the Roubidoux Aquifer. The EPA reported that it performed flood-plain sampling between Commerce and Miami, Oklahoma, but the Quapaws argued the EPA did not perform the sampling.³⁰⁷ As of 2005, when the EPA conducted its third five-year review, acidic water had been detected at several Roubidoux wells. The EPA argued that the effectiveness of the well-plugging program could not yet be determined, but neither the EPA, nor the Oklahoma Department of Environmental Quality, found drinking water that failed to meet standards of the Safe Drinking Water Act.³⁰⁸ The Quapaws were questioning the EPA's ability to clean tribal land.

On December 9, 2003, the EPA, along with two potentially responsible parties (PRPs), mining corporations, and the Interior Department, agreed to an Administrative Order of Consent to perform a remedial investigation and feasibility study in regard to chat piles and mining waste in non-residential areas surrounding the Tar Creek site, which became Operable Unit 4.³⁰⁹ The EPA scheduled Operable Unit 5 for 2006-2007 to deal with the pollution of the Spring River and Neosho River.³¹⁰ It seemed the EPA had originally underestimated the amount of pollution in the area.

³⁰⁶ CH2M Hill, "Third Five Year Review," x.

³⁰⁷ *Blue Tee Corp*, at 7.

³⁰⁸ CH2M Hill, "Third Five Year Review," C.

³⁰⁹ Omar Gillham, "Bargain Buyout," *Tulsa World*, December 19, 2010.

³¹⁰ Coleman, "OU 4," 7; *Blue Tee Corp*, 8.

The time had come for residents to move due to the severity of the pollution. The Water Resources Development Act of 2007 provided \$30 million for the EPA to plan and implement removing residents in the Tar Creek Superfund area. The EPA recommended only resident removal for those people under the greatest threats of chemical exposure and it predicted human removal to last thirty years.³¹¹ In 2005, before the passage of the Water Resource Development Act, which allotted money for the federal government to move families from Quapaw lands, Oklahoma, without Quapaw input, spent \$3 million to relocate fifty-two families with children under six. The initial round of buyouts in 2005 cost \$54,029 per home, \$37 per square foot. The second group of buyouts in 2008 cost \$65,624 per home, \$52 per square foot. The relocation trust presented 878 buyout offers, with fifty-one offers rejected. Before the buyouts, Picher had 1,640 residents, the town of Cardin had 150, and the former town of Hockerville did not have any. The federal buyout program of homes and businesses around the Tar Creek Superfund was almost completed by the end of 2010. Initial projections placed the buyout at \$55-\$60 million, but it ended up costing \$46 million. James Inhofe, author of the Midnight Rider, which also infringed on tribal sovereignty and is discussed in depth in section three, was a key figure in bringing the money to northeast Oklahoma for the buyouts.³¹²

On June 29, 2004, Quapaw Environmental Director Tim Kent told CHM2 Hill that he would have liked to have seen the tribe have more control of the resources for cleaning the site. CHM2 Hill was the firm that the EPA contracted to finish the third five-year review. As part of the review, CHM2 Hill questioned Kent and other local leaders about their opinions on the process. Kent stated that the tribe was developing water quality standards of their own,

³¹¹ Samuel Coleman, "Superfund Explanation of Significant Differences for Record of Decision: Tar Creek Superfund Site Operable Unit 4, Ottawa County, Oklahoma, April 2010," 7.

³¹² Gillham, "Bargain Buyout."

suggesting that the tribe had the ability to operate their own environmental recovery area.³¹³ CH2M Hill asked Kent his overall impression of the work done at the site since the completion of the second five-year review. Kent was dissatisfied that OU 1 had not worked, and worse, that it seemed the EPA had given up on it. He thought that existing technologies could be used to finish OU 1. He also suspected that water from mines might be migrating to the Roubidoux Aquifer through other means than faulty well casings.³¹⁴ In other words, he questioned that the EPA had complete control of the situation.

Kent, however, was pleased with the soil remediation efforts. If there was a problem, it was at the location where the EPA removed clean soil to replace the polluted soil. Water had run off the area into Beaver Creek. He told the EPA about the issue, but as of 2005, it seemed the EPA was still looking into it.³¹⁵

Kent also believed that OU 4 was too narrow in scope. He did not like the fact that the remedial investigation and feasibility study addressed only chat piles, and that it did not expand to other issues such as the fate of transport wastes or the full characterization of wastes. The tribe asked the EPA to create another operable unit to deal with the sediment problem at the site, which the EPA did not do.³¹⁶

Kent applauded the outcomes of the remedial operations, because the lead levels in the blood of local children were lower, which Kent attributed to the remediation project. Even so, Kent was concerned about the buyout program, because of the potential for infringement of the federal trust responsibility. Furthermore, Kent wanted to be contacted whenever work was done

³¹³ CH2M Hill, "Third Five Year Review," Attachment 2, Kent Interview Form, page 3.

³¹⁴ Ibid,1.

³¹⁵ Ibid.

³¹⁶ Ibid.

on tribal land. Kent believed that CERCLA allowed greater involvement by tribes, not less, and argued that the tribe should have complete control of the Superfund process.³¹⁷ The EPA did not take the extra step to follow through on what Kent desired, since CERCLA did not include a treatment as a state provision for tribes to take over site evaluation and planning.³¹⁸ Kent's statements were in accord with what Quapaws had done for centuries, which was to push for the federal government to recognize the tribe's ability to rule itself.

Chat removal was another problem that the Quapaws felt they were capable of addressing on their own, but the federal government limited the Quapaws ability to sell the polluted substance. There was definitely a market for chat, because the Oklahoma Department of Transportation (OKDOT) preferred it in hot mix asphalt, where its hard and durable nature, along with its skid resistance, made for great highways.³¹⁹ There was also promise for the Quapaws to profit from chat sales, because OKDOT's requirement that chat be bought on the open market, along with other aggregate asphalt sources, increased the profit potential.³²⁰ Without respect to tribal sovereignty, the BIA placed a moratorium on chat sold by Quapaws in

³¹⁷ Ibid, 1-3.

³¹⁸ 42 U.S.C. § 9626 (1988).

³¹⁹ US EPA, "Chat Mining Waste," 3-5.

³²⁰ US EPA Region VI, Oklahoma Department of Transportation, "Perspective on Chat Mining," Powerpoint Presentation, 2010, accessed March 7, 2014, http://www.epa.gov/region6/6sf/oklahoma/tar_creek/ok_tar_creek_chat_okdot.pdf.

1997, but slightly changed course in 2001, opening chat sales to Quapaws, but with BIA regulation. The BIA also made deals with outside entities to haul chat.³²¹

The BIA acted much as it did before 1970, making rulings on the dismissal of funds for the tribe, but not recognizing the tribe's ability to make those rulings itself. After 2001, the BIA



Figure 5.2 Chat Piles of Picher, OK

(James S. Aber and Susan W. Aber, "Picher, Oklahoma: Legacy of Mining," accessed August 9, 2013, <http://www.geospectra.net/kite/picher/picher.htm>.)

still did not recognize the tribe's ability to regulate chat sales. Jenny Rampy, a Quapaw, complained that her chat was removed without her approval. The company hauling Rampy's chat from her residence argued that it had a contract with the majority land owner, a non-Indian, since 2002. BIA spokeswoman Nedra Darling defended the BIA's position on chat sales, reasoning that a portion of the profits were put into an escrow account for Indian land owners in a private

³²¹ Clifton Adcock, "Quapaws Tied to Toxic Chat, Like It or Not," *Tulsa World*, February 28, 2010; CH2M Hill, "Third Five Year Review," 47.

bank in Kansas. The Quapaws had not received any of the money. Quapaw Jan Kellough argued that “The land is still in trust with the federal government; that’s what we don’t understand,” thus, why would the federal government hide money from the tribe.³²² Like the early twentieth century, the BIA tried to ensure profits for the Quapaws, but without the tribal government’s input, or that of landowners.

Only after the turn of the new millennium did the BIA allow Quapaws to sell their chat individually. Even then, the BIA allowed chat to be taken from Quapaw property without tribal consent. The Interior Department answered calls by Quapaws to regulate chat, in 2005, with a pilot project on chat sales, which asked the Quapaws to meet Best Management Practices (BMPs) similar to those imposed by the Oklahoma Department of Environmental Quality on non-tribal land. The project called on the state, along with the University of Oklahoma, to investigate the safety of chat in asphalt paving.³²³ Tyler Powel, office director for the Oklahoma secretary of the environment, stated at the 13th National Tar Creek Conference, that removing chat piles could take thirty years, even if 100 train car loads were taken out per day. He remained hopeful that the job would be finished and that the area would be restored.³²⁴ There could be promise for the future of chat sales for the tribe, but overall, the BIA had disregarded the tribe’s ability to regulate chat sales.

Not only were the Quapaws confused by the federal government’s unwillingness to let the tribe regulate chat sales, but the tribe sued the EPA on May 5, 2004, due to its “intermittent, delayed, stalled and ill-defined”³²⁵ efforts at cleaning the region. The Quapaw tribe sued under a

³²² Clifton Adcock, “Fight Against Chat Removal Erupts,” *Tulsa World*, February 13, 2010.

³²³ CH2M Hill, “Third Five Year Review,” 47.

³²⁴ Omer Gillham, “Unfinished Business.”

³²⁵ *Blue Tee Corp.*, at 9.

CERCLA provision, allowing a natural resource trustee to sue due to natural resource damages (NRDs). Originally, the case was against seven mining companies, and labeled *Quapaw Tribe v. Blue Tee Corp* (2008), but the tribe filed an amended suit against the federal government. The tribe believed that danger from lead exposure and chat piles had existed since the 1930s, and that the EPA should have taken action to clean the region much earlier than it did. The EPA, instead, did not begin soil remediation until 1996, even though Tar Creek went on the National Priority List in 1981. The EPA also did not investigate the chat piles and tailing ponds for two decades after initial discovery. Furthermore, the tribe criticized the EPA for not issuing its first five-year review until 1994. The EPA responded to Quapaw complaints by arguing that since Tar Creek was a complex site, it had multiple operable units, which take years to remedy.³²⁶

The Tenth Circuit Court did not rule in favor of the Quapaws. First, there was a technicality that hurt the Quapaws. They could not file suit for natural resource damages until remediation efforts at a Superfund site were completed.³²⁷ The court decided that while claims for losses were allowed under CERCLA, it could not grant the tribe a financial settlement, since there was not precedent for such action against the EPA under CERCLA. The decision in *New Mexico v. General Electric* (2006) provided the opposite precedent, as the court found that if preemptive money was allowed for recovery, then a remediation job might not be finished, or money provided for remediation and recovery might be used for another purpose. The Quapaws had hoped to receive money for damages, and for the interim loss of use, because the claim did not interfere with the EPA's ongoing work at the Superfund site.³²⁸

³²⁶ Ibid.

³²⁷ CERCLA, 42 U.S.C. § 9613 (1980).

³²⁸ *New Mexico v. General Electric Company*, 467 F. 3d 1223 (2006).

Ultimately, the Tenth Circuit did not agree with the Quapaws that the EPA was not “diligently proceeding” to clean the area, even though there was no defined period for the EPA to complete the remedial investigation and feasibility study for OU 5. The tribe tried to use the Resource Conservation and Recovery Act’s (RCRA 1976) “diligently proceeding” provision, because RCRA allowed a citizen to bring suit. The problem for the court was that RCRA was not the same as CERCLA, so the court did not deem it a sufficient parallel example. Furthermore, RCRA also did not define “diligently proceeding.” The court said Congress meant to provide federal agencies the ability to make professional judgments without interference from the courts in terms of professional analysis. There was simply no way for the court to judge the value of a claim until the EPA had completed full remediation. The mere fact that chat removal could take thirty years did not mean that the EPA was acting without diligence. The EPA also assessed the risks to humans from pollution from chat piles and mining waste differently than the tribe did, but this did not mean the EPA was acting without diligence, especially given the fact that the EPA had started the process of moving families to other locations.³²⁹ In the end, the Quapaws tried to define appropriate remediation methods, but the Tenth Circuit disagreed. The tribe was left to allow the EPA to clean their land as was defined by CERCLA. Still, the Quapaws had continued to exert their self-determination over their land through the suit, challenging the power of the EPA, and the federal government.

In conclusion, mining companies had polluted the Quapaws’ land for the majority of the twentieth century, yet the Quapaws were not in control of their own destiny in regard to cleaning the region. The EPA offered the Quapaws opportunities to perform remedial investigations and feasibility studies, and spent nearly two million dollars in that effort, but the Quapaws were not

³²⁹ *Blue Tee Corp.*, at 29-30.

allowed to clean the area themselves. According to Ursula Lennox, the remedial project manager for the Tar Creek Superfund site, “the EPA’s mission is to protect human health and the environment, and the funds designated for this project enables this mission to be accomplished. Congress has given the EPA the authority to clean up uncontrolled or abandoned hazardous waste sites, but, to ensure that the tribes, public, and communities are engaged in this effort, various grants and tools are awarded and used.”³³⁰ Tribal environmental director Tim Kent asked the EPA to recognize the Quapaws’ ability to lead the cleaning process for the region, but the EPA was not willing to let the Quapaws take the lead.³³¹ Nevertheless, the Quapaws continued to vie for control of Quapaw land.

Section Two Summary

The Quapaws pushed the United States government to recognize the Quapaws’ sovereignty over their land for hundreds of years. The Quapaws strength to act as sovereigns in the face of the United States was evident back in the nineteenth century. First, the Quapaws survived treaties that ceded land to the United States. Then the Quapaws remained on their land despite allotment beginning in 1887. In the twentieth century, Quapaws challenged the leases approved by the Interior Department in an effort to get better financial royalties from the mining of the land. In the 1990s, the Quapaws questioned the EPA’s ability to clean the pollution left by the mining companies, and pushed the EPA for recognition that the tribe could clean its own land, although the EPA fell short of recognizing tribal sovereignty over the Superfund process.

Despite its creation at the dawn of the Self-Determination Era, the EPA, like the BIA and Interior Department, did not recognize Quapaw sovereignty over tribal lands. During the

³³⁰ Lennox, email to author, October 19, 2011.

³³¹ 42 U.S.C. § 9626 (1988).

nineteenth century, the federal government consistently tried to move the Quapaws out of the way of non-Indian expansion. In the twentieth century, the federal government made judgments on behalf of the Quapaws for mining profits. As the twentieth century gave way to the new millennium, the EPA followed suit by not turning over control of the remediation project at Tar Creek to the Quapaws. Like the case study of the Isletas, the EPA did not recognize the Quapaws' abilities to make decisions about their land without the help of the federal government.

Chapter 6: The Osage Nation and Oil before the EPA

The Osages came to control a vast oil reserve over many years, which ultimately gave them the responsibility to keep the land clean of oil waste. The Osage origin story teaches of a connection to the land and to be wary of non-Indians, requiring Osages to work in peace with non-Indians. The story begins with Wah'Kon-Tah, the life force of the universe, sending Osage ancestors from the stars to populate the earth. The Children of the Middle Waters, or Little Ones, floated down to earth and landed on a red oak tree in the autumn. Wah'Kon-Tah taught the Little Ones life skills, such as the power of fire, by lighting a field ablaze with his crooked fire lance. Wah'Kon-Tah also showed the Little Ones how to watch the stars to see what their brethren were doing. By studying the skies, the Little Ones gradually became aware of the seasonal changes. Wah'Kon-Tah, then, divided the Little Ones into the People of the Waters, the People of the Land, and the People of the Sky. The three groups of the Little Ones discovered the U-Tah-No'n-Dsi, the Isolated Earth People, but the Little Ones stopped short of making contact. The Little Ones were scared, because the Isolated Earth People practiced murder and deceit. Eventually, Wah-Sha-She, leader of the Water People, stepped forward to offer the pipe of peace and smoked it with the earth people. They made peace and remained on earth, becoming the Osage Nation.³³² Through the Osage creation story it is evident that tribal members must continue to work with non-Indians, even though non-Indians do not recognize Osage sovereignty.

The federal government has usually protected the ability of non-Indians to operate on Osage lands, over the Osages' right to keep and manage their property. In much the same way, oil pollution on Osage land before the EPA was only measurable to the federal government in

³³² Mathews, *The Osages*, 9-17.

dollar amounts, and the Osages' ability to protect their own land from pollution was not important to the federal government. It did not recognize the Osages' ability to choose how oil companies should clean Osage land and at what cost the Osages should be reimbursed. That did not stop individual Osages from complaining to the federal government about oil pollution during the earlier twentieth century, as they asked for the government to clean land that was damaged by oil spills. The Osages acted as sovereigns even though the federal government did not recognize their sovereignty.

There are many histories of the Osage Nation, including a history of the Osage oil reserve, but none cover the Osages relationship with the EPA, not to mention Osages of the Self-Determination Era. In addition, the histories of the Osages do not address pollution and the land prior to the birth of the EPA in 1970, and especially pollution and land issues intertwined with the Osages' drive to clean their tribal land. Furthermore, historians have not illustrated the Osages' persistent push against the federal government to respect Osage land. The first book to consult on the Osages to become familiar with their history is John Joseph Mathews' *The Osages: Children of the Middle Waters* (1961), in which the goal is to bring tribal history from an Osage perspective, because he realized the elders of his community were concerned the oral histories of the Osages would be lost. Mathews was an Osage Tribal Council member who helped create the Osage Nation Museum in Pawhuska. Terry Wilson has written that one could not begin to understand Osage history until you read Mathews. Mathews' book is heavy on oral documentation from Osages, as he consulted forty-five individuals to get their take on Osage

history. It also provides a detailed history of the early years of Osage involvement with European powers. Mathews ends his study in the 1930s, so there has been much to build on.³³³

Gilbert C. Din and A. P. Nasatir, in *The Imperial Osages: Spanish-Indian Diplomacy in the Mississippi Valley* (1983), described the early years of the tribe through the use primary material from Spanish sources, which is substantial given the long Osage history with Spanish contact. Din and Nasatir did not cover modern history, but their study is essential reading for a historian that wants to understand the early years of the tribe. Din and Nasatir outlined how the Osages were major power brokers during the early years of European contact.³³⁴

Craig Miner's *The Corporation and the Indian: Tribal Sovereignty and Industrial Civilization in Indian Territory, 1865-1907* (1976) was the story of several tribes, but Miner wrote the first chapter devoted to the Foster Lease on the Osage reservation. Miner's thesis was that the corporations took advantage of the tribe, which was certainly the case. Unlike the section that follows, Miner did not give the Osage Nation credit for its perseverance and he did not recognize the power of individual Osage voices to help the BIA identify oil spills on the reservation.³³⁵

In *The Underground Reservation, Osage Oil* (1985), Terry P. Wilson devoted research to the Osages and their mineral leases, with particular attention to the same archives that Miner used to write about the Foster Lease. Wilson's goal was to tell the story of the Osages, because

³³³ John Joseph Mathews, *The Osages: Children of the Middle Waters* (Norman: University of Oklahoma Press, 1961).

³³⁴ Gilbert C. Din and A.P. Nasatir, *The Imperial Osages: Spanish-Indian Diplomacy in the Mississippi Valley* (Norman: University of Oklahoma Press, 1983).

³³⁵ Craig Miner, *The Corporation and the Indian: Tribal Sovereignty and Industrial Civilization in Indian Territory, 1865-1907* (Columbia, MO: University of Missouri Press, 1976).

his wife was Osage, and he felt the tribe had been disrespected in the historical record. Wilson did not provide much information past the Assimilation period (1887-1934), most notably leaving out a discussion of environmental pollution from oil.³³⁶ There are more studies of the Osages, and some are referenced in this chapter, but the ones previously described are the most important to read in order to get a feel for the problems and successes of the Osages.

After 1803, the Osages had to learn to live in unison with the federal government, which did not respect the tribe's right to live without the interference of non-Indian settlers. Historians believe the first Osage interaction with Europeans occurred in June 1673, when Louis Joliet, a French trader, and Father Jacques Marquette, a Franciscan missionary from Québec, floated down the Mississippi River from the Great Lakes, taking notes about the flora and fauna of the river, and the Indians living on the banks. On April 9, 1682, French explorer Sieur de la Salle and Italian explorer Henri de Tonti, along with a party of twenty Frenchmen and eighteen Algonquins, reached the mouth of the Mississippi and claimed the entire area for France. They named their new territory, Louisiana, in honor of King Louis XIV.³³⁷ The French traded for furs, horses, and slaves with the Osages. In addition to the market exchange with the French, the Osages supplemented their dietary needs with venison from their hunts.³³⁸ Once Spain acquired Louisiana in 1762, the Spaniards traded with the Osages at the Arkansas River, where the Osages were also doing well in a revived trade with the British.³³⁹ The Spanish, realizing that the Osages held a tremendous advantage on trade, encouraged other tribes to attack the Osages. In 1794, the

³³⁶ Terry P. Wilson, *The Underground Reservation: Osage Oil* (Lincoln, NE: University of Nebraska Press, 1985).

³³⁷ *Ibid.*, 104-111.

³³⁸ Rollings, *The Osages*, 6-7.

³³⁹ John, *Storms Brewed*, 388, 409.

Spanish finally decided to make peace with the Osages, because they were concerned that French envoy Edmond Genêt, who was in America garnering support for a war against the British and Spanish, would convince the powerful Osages to attack the Spanish.³⁴⁰ Even at the turn of the nineteenth century, the Osages were still quite powerful and held control of their own destiny, despite the encroachment of the European powers.

Following the Louisiana Purchase, the United States established its relationship with the Osages and chipped away at Osage power as part of its Indian removal plan. President Thomas Jefferson made William Clark the Indian agent to the tribes of the west in the fall of 1806 upon Clark's return from the famed Lewis and Clark expedition of the American Northwest. Clark officially became superintendent of Indian affairs in 1812. In 1808, Clark met with Pawhuska, an Osage chief, at Fort Prairie Fire to sign the first Osage peace treaty with the United States. The Osages agreed to settle near Prairie Fire, later named Fort Osage, and not roam the Prairie and Plains attacking other tribes. To lure the Osages into a life of farming, the United States promised to supply a blacksmith, grain mill, plows, two log houses, a trading post, \$1,000 in merchandise, and \$1,200 in cash. The federal government also would not hold the Osages accountable for American property that the tribe had destroyed. Most importantly, however, William Clark promised to protect the Osages. The ceded land included virtually all of the modern state of Missouri, south of the Missouri River, and also included the modern state of Arkansas north of the Arkansas River.³⁴¹ As might be expected, losing land to the encroachment of non-Indians took a toll on Osage tribal unity. By 1813, one band of Great Osages lived on the Osage River, 400 miles from where it splits with the Missouri River, and the second band of

³⁴⁰ Rollings, *The Osage*, 171-174.

³⁴¹ Treaty with the Osage, 7 Stat. 107 (1808).

Great Osages lived on the Arkansas River, 750 miles from where it splits with the Missouri River. The band on the Osage River numbered about 500, while the band on the Arkansas River numbered about 400. Sixty Little Osages lived near the Great Osages on the Osage River, and 150 lived near the Great Osage band on the Arkansas River.³⁴² By the end of the century, the Osages' land holdings were severely diminished, and the federal government did not respect the Osages' right to rule. Even with the federal government's lack of sovereignty recognition, the Osages continued to exert control over their natural resources.

The federal government signed another treaty with the Osages in 1818, after they lost to the Cherokees at the Massacre of Claremore Mound, proving Clark's promises of peace were empty. The Osages' trouble with the Cherokees began when the Cherokees migrated to Osage territory from Tennessee beginning in 1786. By 1816, about 6,000 Cherokees lived on the lower Arkansas River. This Cherokee band signed a treaty with the federal government on July 8, 1817 that the band would give up whatever ground it still owned in Tennessee.³⁴³ The Cherokees and Osages argued over hunting ground, with murders often ensuing after clashes in the forests. During the Massacre of Claremore Mound, the Cherokees killed thirty-eight Osage women, children, and old men, and captured over 100 girls and boys. The Cherokees sent word to the federal government of their victory, and Secretary of War John C. Calhoun ordered the Osages to surrender their land to the Cherokees.³⁴⁴ The ceded land bordered the Arkansas River, the Verdigris River, the Verdigris Falls, and all Osage land east to the Cherokee border.

³⁴² Pierre Chateau, Indian Agent, to William Clark, July 29, 1813, William Clark Papers, Volume 2, MS 94, Kansas State Historical Society.

³⁴³ Article of a Treaty Concluded at the Cherokee Agency, July 8, 1817, WCP, V2, MS 94.

³⁴⁴ Rollings, *The Osage*, 236-243; Baird, *The Osage People*, 32; According to Baird, eighty-three women, children and old men were killed by the Cherokees, not thirty-eight.

The federal government's meager compensation to the Osages came in the form of paying non-Indian claims against the tribe, which amounted to \$4,000.³⁴⁵ The federal government's plan of limiting Osage independence was coming to fruition, but the Osages continued to live in their much reduced territory.

Even after taking most of the Osages' land, Clark still was under the impression he had to mold the Osages into a "peaceful" tribe. On October 6, 1818 the Big and Little Osages signed a treaty with the Cherokees, and the Cherokees' allies, the Shawnees and the Delawares. The two sides promised to return all prisoners in spring 1819, and the Osages agreed to allow the Cherokees and their allies to hunt on their land.³⁴⁶ On September 21, 1822, the Delawares asked federal Indian sub-agent Pierre Menard for an agreement with the Osages to pay for past damages from Osage raids. The Delawares hoped for \$1,000 or land, but the Osages only offered \$500. The Delawares eventually accepted an agreement of peaceful relations from the Osages, although the treaty simply stated that the "white hairs" of the Osages agreed to the peace treaty.³⁴⁷ A consistent theme through all the Osage treaties was that the agents and superintendent hoped for peace, but were not particularly concerned that the Osages had to give up their most important resource, their land, to get that peace. In the collective eyes of the federal government, non-Indian settlement always trumped Osage needs.

In 1825, William Clark wrote a series of letters to tribes to try to instill faith in them that the federal government would provide for Indian people. He told the Osages that he had "turned

³⁴⁵ A Treaty Made and Concluded by William Clark, Governor of the Territory of Missouri, Superintendent of Indian Affairs, with the Several Bands of the Big and Little Osages, September 25, 1818, WCP, V2, MS 94; Treaty with the Osage, 1818, 7 Stat. 183 (1818).

³⁴⁶ A Treaty of Amity and Friendship made and concluded at St. Louis, October 6, 1818, WCP, V2, MS 94.

³⁴⁷ Pierre Menard, sub-agent, to William Clark, September 21, 1822, WCP, V2, MS 94.

three Indian armies from the direction of your towns and prevented the parties from sucking the blood of your people.”³⁴⁸ Clark argued that the Osages’ land was valued by many tribes, thus the Osages had to cooperate with the federal government and share Osage land. Clark, however, did not mention that non-Indians wished to possess the lands as well. He wrote that “if you have confidence in me to attend to what I say—Your Great Father the President of the U.S. is willing to purchase your lands and apportionate a part to such tribes he might think proper, who will live in friendship with you and will strengthen your arms.”³⁴⁹ Clark had an unfair advantage in negotiations with the Osages, since animals were scarce and tribal annuities were small.³⁵⁰

The Osage chiefs agreed to the treaty Clark wanted on June 2, 1825, at St. Louis. The Osages ceded all their remaining land in Missouri and the Territory of Arkansas, along with all lands west of Missouri and the Territory of Arkansas, north and west of the Red River, south of the Kansas River, and east of a line from the head of the Kansas River, southward through the Rock Saline. It was quite a bargain for the United States, since American citizens could move freely through the area, and the federal government reserved the right to navigate rivers and lakes. The federal government agreed to provide the Osages with \$7,000 in cash and provisions annually for twenty-five years, along with 600 cattle, 600 hogs, 1,000 chickens, ten yoke of oxen, six carts, various farming tools, a blacksmith, and an advisor on farming. The federal government planned to assume the debts to trading houses in the amount of \$4,105.80 if the Osages would allow the federal government not to abide by the provisions in the 1808 treaty, which forced the United States to furnish American troops for the protection of the Osages at Fort Osage. As in previous treaties with the Osages, the federal government also agreed to pay

³⁴⁸ William Clark to Osage Chiefs, 1825, WCP, V2, MS 94.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

white American citizens for property damaged by the Osages. Once the treaty was signed, the tribe moved to modern-day southeastern Kansas.³⁵¹ Despite the treaty, the Osages continued to hunt and raid.

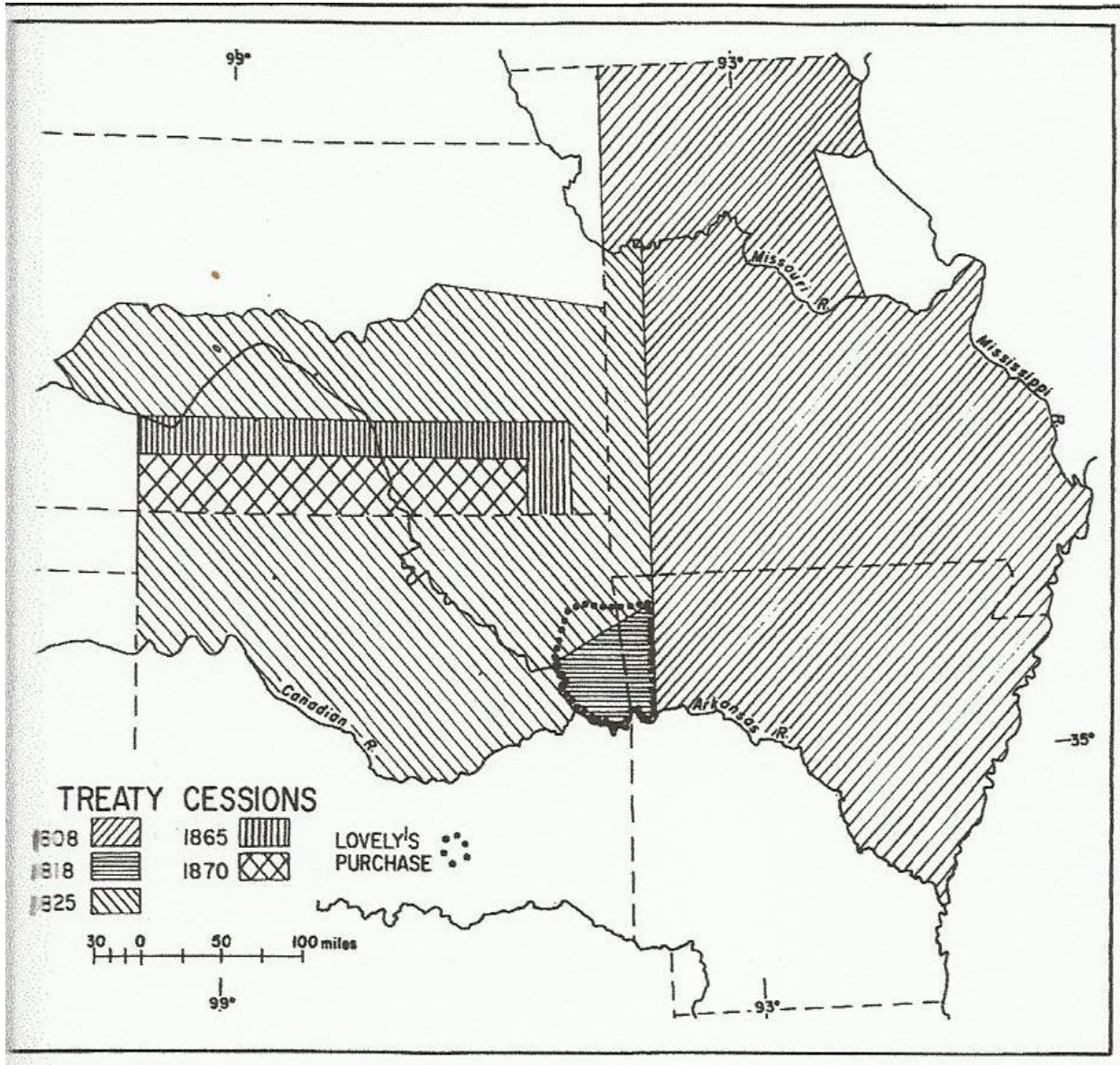


Figure 6.1 Osage Treaty Cessions

(W. David Baird, *The Osage People* (Phoenix: Indian Tribal Series, 1972.), 31)

³⁵¹ Treaty with the Osage, 1825, 7 Stat. 240 (1825).

The Osages were not pleased with the conditions in their new home. The Osages had to compete with other tribes for hunting land and non-Indian squatters were prevalent. The Osages raided other tribes for provisions well through the next few decades, since treaty provisions proved to be insufficient. Horse theft was one Osage strategy to make up for insufficient annuities. In the 1820s the Osages raided the Pawnees on occasion,³⁵² and in the summer of 1836, an Osage band stole horses from the Peankeshaws.³⁵³ In 1850, the Osages were low on provisions because their federal annuity payment was late, despite the request of Superintendent D.D. Mitchell to Commissioner of Indian Affairs Orlando Brown to honor the Osage treaty and issue the annuity payment.³⁵⁴ In late summer 1854, a band of Osages rode north to steal horses from the Sacs and Foxes.³⁵⁵ In response, the Sacs and Foxes planned a war for later in the summer of 1854 against the Osages, but the Sacs and Foxes never followed through on their plans.³⁵⁶ Osage bands were generally peaceful, at least to the eyes of federal bureaucrats. Colonel M. Arbuckle, commanding officer at Fort Smith, argued that a pledge should be taken by other tribes not to bother the Osages.³⁵⁷ Arbuckle's pity was not necessary, though, as evidence from previous years showed that the Osages could survive despite the lack of provisions.

³⁵² William Clark to Lewis Cass, August 18, 1829, William Clark Papers, Volume 4, MS 94, Kansas State Historical Society.

³⁵³ R. W. Cumming to William Clark, June 7, 1836, William Clark Papers, Volume 34, MF 3166, Kansas State Historical Society.

³⁵⁴ D.D. Mitchell, Superintendent, to Orlando Brown, Commissioner, April 23, 1850, William Clark Papers, Volume 9, MS 96, Kansas State Historical Society.

³⁵⁵ Report from the Great Nemaha Agency, August 27, 1854, Charles R. Green Papers, Box 7, Miscellaneous Indian Correspondence, Kansas State Historical Society.

³⁵⁶ Alfred Cumming to George Manypenny, August 11, 1854, WCP, V9, MS 96.

³⁵⁷ Colonel M. Arbuckle to Major General Alex Macomb, May 31, 1830, United States Office of Indian Affairs, Letters received, Osage Agency, MS 267, Kansas State Historical Society.

The Osages land resources were limited on their diminished land holdings, but they continued to find ways to survive and continued to be a power across the region. According to one settler in 1858, the Osages were unwilling to sell ponies, even skinny ponies, illustrating the Osages ability to conserve their resources.³⁵⁸ A band of Osages who lived among the Sacs and Foxes in Kansas even considered going on an exhibition tour to make money.³⁵⁹ In the summer of 1860, a drought hit Kansas, and with few provisions from the federal government, the Osages traveled west to the Kansas plains to hunt buffalo, unwilling to let federal treaties dictate when and where the tribe could travel.³⁶⁰

The 1860s and 1870s saw Osage lands officially opened for settlement by the federal government, and the federal government forced the Osages to move to their current home lands in Oklahoma. Final Osage land cessions came in 1865, as they ceded the northern and eastern sections of their Kansas reservation in exchange for more federal provisions. In 1865, the Osages ceded thirty miles of land on the eastern part of the Kansas reservation and twenty miles on the northern border. For the eastern ceded land, the federal government paid \$300,000, but the federal government kept the money in trust for the tribe. The ceded land was not to be open to homesteaders, but soon after, it was.³⁶¹ The annuity from the 1865 land sale never reached the tribe, because the local Indian office never opened an account to disperse the funds.³⁶² On

³⁵⁸ Joseph H. Trego to Alice Trego, February 28, 1858, Joseph Harrington Trego Collection, Box 1, Folder 1, Kansas State Historical Society.

³⁵⁹ John Haverty, Superintendent, to Orlando Brown, Commissioner of Indian Affairs, Feb. 21, 1850, WCP, V9, MS 96.

³⁶⁰ Judge Graham, Madison County to Thaddeus Hyatt, President of the National Kansas Committee, September 14, 1860, Thaddeus Hyatt Collection, Box 2, Folder 1, Kansas State Historical Society.

³⁶¹ Treaty with the Osage, 1865, 14 Stat. 687 (1865).

³⁶² Wilson, *The Underground Reservation*, 14.

January 17, 1867, Congress adopted the Kansas Legislature's resolution that Indian lands be opened to settlement under the Homestead Act, which provided free land to settlers who could improve the land.³⁶³ On July 17, 1870, the federal government made the remainder of Osage lands open for sale to settlers with and all Osages were to move from the state of Kansas.³⁶⁴ The Osages gave up a total of 8 million acres in Kansas and settled in northcentral Oklahoma on 1,470,559 acres purchased from their historic foes, the Cherokees.³⁶⁵ By the time the Osages finally moved to Oklahoma, over 15,000 non-Indians lived illegally on the Osages' former lands.³⁶⁶ Ironically, a few years later, oil companies tapped a massive underground oil reserve on the new Osage lands, but the Osages did not sign over their mineral rights.³⁶⁷

The Osages did not allow the federal government and Kansas state government to dictate how settlement patterns would unfold across the Plains and Prairie without a fight. During the Civil War, the Osages attacked soldiers who crossed the region to recruit for their military forces. On one occasion during the war, Osage warriors killed twenty Confederate soldiers crossing Osage lands.³⁶⁸ In the winter of 1873, a band of Osages hunting in south-central Kansas killed John Mosely, a popular citizen of Barbour County. Due to tall-tales of Indian atrocities, the locals were worried that the killing of Mosely was the first move in a pending Indian war. The Osages killed three more settlers in Barbour County in the summer of 1874, and the two

³⁶³ Kansas House of Representatives, "Settlers on Osage Lands," 29th Congress, 2nd Session, January 17, 1867.

³⁶⁴ Craig Miner and William E. Unrau, *The End of Indian Kansas: A Study in Cultural Revolution, 1854-1871* (Lawrence: University Press of Kansas, 1878), 125.

³⁶⁵ Mathews, *The Osages*, 686-692; Mathews, *Wah'Kon-Tah*, 359; Wilson, *Underground Reservation*, 16.

³⁶⁶ Miner and Unrau, *The End of Indian Kansas*, 123.

³⁶⁷ Treaty with the Osage, 7 Stat. 107 (1808).

³⁶⁸ E.A. Herrod, Professor of Mathematics, Northwestern Territorial Normal School, to Honorable George W. Martin, October 2, 1902, Box 3, Osage Indians, Indian History Collection, Kansas State Historical Society.

incidences were enough evidence of a prospective Indian offensive to convince Governor Thomas Osborn to call on Captain C.M. Rickers to form a militia unit of sixty men to kill Indians. In August 1874, Rickers' militia found and killed four Osages who had nothing to do with the previous murders, but were only hunting on the Plains. Rickers did not care that the Osages did not have a connection to the killing of John Mosely. The federal government, indeed, charged Rickers with taking Osage property, but not with murder, and he remained in charge of his militia. The federal government demanded only reparations from the state of Kansas in the name of the Osages.³⁶⁹

Despite the lack of federal sovereignty recognition, the Osage Tribal Council approved leases on tribal land, but with the oversight of the federal government. In 1891, the federal government allowed Indian tribes who owned reservations to lease the land for mining for the first time, but also imposed a ten-year limit to the contracts approved by tribal councils, thus beginning the next phase of federal infringement of Osage sovereignty. The federal government deemed tribal councils incompetent and unable to protect themselves from dishonest oilmen.³⁷⁰ Henry Foster of Independence, Kansas, asked the BIA for the exclusive right to test and produce oil on the Osage reservation, and the Osage National Council approved the lease on March 14, 1896. The lease granted Foster exploration rights on 1.5 million acres. The secretary of the interior approved the Foster lease just after Henry Foster died, so Henry's brother, Edwin Foster, then took on the project. The lease stated that in return for exclusive rights to oil exploration, drilling and production, oil had to be found within eighteen months. Once oil was found, new

³⁶⁹ Lewis Hanback, Captain, to H.T. Beman, Major, August 24, 1875, Military History Collection, Box 4, Folder 10, Kansas State Historical Society; C. M. Ricker, Captain, to Charles Morris, Adjunct General, November 6, 1874, Governor's Records, Osborn, Box 3, Folder 57, Kansas State Historical Society.

³⁷⁰ Act of Feb. 28, 1891, 25 U.S.C. 397 (1891).

wells had to be drilled within six months. Foster was required to pay the Osages ten percent on oil production, and \$50 on each producing gas well every year, but he could use all the surface resources he needed, such as timber, stone, water, and wood.³⁷¹

Congress soon created a system of wealth distribution for the Osages, as the tribe began earning handsome profits from oil production. Congress allotted the entire Osage reservation in 1906 under the Osage Allotment Act (1906). No Osage born after July 1, 1907 was to receive an allotment, and all Osages maintained a headright for minerals, meaning that they received payments from leases to non-Osage entities that produced oil on Osage land. The federal government allotted the reservation three times into sections of 160 acres and then divided the remaining land among the Osages.³⁷²

Individual Osages complained about oil pollution, showing how the Osages continued to exert their sovereign control over their land, even after many years of the federal government rarely recognizing the tribe's ability of self-rule. The federal government responded to the Osage complaints by asking companies for financial restitution. On February 28, 1907, Secretary of the Interior Ethan Allen Hitchcock informed the Prairie Oil and Gas Company that it had to pay \$205.02 for 2.23 acres of damages as a result of its Bird Creek Discharge Line and its Bird Creek Suction Line on the Osage Reservation. Hitchcock, however, did not make the oil company clean the land. Nor did he provide the tribe money to clean its land.³⁷³ The practice of the secretary fo

³⁷¹ Miner, *The Corporation and the Indian*, 165-166; Wilson, *The Underground Reservation*, 100-101; Fixico, *The Invasion of Indian Country*, 30.

³⁷² Osage Allotment Act, 34 Stat. 539.

³⁷³ Frank M. Tonsen, Chief Clerk of Secretary of the Interior, to Ret Millard, US Indian Agent, Osage Agency, March 9, 1907, RG 75, Records of the Osage Agency, Records of the Oil and Gas Division, Letters Received, 1906-1925, Box 1, National Archives, Fort Worth, TX. (Hereafter, Osage Agency, Oil and Gas, Box 1)

the interior asking a company to pay for pollution and change practices was a consistent theme in the early twentieth century on the Osage reservation.

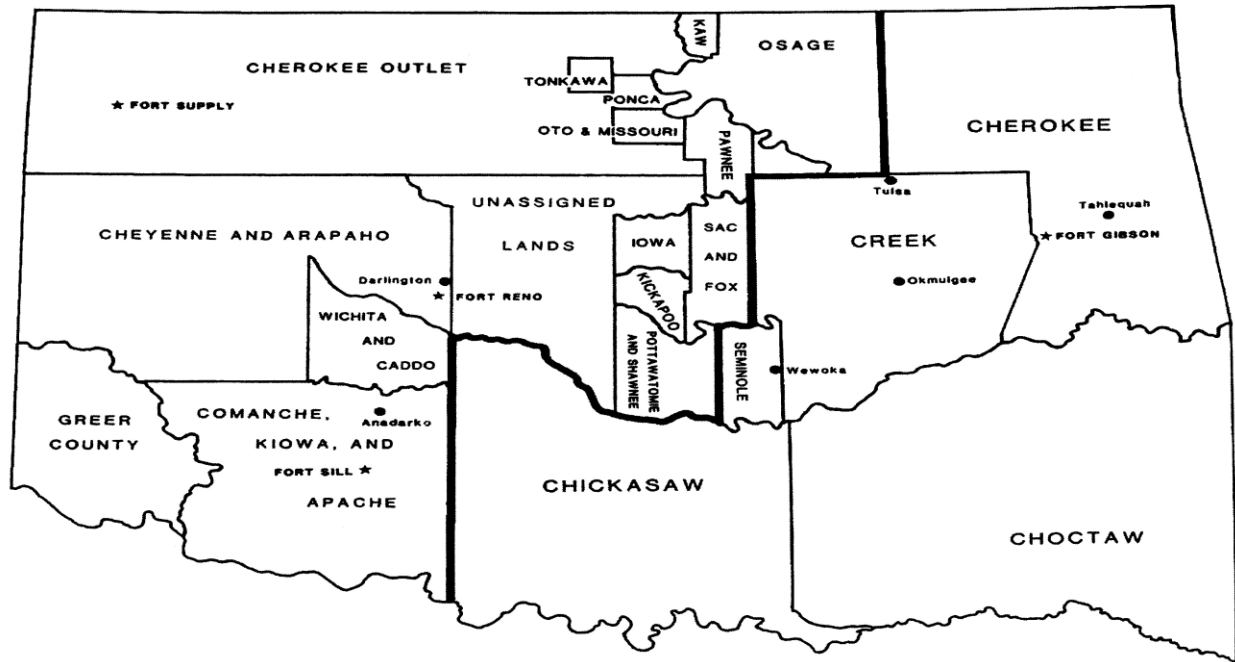


Figure 6.2 Indian Reservations in Oklahoma Prior to Statehood in 1907

(Caddo Nation, “Home,” Accessed August 8, 2013, <http://caddonation-nsn.gov/images/IT1866-89.gif>.)

Before Osages received money for damages, the federal government usually investigated their claim. On February 14, 1907, C.F. Larrabee, the interim commissioner of Indian affairs, ordered the BIA agent of the Osage Nation, Ret Millard, to investigate and assess the damages by mining companies on Albert Lombard’s land. The companies mined on cultivated land and land platted for homesteads, which was in violation of the Osage Act of 1906. The historical record is unclear on whether Lombard’s land was damaged, but if it had been, the common

practice was for the company to pay for the damages at a value prescribed by the federal government.³⁷⁴

The Osages continued to exert control over their land despite the lack of federal recognition of tribal sovereignty. In early 1908, Lenora Stewart, an Osage Indian, made a claim of \$1,000 in damages to the local BIA agent for pollution, but she would only see half that amount, since the civil engineer assigned to the case did not agree with her claim. She complained to the local BIA agent that the Indian Territory Illuminating Oil Company (ITIOC) had released salt water on her land. Inspector Charles F. Leech, a civil engineer, inspected the claim. He found that salt water from the well on Lot 33, which produced about seventy-five barrels of salt water waste per day (salt is a byproduct of oil production), had leaked into Butler Creek, which flowed through Stewart's land. Stewart relied on Butler Creek for water for her cattle. Leech reported that the ITIOC had done everything possible to prevent waste from Lot 31 from leaking into waterways. The ITIOC had constructed a reservoir to catch salt water so that it could be pumped into tanks. Although, the BIA officials were probably unaware of the variety of metal and toxins that salt water waste contained, they did realize that the salt water itself was dangerous for the land. The waste from the two wells on Lot 31 often produced fifty barrels of saltwater daily, which often found its way into Butler Creek. In addition, the ground around the reservoir was saturated with oil. The excess oil could not be burned off, because that would destroy the operation of the ITIOC. Sometimes oil companies "cleaned" oil from the soil by burning. Well 18 on Lot 32, the largest to that point on the Osage Reservation, made 8,000 barrels of oil, salt water, and other waste after it was shot. Leech wrote that it was extremely

³⁷⁴ C.F. Larabee, acting Commissioner of Indian Affairs, to Ret Millard, February 14, 1907, RG 75, Osage Agency, Oil and Gas, Box 1.

difficult to control the oil and waste flow, even though workers were offered \$10 a day to try to control it. It took two weeks to control Well 18, and most of the discharge from the well flowed into Butler Creek. After the company got the well under control, it made about 4,700 barrels of oil, salt water, and other waste. The ITIOC constructed two reservoirs, thus Leech believed that the company did everything possible to control waste, yet a large portion still flowed into Butler Creek. As a result, cattle could not drink from Butler Creek and an oil fire destroyed two hundred trees on the banks of the creek. Leech assessed the timber to be of little value and that \$500 would cover the damages.³⁷⁵ Osage Agent Ret Millard, the regional BIA agent, left his post just before the accident on Stewart's land, and new BIA Osage Agent, Hugh Pitzer, made a trip on May 19, 1908 to Stewart's land to investigate the claim.³⁷⁶ Upon Pitzer's recommendation, Commissioner Larabee allowed Pitzer to broker a deal between Lenora Stewart and the ITIOC for an undisclosed amount of money.³⁷⁷ The BIA did not recognize Stewart's right to set her price to pay for destruction by oil waste.

Sometimes Osages claims of pollution were not answered in nearly the positive manner that Lenora Stewart received, since the BIA chose when retribution would be paid. On January 30, 1909, landowner R.W. Durill wrote a letter of complaint to Ret Millard that the oil companies were allowing oil to flow into Butler Creek on the Osage reserve, ruining the stock water. Whoever received the letter wrote a note on the bottom after the situation was investigated, saying that there was no cause for action. The author of the brief note likely was not

³⁷⁵ Charles F. Leech, Field Inspector, to Osage Indian Agent, March 26, 1908, RG 75, Osage Agency, Oil and Gas, Box 1; Lenora Stewart to Ret Millard, May 2, 1908, RG 75, Osage Agency, Oil and Gas, Box 1.

³⁷⁶ Hugh Pitzer, Osage Indian Agent, to T.A. Stewart, May 13, 1909, RG 75, Osage Agency, Oil and Gas, Box 1.

³⁷⁷ Larabee to Pitzer, August 24, 1908, Osage Agency, Oil and Gas, Box 1.

Ret Millard, because he was not the Osage agent by that date.³⁷⁸ It may have been A.W. Curley, the clerk for the Osage Agency, who also wrote a letter to Durill on February 4 stating that the matter would be investigated at once.³⁷⁹ The Osage agent, presumably Hugh Pitzer, wrote a letter to Durill on April 8 stating that while the oil inspector found evidence of salt water that had escaped into Butler Creek, “the conditions were not such as to justify any action.”³⁸⁰

The oil companies were often responsive to the requests of the BIA and findings of the oil field inspector, although not necessarily responsive to the claim of the Osage land owner. J.W. Evans of the Matson Oil Company responded on March 4, 1909, to a request from the Osage Agency to make sure oil was not running from his company’s tanks onto the ground. He wrote in reference to oil leaking on Lot 53 that “the matter will receive my prompt attention, and immediate steps taken to prevent waste.”³⁸¹ On April 6, 1909, when Hugh Pitzer sent a letter to Waite Phillips, president of the Creston Oil and Gas Company (the younger brother of Frank and L.E. Phillips, who began Phillips Petroleum) that gas lines on his Lot 195 were leaking, Phillips sent his field inspector to investigate and fix the problem.³⁸² Ultimately, Phillips’ field inspector did not find a problem, and thus Phillips did not fix the problem.³⁸³ The BIA accepted this conclusion.

³⁷⁸ R.W. Durill to Ret Millard, January 30, 1909, RG 75, Osage Agency, Oil and Gas, Box 1.

³⁷⁹ A.W. Curley, Clerk for Osage Agency, to R.W. Durill, February 4, 1909, RG 75, Osage Agency, Oil and Gas, Box 1.

³⁸⁰ Superintendent to R.W. Durill, April 8, 1909, RG 75, Osage Agency, Oil and Gas, Box 1.

³⁸¹ J.W. Evans, Manager, Matson Oil Company, to Hugh Pitzer, March 4, 1909, RG 75, Osage Agency, Oil and Gas, Box 1.

³⁸² Waite Phillips to Hugh Pitzer, April 14, 1909, RG 75, Osage Agency, Oil and Gas, Box 1; Andrea Martin, Oklahoma Historical Society’s Encyclopedia of Oklahoma History and Culture, “Phillips, Waite,” accessed October 28, 2013, <http://digital.library.okstate.edu/encyclopedia/entries/P/PH009.html>.

³⁸³ Waite Phillips to A.W. Curley, April 28, 1909, Osage Agency, Oil and Gas, Box 1.

Sometimes the BIA was proactive, but still did not force great changes from the oil companies. On June 29, 1909, Hugh Pitzer detailed to Waite Phillips how his No. 20, 21, 22, and 23 receiving tanks had been allowed to overflow on June 23 and 24. Approximately 150 barrels of oil leaked onto the ground. The oil flowed down a “hollow” across Lot 68 and into Candy Creek. Pitzer told Phillips that the, “tanks should be more carefully looked after and not permitted to overflow.”³⁸⁴ Pitzer also told Phillips that the company was responsible for \$7.79 in lost royalties that they needed to pay to the Osage Agency immediately.³⁸⁵ It is not clear why the oil companies tended to listen to the oil field inspector, but nevertheless, the companies paid their fines if they also agreed with the conclusion of the oil field inspector.

Action by oil companies usually had to also be convenient for the oil company. On September 2, 1909, Bird Jones, an Osage, told Mr. Jarmark, chief clerk of the Osage Agency, that salt water from Lot 276, which belonged to her family and Laura Jones, had spilled on their land. The Barnesdale Oil Company had a gas separator to divide salt water from gas. Well 1 had needed repair for three months and the pipes had finally burst, allowing the salt water to spill over two acres of hay meadow. Bird Jones claimed that this salt water spill made the land worthless, and therefore she wanted the government to pay for the loss.³⁸⁶ L.W. Young of the Barnsdall Oil Company responded by shutting down the gas well that was leaking, arguing that Jones’s claim was “uncalled for, inasmuch as a ditch has been made from the well, in which the water has been running.”³⁸⁷ There is no evidence that Jones received retribution for the damage

³⁸⁴ Hugh Pitzer to Waite Phillips, June 29, 1909, Osage Agency, Oil and Gas, Box 1.

³⁸⁵ Ibid.

³⁸⁶ Bird Jones to Mr. Jarmark, Chief Clerk Osage Agency, September 2, 1909, Osage Agency, Oil and Gas, Box 1.

³⁸⁷ L.W. Young, Superintendent of the Barnsdall Oil Company, to Hugh Pitzer, September 10, 1909, Osage Agency, Oil and Gas, Box 1.

from the oil waste. Even though Young did not agree with the claim, the gas well was shut down, since the company was not using it.³⁸⁸ Jones asked for retribution for an oil spill, and the company actually shut down the offending well, but only because the Barnesdale Company responded to the request of the federal government to fix the problem. Ultimately, the company only shut down the well because it was convenient for them.

With complaints on the rise, oil companies searched for creative ways to gain advantages in the oil fields, since financial settlements of oil pollution complaints could reduce the companies' profits. Oil companies, in 1932, began re-pressuring wells with natural gas. Some companies used acid to eliminate geological resistance to the flow of oil and others flooded land around wells. Oil companies approached the Osage Council in 1936 to approve leases for twenty-eight separate 160-acre lots to allow for more effective implementation of a re-pressuring system, even though re-pressuring allowed for salt waste to be released on clean land. The Osage Tribal Council approved the plan, as did the Interior Department, and over 70 percent of Osage County's oil production came from flooded land by 1966.³⁸⁹ By the 1960s, the Osage Tribal Council, with the BIA's approval, was making decisions to increase profits for the tribe, although the Osage Tribal Council did not echo the concerns of all Osages.

William Zimmerman, assistant commissioner for the BIA, supported the Osage Tribal Council's ability to set land values, even though the Osage Tribal Council did not represent the interests of all the Osages. The federal government authorized the Osage Tribal Council in 1947 to determine the bonus value of land leased for oil, gas, and mining purposes, ultimately leading

³⁸⁸ Ibid.

³⁸⁹ Wilson, *Underground Reservation*, 186-187.

to the selling of millions of acres of Osage land.³⁹⁰ In 1948, the federal government allowed Osages who were members of the tribe, but not of two Osage parents, to sell their land. By 1957, the surface rights to 1.2 of the 1.4 million acre reserve had been sold.³⁹¹ This was controversial since some Osages argued that the Osages who sold their land were not loyal to the tribe, yet the federal government allowed them to sell, creating a form of limited self-determination that only benefitted part of the tribe.

The federal government did not recognize the Osages' ability to make the determination to extend the mineral estate. The federal government approved revised leases on the Osage reserve beginning on November 14, 1949, to allow for blanket leases (large leases), as a response to wells that were not producing, creating greater incentive for oil companies to continue to produce oil on the reservation. Blanket leases allowed fewer oil companies into the fields, so there was less competition, and the companies already there in the field would feel secure in investing in machinery. The BIA allowed twenty-two separate projects, ranging from 320 to 23,240 acres. In the 1950s, secondary oil recovery (using chemicals or gas) led to daily oil figures tripling, which meant more oil companies wanted long-term contracts. The federal government responded to this need in 1964 by allowing companies to mine on Osage land indefinitely. Mining companies could invest in machinery and be fairly secure in the fact that their mining operations would eventually pay for the machinery. The Osages bore the entire cost of the maintenance of the oil reserve, although management duty still fell to the BIA.³⁹² Even

³⁹⁰ *Hearing on H.R. 3323, Before the Subcommittee on Indian Affairs of the Committee of Public Lands, House of Representatives*, 80th Cong. 1-2 (July 3, 1947) (statement of William Zimmerman, Jr. Assistant Commissioner, Bureau of Indian Affairs).

³⁹¹ Baird, *The Osage People*, 82-83.

³⁹² *Hearing on H.R. 10204, Before the Committee on Interior and Insular Affairs, House of Representatives*, 88th Cong. 1-3 (August 12, 1964) (statement of James Edmondson, Senator, Oklahoma).

with maintenance costs, Osage profits rose due to the oil crisis in America, stemming from war in the Middle East in 1973. The value of a single headright rose from \$2,715 annually in 1972 to \$10,870 by 1977, then to more than \$30,220 by 1980.³⁹³

During the twentieth century, the courts did not support self-rule by the Osages, although the courts occasionally upheld the federal trust relationship. In *McCurdy v. United States* (1924), the Supreme Court decided that allotted Osage lands were not subject to taxation by Oklahoma. The land in question belonged to Osages who died before the secretary of the interior approved the allotments on November 19, 1908. Under the Osage Allotment Act of 1906, Congress approved Osage allotments that were nontaxable by a state or territory, even if an Indian who owned the allotment died and the allotment was transferred to an heir.³⁹⁴

In *Oklahoma Ex Rel. Oklahoma Tax Commission et al. v. Barnsdall Refineries, Inc. et al.* (1936), the Supreme Court ruled that an excise tax by Oklahoma on oil produced on Osage land was also illegal, thus upholding *McCurdy*.³⁹⁵ The court's reasoning began with the Act of March 3, 1921, in which the federal government authorized Oklahoma to levy a tax against the gross production of oil in Osage County.³⁹⁶ It was meant to pay for improvements to Osage County, and thus, it was meant to benefit the Osages. In contrast, the 1933 state law in question called for a 1/8 cent per barrel tax on all oil proceeds in Oklahoma. The tax went directly to the state treasury and was used to defray the costs of operating the state's oil and gas distribution law. The court decided this tax unnecessarily burdened the lessees in Osage Country, which were to be

³⁹³ The Osage Nation Minerals Council, "Osage Headright Payments (Annual)," assessed July 25, 2013, http://www.osage-tribe.com/minerals/uploads/2012_Hdrght_Pmt_Rnk_Infltn1.pdf.

³⁹⁴ *McCurdy*, 264 U.S. at 485; Osage Allotment Act, 34 Stat. 539 (1906).

³⁹⁵ *Oklahoma Ex Rel. Oklahoma Tax Commission et al. v. Barnsdall Refineries Inc. et al.* 296 U.S. 521 (1936).

³⁹⁶ Act of March 3, 1921, 41 Stat. 1250 (1921).

regulated solely by the federal government. It was illegal for the state to tax the Osage Nation, but the court held that such a tax could exist if it ultimately benefited the Osage Nation, not Oklahoma.³⁹⁷ In both *McCurdy* and *Barnsdall*, the court decided that the federal government and state governments could collect taxes that benefitted the Osage Nation, although the Osage Nation could have no voice in passing the legislation that called for those taxes. And, the state could tax businesses on the reservation if the court deemed the tax beneficial for the Osage Nation.

In contrast to the previous two cases, the Supreme Court found in *West v. Oklahoma Tax Commission* (1948) that the Osages' land was indeed subject to Oklahoma's estate tax upon the transfer. Thus, not only did the Court not recognize the ability of the Osages to run their own affairs, the federal trust relationship could also be bypassed when the federal courts deemed it necessary. Charles West, Jr., an Osage, died in 1940 and his mother was to receive his entire estate. The Oklahoma Tax Commission levied a tax of \$5,313.35 against the transfer of the estate valued at \$111,219.18. The federal government still held the land in trust, and the Oklahoma Inheritance Transfer Tax Act of 1939 provided the consent for the state to tax land under federal trust.³⁹⁸ The *West* court used the case of *Oklahoma Tax Commission v. United States* (1943) as its guide. In this case the federal government sued to recover inheritance taxes paid on the land of three members of the Five Civilized Tribes (Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles). The justification was that Oklahoma's Indians were citizens of Oklahoma, and therefore they were not immune to inheritance taxes. The Court also believed that Oklahoma

³⁹⁷ Oklahoma Ex Rel, 296 U.S. at 521-526.

³⁹⁸ Oklahoma Inheritance and Transfer Act of 1939, 989, Title 68, Okla. Stat. 1941; *West v. Oklahoma Tax Commission*, 334 U.S. at 719, 723-725 (1948).

would hold a heavy burden if Indian land was exempted from inheritance taxes, since revenue was needed for the public good.³⁹⁹

The Osages could not protect their property from the decisions of the courts, and even their own tribal council, but by the latter half of the twentieth century the technology came available that allowed them to protect their underground water from oil waste. Private companies developed waste injection during the mid-twentieth century, since the federal government allowed oil companies to control the method of waste disposal. Waste injection wells protect both subsurface and surface water from brine and a variety of other materials harmful to humans, plants, and animals. The brine brought to the surface during the oil production process is saltier than sea water, and often has toxic metals and radioactive substances. All oil and gas-producing states now require that the brine be injected into the same rock formation or a similar formation from where it originated. Before the 1970s, scientists believed that once crude oil leaked on land it would evaporate, oxidize, become part of a solution, disperse, or be eaten by microorganisms.⁴⁰⁰ Scientists were still developing processes for oil waste injection throughout the twentieth century, thus the BIA did not have to address the issue before the 1970s, although they were clearly aware of the mess of oil leakage on land, as was evidenced from the complaints from Osages during the early twentieth century.

In the United States, scientists first separated salt from oil waste in 1859 when companies tried to market lamp oil, yet scientists paid little attention to the oil and brine industry for fifty years after that, especially in states like California, Kansas, Texas, and Oklahoma, where brine

³⁹⁹ Oklahoma Tax Commission v. U.S. 319 U.S. at 598, 603, 609 (1943); 334 U.S. 717 (1948); Act of May 10, 1928, Restrictions on Lands of Members of the Five Civilized Tribes, 45 Stat. 495 (1928).

⁴⁰⁰ A. Gene Collins, "Oil and Gas Wells: Potential Polluters of the Environment?" *Journal (Water Pollution Control Federation)* Vol. 42, No. 12 (Dec., 1971): 2387.

could be especially thick.⁴⁰¹ Oil producers generally used surface disposal, which was the norm. This was the case not just in Oklahoma, but around the nation. In 1907 at Bradford Field, Pennsylvania, oil producers flooded land with brine in the hope that it would simply evaporate.⁴⁰² Farmers even sued for damages in the 1920s. A farmer from Oklahoma, Bessie Edwards, sued the Pulaski Oil Company in 1923, because salt sterilized a strip of her land. The court awarded Edwards only \$800 since an acre was worth just \$50 at the time.⁴⁰³

Most land owners received payments from oil companies, so they had little incentive to complain about oil waste, thus it was a tremendous show of self-determination that Osages stood up to the companies in the early twentieth century. The private companies often settled with land owners over waste spills in order to keep the information out of the public eye. In addition, land owners often did not go to court due to legal fees, and the fact that it was almost impossible to prove that salt water from an injection well, or an oil well, polluted a fresh water aquifer. It was much less costly to simply drill another shallow well.⁴⁰⁴

A variety of systems were used in the early twentieth century to dispose of waste. In 1927, the Atlantic Company of Texas, with seven oil wells, disposed of waste oil and bottom sediment in open pits, which oil companies believed could protect rivers and lakes. The Rowan Davis Lease of Texas used a treatment plant and removed bottom sediment instead of letting it flow into Pine Oak Creek. In one Texas oil field, a local farmer asked that the brine be released

⁴⁰¹ Hugh S. Gorman, "Efficiency, Environmental Quality, and Oil Field Brines: The Success and Failure of Pollution Control by Self-Regulation," *The Business History Review* 73 (Winter, 1999): 606.

⁴⁰² Collins, "Oil and Gas Wells," 2391.

⁴⁰³ Gorman, "Efficiency," 606; William B. Black, "Underground Waste Disposal," *Sewage and Industrial Wastes* 30 (May, 1958): 669-672.

⁴⁰⁴ James P. Sterba, "Salt Contamination of Water is Linked to Oil Companies," *New York Times*, March 12, 1977.

into the field for his cattle to drink. The salt content was low, so the cattle could tolerate it. In contrast, oil companies in California pumped their brine into the Pacific Ocean. By 1930, they were pumping 200,000 barrels of waste brine into the ocean every day.⁴⁰⁵

Scientists developed water injection in Pennsylvania just after the turn of the twentieth century, but thought that it was unrealistic for the long term. Scientists could pump water underground into tight sandstone containing crude oil, pushing the remaining crude to the surface. In the early years, industrial waste was often injected into Michigan sandstone. Porous sandstone, the Traverse and Sylvania, were both appropriate for the disposal of waste. Oil field brines were also injected in Michigan along with California, Texas, Arkansas, and Kentucky during the twentieth century.⁴⁰⁶ Scientists believed that while oil emulsions might be readily disposed, oil brines needed just the right conditions for proper disposal. Kansans had problems with algae, which grew when deep water came in contact with oxygen, plugging the pores of the receiving strata. Scale from the corrosion of metal pipes, as well as chemical reactions with incompatible brines, also clogged the strata. Oil companies used evaporation ponds in Kansas, Oklahoma, and Texas. Geologists, however, believed that soil seepage was not problematic since many states had low salt concentrations in their soil. By the 1930s, the Bureau of Mines finally realized that seepage had polluted shallow underground aquifers in Kansas. As a result, farmers had to relocate their freshwater wells, particularly difficult during a drought.⁴⁰⁷

The first test injection well in Texas was at the East Texas oil field in 1936, which would lead scientists to change their idea of waste disposal. The East Texas Salt Water Disposal

⁴⁰⁵ Gorman, "Efficiency," 612-615.

⁴⁰⁶ Black, "Underground Waste Disposal," 669-672; Gorman, "Efficiency," 619.

⁴⁰⁷ "Industrial Wastes: Oil Pollution and Refinery Wastes," *Report of Committee on Oil Production, Conference of State Sanitary Engineers* (October 1934):108; Gorman, "Efficiency," 606, 615, 622.

Company was established in 1942 and 250 operators subscribed to membership through stock. By 1959, over 1,874,000,000 bbl (barrels) of water had been injected through sixty injection wells. The company took salt water from the tank batteries of operators, transported it to a central point, and treated the salt water with chemicals to stabilize it before returning it to underground wells.⁴⁰⁸ By the 1950s, scientists believed that there was tremendous capacity for underground storage of waste. Fracturing—the splitting of rock layers—allowed for upwards of forty million gallons per acre of waste. The fractured area was held under pressure while waste was distributed into the strata. Scientists thought that underground fracturing made no changes on the surface, since there were many layers of clay, shale, and plastic materials above the fractured layer.⁴⁰⁹

The stage was set for the EPA to clean land in Indian country through waste injection. Congress approved the expansion of the Osage Mineral Estate, and the BIA allowed oil companies in the field with little oversight of their injection processes. This brought both wealth and pollution to Osage Country. As detailed in the next chapter, the EPA then created rules for oil companies as allowed by the federal government under the Clean Water Act.

Despite a lack of federal recognition that the Osages could make land decisions on their own, some Osages asked the federal government to stop pollution on Osage lands. Osages, like Lenora Stewart, asked oil companies to at least pay for damages to Osage land caused by oil

⁴⁰⁸ W.S. Morris, “Industrial Wastes: Subsurface Disposal of Salt Water from Oil Wells, Presented at the 32nd Annual Meeting, Federation of Sewage and Industrial Wastes Association, Dallas Texas, October 12-15, 1959,” *Journal (Water Pollution Control Federation)* 32 (Jan. 1960), 43-45.

⁴⁰⁹ Black, “Underground Waste Disposal,” 672; Marcus G. Puder, Bill Bryson and John A. Veil, “Compendium of Regulatory Requirements Governing Underground Injection of Drilling Wastes,” prepared for the US Department of Energy Office of Fossil Energy National Petroleum Technology Office under contract W-31-109-Eng-38 by Argonne National Laboratory (Feb. 2003), 3.

spills. The science was not available prior to 1930 for the BIA, and the Osages, to know the true harm of oil waste. All they were aware of was that the salt water and oil pollution made cattle sick and destroyed river banks. The BIA forced companies to pay for damages, keeping oil leases alive and maintaining royalties for the Osage land owners. While the BIA encouraged the Osage Tribal Council to have a stake in land decisions during the twentieth century, the BIA did not recognize tribal self-determination.

Chapter 7: The Osage Nation, the Midnight Rider, and the EPA

On August 10, 2005, President George W. Bush signed the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) with Republican Senator James Inhofe's ominous Midnight Rider, section 10211, attached to it. The Midnight Rider forced Oklahoma's tribes to make deals with Oklahoma for primary control of oil waste injection (primacy). The rider not recognize the Osages' ability to operate their own injection wells as allowed by the 1986 amendment to the Safe Drinking Water Act, and infringed on the federal trust relationship with the Osages, since it interjected the state of Oklahoma into the relationship. According to over two hundred years of legal precedent, the federal government should not have allowed Oklahoma to usurp the power of the EPA to award Indians primary control of their environmental protection systems. When a tribe had been awarded primacy by the EPA, they could operate an environmental program without everyday oversight from the EPA, as long as the tribe followed federal regulations. Tribal leaders in Oklahoma and around the United States expected the EPA to at least protest the Midnight Rider, yet the EPA did not. Instead, the EPA helped tribes navigate the new law.

The Osage Nation and the EPA began working together on underground waste injection in 1980.⁴¹⁰ At the time the Osage Nation owned more oil and gas acreage than

⁴¹⁰ Diane Daniels, Director of Osage Nation Environmental and Natural Resources Department, Interview with author, February 5, 2010.

any tribe in the United States at 995,707.17 acres, so there was plenty of waste from oil operations with the potential to pollute underground sources of drinking water.⁴¹¹ The EPA even used Osage employees to build the program. Three Osage employees reported to two EPA officials for several years.⁴¹² As detailed in the previous chapter, in the late twentieth century, the federal government finally understood how to successfully deal with oil waste through the use of underground injection.

The Safe Drinking Water Act called on the EPA to oversee underground waste injection programs on Indian reservations, and in states, to prevent oil waste spills. For example, the EPA has looked at each injection well on a case-by-case basis and set requirements for waste injection pressures based upon subsurface rock formations. High well pressures sometimes fracture subsurface rock formations, which endangers drinking water sources. In addition, well operators have been required to maintain financial resources to ensure the plugging of old injection wells.⁴¹³ Overall, the federal government, represented by the EPA, has required more oversight over oil production operations than the BIA had asked for in earlier years. As a result of tougher restrictions, oil companies challenged the requirements.

The Osage Nation and the EPA tried to help oil companies follow the Safe Drinking Water Act. The EPA created the Osage Outreach Project in 1996 to get oil companies to cooperate with federal underground waste injection regulations. The EPA

⁴¹¹ Fixico, *The Invasion of Indian Country*, Appendix C, 224. The other major oil and gas producing tribes at the time were the Shoshone and Arapaho Tribes of Wyoming, who owned 545,108.84 acres, the Uintah and Ouray Tribes of Utah who owned 385,685.36 acres, and the Mandan, Hidatsa and Arikara Tribes of North Dakota, who owned a consolidated 352,691 acres

⁴¹² Diane Daniels, interview with author, February 5, 2010.

⁴¹³ Underground Injection Control, 40 C.F.R. Parts 124, 144, 146 and 147.

educated oil companies operating on the Osage reservation, both non-Indian and Indian, about the regulations they needed to follow in regard to underground injection. The EPA published two manuals to help companies on the reservation avoid expensive penalties.

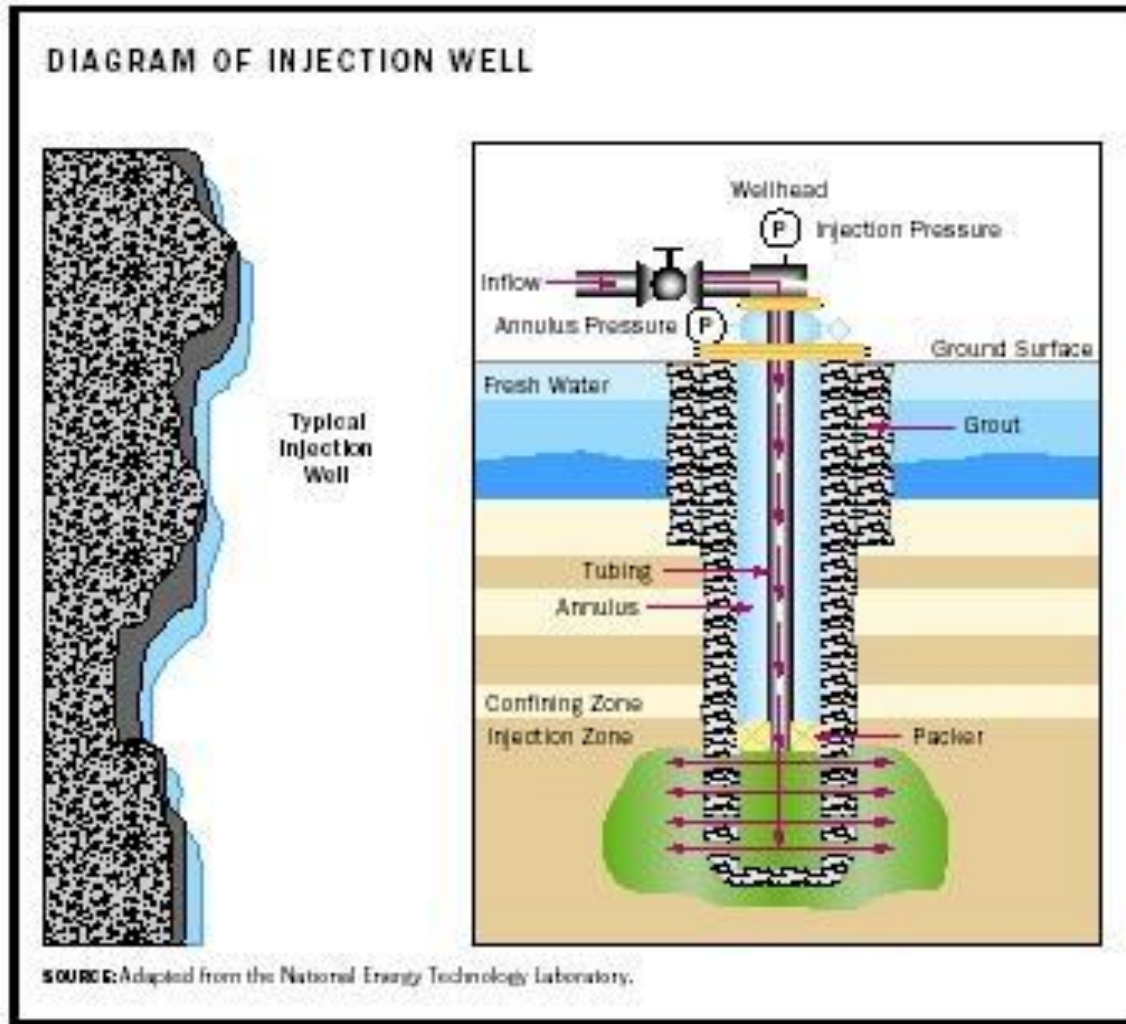


Figure 7.1 Oil Waste Injection Well

(Pollution Issues.com, "Injection Well," accessed October 13, 2013, <http://www.pollutionissues.com/Ho-Li/Injection-Well.html#b>; also see, Paul Osborn, ed., "Technical Program Review: Underground Injection Control Regulations," (Washington D.C.: GPO, 2002).

⁴¹⁴ Wesley Brown, "Osage Get EPA Pointers," *Tulsa World*, Aug. 28, 1997.

In 2005, Osage Nation officials completed the federal treatment as a state application and the federal primacy application, which would give the EPA the ability to recognize Osage primacy over oil waste injection on the reservation. When the federal government approved a treatment as a state application, a tribe had the ability to operate an environmental program independent of the federal government, much like a state, as long as the tribe followed federal law. States and tribes had to prove they would regulate waste disposal with the same strict standards of the EPA. For example, if the EPA had awarded the Osage Nation primacy of underground waste injection, it would have been required to ensure all wells on the Osage reserve passed the mechanical integrity test, illustrating that each well had no significant leaks.⁴¹⁵ The Osage Environmental and Natural Resources Department, in conjunction with the EPA, was already enforcing EPA regulations, thus the achievement of primacy over injection practices on the reservations was a natural step for the Osages.

The local representative of EPA's Region VI, which covered the area of New Mexico, Oklahoma, and Texas, told Diane Daniels, the director of the Osage Environmental and Natural Resources Department, to wait until both applications were completed and to submit them together. While her office was completing the applications, the Midnight Rider became law.⁴¹⁶ Daniels now had to make a deal with Oklahoma before her department could be awarded primacy. The chance of Oklahoma agreeing to Osage primacy of its underground injection control program was slim.

⁴¹⁵ Underground Injection Control, 40 C.F.R. § 147.2912 , 2902.

⁴¹⁶ Daniels, interview with author, February 5, 2010.

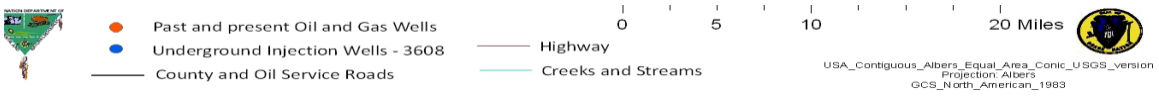
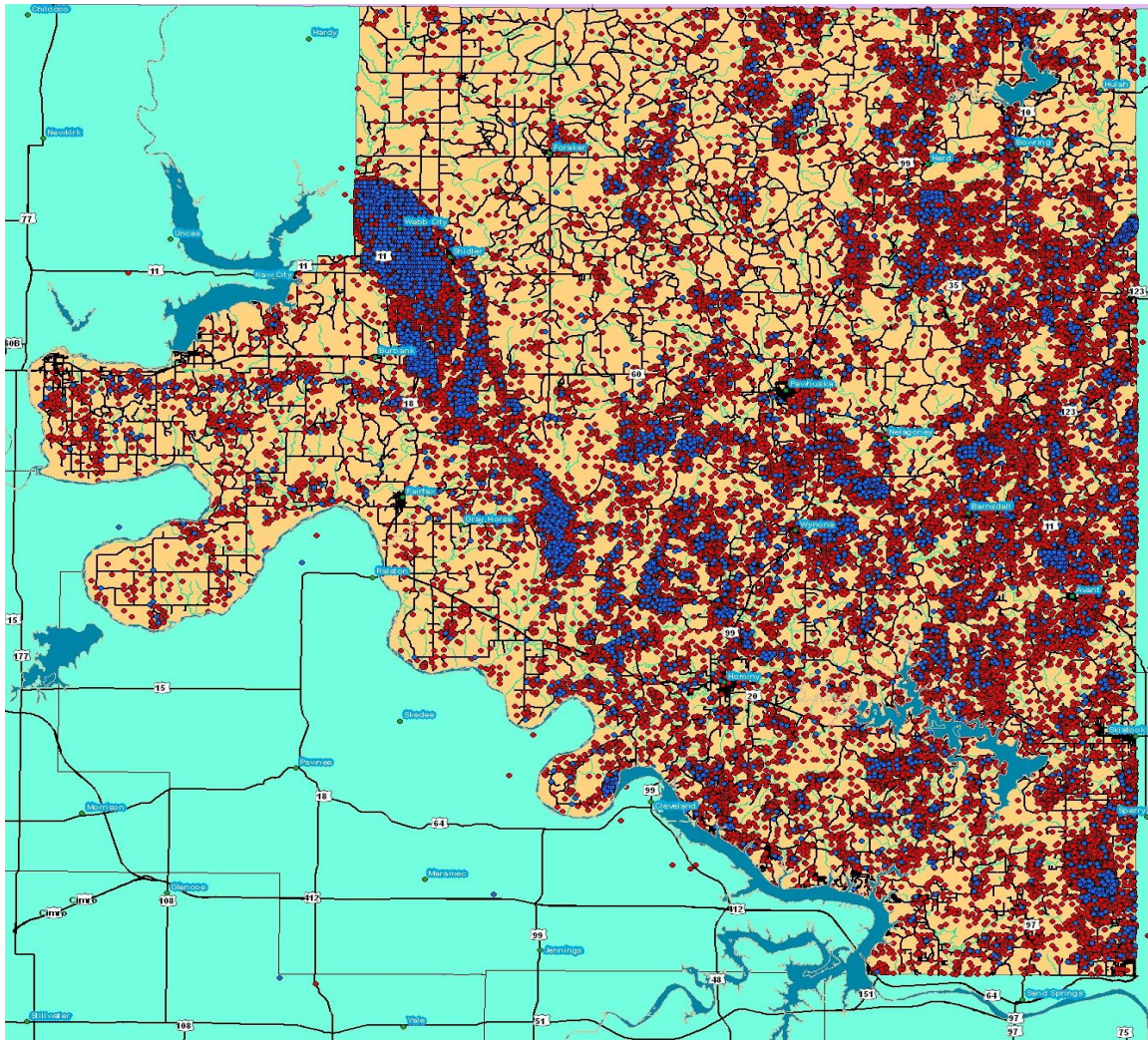


Figure 7.1 Oil and Gas Wells on the Osage Reservation
 (Osage Nation Roads Department, “Osage Nation Oil and Gas Well Map,” accessed August 9, 2013, http://www.osagetribe.com/tip/welcome_sub_page.aspx?subpage_id=5.)

The Midnight Rider also challenged the Supreme Court's decision in *Chevron*, which gave the EPA the discretion to interpret environmental law.⁴¹⁷

Why would Inhofe want to stop tribes in Oklahoma from gaining primacy status? Inhofe has always had connections with the oil and gas industry, therefore protection of the oil and gas industry seems to be the reason for the Midnight Rider. As a member of the House of Representatives, Inhofe worked to protect oil and gas producers in Oklahoma. In 1988 he spoke on the floor of the House in favor of repealing a provision in the Omnibus Budget Reconciliation Act of 1987 which would charge oil producers an extra fifteen cents on diesel fuel. At the time the industry was suffering due to a glut in the market, therefore it constituted a horrible blow to small producers in Oklahoma. By 1987, oil and gas production was down by twenty-five percent in Oklahoma. In that period the number of employees in oil and gas manufacturing declined thirty-four percent and the number of employees in oil and gas extraction went down 65,000 workers. The tax was going to cost one small, operator—unnamed by Inhofe—more than \$300,000. This operator was going to shut down his business, forcing hundreds out of work. Included in Inhofe's proposal was an exception for farmers and ranchers using diesel in their work pickups. Operators could get the money back in a refund, but Inhofe argued that even a short term hike would be disastrous. He also argued it would damage cash flow and increase bureaucracy and administration costs.⁴¹⁸

In 1999 Senator Inhofe came out on the side of oil producers, operating 13,000 oil and gas wells in Osage County, when state and federal laws endangered profits. The

⁴¹⁷ *Chevron U.S.A. Inc. v. Natural Resource Defense Council*, 467 U.S. 837 (1984).

⁴¹⁸ *Assisting Oilfield and Gas Operators, United States Senate*, S. Rep. 100-458 (Feb. 23, 1988) (statement of James Inhofe).

Osage Environmental Audit, conducted by Oklahoma State’s Bureau of Social Research and funded by the Oklahoma Commission on Marginally Producing Oil and Gas Wells, found that oil producers spend \$9 million a year, \$1.97 a barrel, to comply with state and federal environmental laws. That meant that producers were spending a total of \$15.35 to produce a barrel of oil, incurring a net loss of \$4.45 per barrel. Thus, domestic producers had difficulty competing with foreign oil companies. Venezuelans could produce and ship oil cheaper than domestic producers could draw the oil from the ground. Prices began plunging in 1997, costing between 10,000-15,000 jobs. Inhofe along with other leaders, including Osage Nation Chief Charles Tillman, looked for ways to decrease costs. Inhofe argued the unnecessary costs must be removed and that all regulations should be based in “sound research.” Tillman said that oil profits on the reservation had declined 90% in the 1990s.⁴¹⁹

In 2005, Inhofe was the majority leader of the Senate’s Environment and Public Works Committee. He made protecting big oil corporations in the state of Oklahoma a top priority with his position. In 2007, Inhofe received more than \$1 million in contributions from the oil and gas industry.⁴²⁰ For the 2010 federal budget, Inhofe requested \$1 million for a compressed natural gas station for the city of Norman.⁴²¹ Illustrating a lack of belief in oversight, Inhofe was well noted for being a global warming denier, calling it the “greatest hoax ever perpetrated on the American people,”

⁴¹⁹ Russel Ray, “Osage County, OK Study Finds Rules Hinder Oil Producers,” *Tulsa World*, April 29, 1999.

⁴²⁰ Jim Myers, “Environmentalists Target Inhofe,” *Tulsa World*, October 10, 2007; Diane Daniels, interview with author, February 5, 2010; David Conrad, Executive Director, NTEC, email to Diane Daniels, Sept. 30, 2005.

⁴²¹ Canteel, “Despite Lawmakers Attempts.”

and not surprisingly, the natural gas industry does plenty to pollute the air.⁴²² Ultimately, by allowing Oklahoma to judge primacy, not the EPA, Inhofe was doing what he could to reduce oversight, and thus penalty fees, in the oil fields.

Tribal leaders in Oklahoma and across the nation were alarmed at federal infringement of tribal sovereignty with the passage of the Midnight Rider, especially in regard to the unexpected method in which the Midnight Rider passed Congress. Jeannine Hale, administrator of environmental programs for the Cherokee Nation, was one of the first tribal officials to notice the Midnight Rider. On Friday, July 29, 2005, she contacted tribal leaders around the country. She wrote, “Folks, we have a really bad provision in the Highway bill that has been passed by the House and is on the Senate floor today. You had better read it.”⁴²³ Tribal leaders did not respond soon enough to her call to action, but the problem quickly became a concern for them.

On August 2, 2005, A. David Lester, executive director of the Council of Energy Resource Tribes (CERT), sent an email to tribal leaders stating he believed that they were entering an era, “of retrenchment from social and political justice overall in the American political environment that will tolerate roll back of certain gains by Indian Tribes of the

⁴²² Jim Myers, “Inhofe on '08 campaign: Dems are gunning for me: Recent fundraising letters have targeted the Oklahoma Republican and his views on global warming,” *Tulsa World*, April 5, 2007; Elizabeth Shogren, “Inhofe Offers Parting Shot on Global Warming,” *National Public Radio*, Washington D.C. December 7, 2006, <http://search.ebscohost.com.er.lib.k-state.edu/> (accessed March 15, 2010); Kevin Williams, interview by Molly Messick, “Rural Wyoming County’s Air Quality Worse than L.A.” *Morning Edition*, NPR, April 5, 2011.

⁴²³ Jeannine Hale, Administrator Environmental Programs, Cherokee Nation, email to Diane Daniels, Director of the Osage Nation Environmental and Natural Resources Department, July 29, 2005, DD emails.

past 30-40 years.”⁴²⁴ Lester was referring to the fact that the Midnight Rider represented the goals of legislators who did recognize tribal self-determination.

Three days later, James G. Sappier, chief of the Penobscot Nation, and chairman of the National Tribal Environmental Council, wrote a letter to President George W. Bush urging him to veto HR 3. Sappier claimed the Midnight Rider stood as an affront to tribal sovereignty in Oklahoma since it removed the ability of tribes to regulate environmental quality on their own lands. He argued that since Inhofe added the provision at the last minute, the bill undermined “a fair process for substantive legislation that is deliberative and equitable.”⁴²⁵ Sappier also called on the President Bush to veto HR 3, because the legislation was “an outrageous circumvention of the Congressional process and fundamental rules of democracy until the offending non-germane provision is stricken.”⁴²⁶ All that said, President Bush signed the bill into law on August 10, 2005 refusing to recognize the ability of Oklahoma’s Indian nations to operate their own environmental programs.

⁴²⁴ A. David Lester, Executive Director of CERT, email to David Conrad, NTEC, Aug. 2, 2005, DD emails.

⁴²⁵ James G. Sappier, Chief of the Penobscot Nation and Chairman of the National Tribal Environmental Council, to George W. Bush, President of the United States, August 5, 2005, in author’s possession. (NTEC was and is truly a national organization, so the rider was a national issue of concern across Indian country. On the NTEC’s Executive Committee sat not only the Penobscot Nation as Chair, but the Yakima Nation as Vice-Chair, the Minnesota Chippewa Tribe as Secretary, Pauma Band of Mission Indians as Treasurer, and the Yurok Tribe and the White Mountain Apache Tribe as At-Large Members. The Standing Committee Managers included the Pauma Band of Mission Indians in charge of finance and fundraising, the Washoe Tribe of Nevada and California in charge of government relations, the Santa Clara Pueblo in charge of membership and nomination, the Cortina Rancheria in charge of planning and programming, and finally, executive director David F. Conrad of the Osage Nation.)

⁴²⁶ Ibid.

The repercussions were felt throughout the community of Indian environmental leaders. Robert Gomez, Director of the Taos Pueblo Office of Environmental Protection, declared that “the secret rider is an outrageous circumvention of the Congressional process and the fundamental rules of democracy.” Gomez said the bill was unfair, since it was “completely unrelated to transportation so no one could even guess it [the Midnight Rider] might be in the bill.”⁴²⁷ It is important to note that the passage of the Midnight Rider did not mark a circumvention of the Congressional process, since it was voted on, but Inhofe wrote the Midnight Rider into the bill the night before the House vote, certainly circumventing the “fundamental rules of democracy.”

David Conrad, of the National Tribal Environmental Council, told Diane Daniels that even the governor of Oklahoma was unaware of the provision.⁴²⁸ Therefore, this was not a power grab by Oklahoma, but instead by Senator James Inhofe, a Republican Senator of Oklahoma. Inhofe acted unilaterally on the issue, completely infringing on the federal trust relationship.

On September 7, 2005, Robert Wilson, Treasurer of the 33rd Business Committee of the Cheyenne and Arapaho Tribes of Oklahoma, asked seven groups and representatives of the federal government to overturn the Midnight Rider, including Arizona Senator John McCain, a Republican who sat on the Senate Indian Affairs Committee. Wilson stated that the Cheyenne and Arapaho tribes of Oklahoma had

⁴²⁷ Robert Gomez, Director, Taos Pueblo Office of Environmental Programs, “Secret Legislation Removes Oklahoma Tribal Sovereignty to Regulate Environment,” post on indigenouswatersnetwork@yahoo.com, Friday, August 5, 2005, author received through email from Diane Daniels, February 16, 2010.

⁴²⁸ David Conrad, NTEC, email to Diane Daniels, August 11, 2005, DD emails.

worked closely with Senator Inhofe, who was chair of the Senate Environment and Public Works Committee, and Chairman Young of the House Transportation and Infrastructure Committee. The tribes were surprised when the rider was added at the last opportunity, because there was no time for comment. Wilson argued that it was accepted federal environmental law for tribes to receive treatment as a state status.⁴²⁹ He was correct, since the Safe Drinking Water Act was amended in 1987 to allow for treatment as a state status.⁴³⁰ The new provision infringed on this ability and further limited tribes by allowing state law to reign on Indian reservations. Wilson stated that “this is an enormous intrusion on tribal sovereignty, and goes against centuries of precedent.”⁴³¹ Wilson was wrong in his last statement, because the United States had infringed on tribal sovereignty throughout American history. The Midnight Rider did, however, go against the intentions of the Self-Determination Era. Wilson did not receive a response, as senators and Congressmen proved unwilling to challenge Inhofe, a senior senator and chair of the Environment and Public Works Committee.⁴³² Oklahoma pushed forward with control of

⁴²⁹ Robert Wilson, Treasurer 33rd Business Committee, Cheyenne and Arapaho Tribes of Oklahoma to Tex Hall, National Congress of American Indians, September 7, 2005; Wilson to Byron Dorgan, Vice Chairman, Senate Indian Affairs Committee, September 7, 2005; Wilson to John McCain, Chairman, Senate Indian Affairs Committee, September 7, 2005; Wilson to Dale Kildee, Co-Chair, Indian Caucus, US House, September 7, 2005; Wilson to Nick Rahall, Ranking Member, Resource Committee, US House, September 7, 2005; Wilson to J.D. Hayworth, Co-Chair, Indian Caucus, US House, September 7, 2005; Richard Pombo, Chairman, Resource Committee, US House, September 7, 2005, all in author’s possession.

⁴³⁰ Underground Injection Control, 40 C.F.R. Parts 124, 144, 146 and 147.

⁴³¹ Wilson to Hall, Sept. 7, 2005.

⁴³² Diane Daniels, interview with author, February 5, 2010.

Indian land and infringement of the federal trust relationship, while the EPA tried to work within the provisions of the Midnight Rider, not lobbying against the law.⁴³³

In December 2005, Oklahoma announced its intention to operate environmental programs on Indian land located within state boundaries. Immediately, tribal leaders tried to talk with the EPA, but there was little the EPA would do.⁴³⁴ Sappier argued it would be better for the EPA to sit down with tribes and Oklahoma and talk things out, expressing that the tribes should be considered equals with the EPA and Oklahoma. He reminded tribal leaders that the EPA had a federal-tribal trust responsibility to uphold.⁴³⁵ In other words, the EPA had the responsibility to protect tribal land, even with the passage of the Midnight Rider.

Sappier and other tribal leaders went forward with their plan to meet with the EPA. On Friday, January 6, 2006, Deborah Ponder, Deputy Director of Environmental Justice and Tribal Affairs for the EPA, wrote to Indian representatives that while Ann Klee, counsel for the EPA, would be available for a meeting on Monday, January 9, any outcome of a meeting with Klee would not affect the EPA's decision to not challenge the

⁴³³ Timothy Cama, "EPA Accused of Improper Lobbying for Water Rule," *The Hill*, May 19, 2015, accessed October 7, 2015, <http://thehill.com/policy/energy-environment/242472-epa-accused-of-improper-lobbying-for-water-rule>. The EPA has been known to lobby for causes and to stand up for itself, as has other agencies.

⁴³⁴ Jonathan B. Hook, Director, Office of Environmental Justice and Tribal Affairs US EPA Region 6, email to Diane Daniels, Dec. 28, 2005, DD emails; Jeannine Hale, email to Jonathan Hook, Dec. 28, 2005; David Conrad, email to Diane Daniels, December 28, 2005, DD emails.

⁴³⁵ James Sappier, email to Diane Daniels, Dec. 30, 2005, DD emails.

rider.⁴³⁶ David Conrad also conceded that Ann Klee would not fight the rider.⁴³⁷ Jeannine Hale told other leaders that tribes could not depend on the EPA and should continue to seek repeal of the rider through negotiations and other means.⁴³⁸ Hale continued to express the need for tribes to fight the Midnight Rider. It is apparent that the EPA's main goal was environmental protection within the scope of the Midnight Rider, rather than assisting the tribes drive toward primacy and self-determination.

By the end of 2006, no tribe in Oklahoma had gained primacy, and the EPA was assisting the tribes of Oklahoma in navigation of the Midnight Rider.⁴³⁹ In February of 2007, Richard Greene, the Region VI EPA Director (for Oklahoma, Texas, New Mexico), sent a letter to tribal environmental leaders in Oklahoma about how to gain primacy under the Midnight Rider. First, the EPA would consider whether primacy agreements between the state and tribes were appropriate. The EPA, however, would be unable to approve any agreement not in accord with existing environmental laws. In addition, a public hearing would be announced in local newspapers, and if there was significant interest, a public hearing would be conducted. The EPA advised that evidence of an agreement with Oklahoma should be submitted alongside the tribal application for treatment as a state eligibility.⁴⁴⁰ The EPA now chose to work with tribes in Oklahoma on

⁴³⁶ Deborah Ponder, Deputy Director, Office of Environmental Justice and Tribal Affairs, US EPA, email to EPA Region 6 Indian Leaders, January 6, 2006, DD emails.

⁴³⁷ David Conrad, email to Diane Daniels, February 17, 2006, DD emails; David Conrad, email to Diane Daniels, February 21, 2006, DD emails.

⁴³⁸ Jeannine Hale, email to Diane Daniels, February 23, 2006, DD emails.

⁴³⁹ Ben J. Harrison, Deputy Regional Counsel, EPA Region 6, email to Hale, June 1, 2007, DD emails.

⁴⁴⁰ Richard E. Greene, US EPA Region Six Director, general draft letter to Oklahoma tribes and the state of Oklahoma, February 12, 2007, in author's possession.

the basis of the Midnight Rider, which limited its freedom to award primacy without agreements from Oklahoma.⁴⁴¹ The Midnight Rider did not stop tribes from trying to gain primacy of their environmental programs.

The tribes of Oklahoma remained unwilling to agree to the Midnight Rider. The Osage Nation drafted a resolution in regard to the rider meant for presentation at the meeting of United Indian Nations on April 16, 2007.⁴⁴² The resolution stated that tribes still retained governmental jurisdiction on their land, despite the Midnight Rider.⁴⁴³ On Friday, June 1, 2007, Jeannine Hale requested a meeting between the EPA and all the tribes of Oklahoma, hoping to talk the EPA into finding ways to circumvent the rider. At this point, the EPA had not received comments from Oklahoma tribes of EPA Region VI asking for interpretations of the rider.⁴⁴⁴ Only the Citizen Potawatomies and the Quapaws were negotiating agreements with the Oklahoma over their environmental programs by August 2007, but no agreements had been finalized.⁴⁴⁵ On August 7, 2007, Hale met with EPA general counsel Roger Martella to discuss the rider and the EPA's policies on how to implement it, but ultimately the EPA's response did not change.⁴⁴⁶ The EPA had decided to help tribes work within the framework of the rider.

⁴⁴¹ Diane Daniels, interview with author, February 10, 2010.

⁴⁴² Jeannine Hale, email to all Indian Environmental Leaders, April 13, 2007, DD emails.

⁴⁴³ Diane Daniels, "United Indian Nations Resolution Regarding 'SAFETEA-LU' Rider," in author's possession.

⁴⁴⁴ Jeannine Hale, email to Diane Daniels, April 13, 2007, DD emails.

⁴⁴⁵ Ben J. Harrison, Deputy Regional Counsel, US EPA Region 6, email to Jeannine Hale, June 1, 2007, DD emails.

⁴⁴⁶ Diane Daniels, email to Jim Gray, Principal Chief of the Osage Nation, Hepsi Barnett, Chief of Staff for the Osage Nation Executive Branch, and David Conrad, July 16, 2007, DD emails; Eve Boss, EPA, email to Diane Daniels and other tribal leaders, Sept. 14, 2007, DD emails.

Tribal leaders fought for repeal of the Midnight Rider when it came up for renewal in 2009. Osage Principal Chief Jim Gray sent a letter to Congress asking for repeal, stating that the Midnight Rider attacked Indian sovereignty in Oklahoma by taking away Indian rights to administer environmental programs. He also wrote that the rider raised concerns for all Indians because “it could be used as a model to chip away at sovereign tribal rights throughout the country.”⁴⁴⁷ Furthermore, he argued, that for tribes in Oklahoma the rider changed the “delicate balance Congress established between tribal, state, and federal sovereignty in its environmental laws, and circumvented the EPA’s duty to reasonable differences between environmental standards.”⁴⁴⁸ Gray’s letter did not sway the members of the United States Senate Committee on Indian Affairs to overturn the law.⁴⁴⁹

Debra Lekanof of the Swinomish Tribe traveled to Washington, D.C., in 2009, to explain the Indian Environmental Act, which several Indian leaders wrote with the hope of negating the Midnight Rider. The National Tribal Caucus supported the effort, believing it was a necessary first step toward repeal of the rider. Lekanof met with the National Tribal Operations Committee (NTOC), which was set up in 1994 by the EPA to facilitate stronger partnerships with tribes. The committee was comprised of nineteen tribal leaders and the EPA’s senior leadership committee, including the head of the EPA. Lekanof told the NTOC that the Indian Environmental Act would reaffirm the EPA’s trust relationship. Lekanof also reassured her fellow tribal leaders that administrator Lisa

⁴⁴⁷ Jim R. Gray, letter to Denise Desiderio, Detailee for the Majority, US Senate Committee on Indian Affairs, May 11, 2009, in author’s possession.

⁴⁴⁸ Ibid.

⁴⁴⁹ NCAI, mass email to members, April 23, 2009, DD emails.

Jackson had reaffirmed EPA's trust relationship to Indian nations. Jackson informed Lekanof that as a part of her commitment to tribes, the American Indian Environmental Office was moving from the Office of Water to the Office of International Affairs as an effort to recognize tribes as sovereign nations.⁴⁵⁰ However, the Indian Environmental Act did not pass, and the federal government extended the SAFETEA-LU for eighteen months on July 31, 2009. The extension closed a federal budget shortfall by transferring \$7 million from the General Treasury Fund to the Highway Fund, which was more important in the eyes of Congress and the President.⁴⁵¹ Recognizing Indian sovereignty to jurisdiction of tribal land was not a priority for the federal government.

In conclusion, the Self-Determination Era held promise for tribal leaders that Congress would recognize tribal abilities to clean and protect tribal land, but the Midnight Rider made it apparent that the federal promises of self-determination did not include primary control of underground injection and other environmental programs. Despite Congress's amendment to the Clean Water Act that allowed tribes to have primary control over their waste injection programs, the Midnight Rider denied the Osage Nation the ability to operate its own oil waste injection program. Since 1980, the EPA had slowly helped the Osage Nation to develop an effective environmental protection program, but now the best way for tribes to move forward was to gain primacy. The

⁴⁵⁰ Debra Lekanof, email to Diane Daniels, July 26, 2009, DD emails; US EPA, American Indian Environmental Office Portal, accessed April 26, 2011, <http://www.epa.gov/tp/contactinfo/trcaucus.htm> ; Teton Times, "Jodi Gillette Moves to BIA-Deputy Assistant Secretary," *Teton Times*, April 20, 2011.

⁴⁵¹ "Senate Passes 18 Month Extension of Highway Bill," Metal Bulletin, *Metal Bulletin Daily Alerts*, July 31, 2009, accessed April 26, 2011, <http://www.lexisnexis.com.er.lib.k-state.edu/hottopics/Inacademic/>

Midnight Rider forced tribes to depend more heavily on the EPA in order to keep tribal land clean.

Indian leaders throughout Oklahoma and the United States did not stop trying to protect and regulate their own land. Their letters and emails illustrate that from 2005 to 2010, tribal leaders like Jeannine Hale of the Cherokees, continued to push the EPA and Congress to change their course and recognize tribal self-rule. Congress could not curtail the ability of native peoples to act on their sovereignty.

Summary of Section Three

Chapters five and six illustrate that the Osages never stopped driving to exert control over their land, but that the federal government would not recognize Osage Nation sovereignty. First, despite the Osages slowly losing their land throughout the Prairie and Plains of the United States, they managed to maintain a life on the Prairie, and they had the foresight to retain their mineral rights. Next, oil companies managed to spill oil and oil waste on Osage land, endangering local fresh water supplies with pollution. Pollution made the cattle sick, killed plants, and rotted away the river banks. The Osages did not stand by and allow this to happen, complaining to the BIA. While the BIA did not clean the land, the BIA asked companies to pay for land pollution.

In the early twentieth century, scientists knew that unrestrained oil was detrimental for the land and animals, but they did not understand the full ramifications of the pollution. They also did not understand how to fix the problem. It was not until the end of the twentieth century that oil waste injection became a staple of the oil producing industry.

By the 1980s, the Osage Nation had a hand in cleaning and protecting its land by overseeing oil waste injection on its reservation with the help of EPA officials. The EPA never gave up its right to help the Osage Nation in this process as provided by the Safe Drinking Water Act, but the Osage Nation did not waver either. When the Osage Nation could finally operate its underground injection control program on its own, without the EPA's help, it jumped at the chance to gain primacy. The Midnight Rider stalled the Osages' efforts by forcing the Osage Nation to make a deal with the state of Oklahoma in order to achieve primacy of oil waste injection.

The Midnight Rider changed how the EPA could relate to tribes in Oklahoma. The rider forced tribes of Oklahoma to make deals with the state before they could apply for primacy with the EPA. Even with this provision, tribal leaders in Oklahoma, and around the United States, weighed on the EPA, Congress, and the President to overturn the Midnight Rider. As of 2010 the Midnight Rider still existed, the EPA had not awarded primacy to any Oklahoma tribes, and the EPA had not recognized the Osages' ability to clean and protect their land from oil waste without direct oversight from the EPA. Like federal agencies of bygone years, the EPA did not recognize tribal self-determination.

Conclusion

As stated in the Introduction, the greater significance of this dissertation is that it analyzes the EPA's relationship with American Indians in the late twentieth century, illustrating that the EPA has not acted as an agency born during the Self-Determination Era, but one more akin to federal agencies of the past. American Indians inherently possess sovereign rights as nations to protect and maintain their land from environmental damage.⁴⁵² Tribes and individual Indians in North America have never stopped exerting their self-determination to act on their sovereignty over their land, and thus they have culturally persevered. Tribes have consistently invoked their right to self-determination according to the provisions of the Bill of Rights and the United States Constitution and in contrast to Chief Justice John Marshall's Cherokee decisions, the Supreme Court's *Lone Wolf* decision, the Interior Department's patterns of paternalism, and the Midnight Rider of a lone Senator.

The Isleta people managed to remain in central New Mexico despite years of challenges to their right to make their own decisions about their land. In the 1920s, the BIA did not challenge the Pueblo Lands Board, and Congress ultimately did not replace Pueblo lands that were misappropriated. The BIA initiated the Lands Program in the 1930s to add land to the Pueblos' holdings, yet other federal agencies blocked the BIA and created the Interdepartmental Rio Grande Board, which eventually provided more

⁴⁵² Council on Foreign Relations, "Montevideo Convention on the Rights and Duties of States," <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>, accessed October 7, 2013.

land for the Pueblos, but not the two million acres BIA Commissioner John Collier had imagined in 1934.⁴⁵³

In spite of the federal missteps, the Isletas pushed to control their own range and the animals on it. They tried to increase the number of animals on the range, because they knew the range could handle the grazing pressure. When the BIA found out what the Isletas were doing, it pushed back, but the Isletas did not stop trying to control their land for themselves and future generations.

Congress amended the Clean Water Act in 1987 to allow the EPA to deal with tribes as they would with the states. The federal government's new respect for tribal nations made sense in light of the Self-Determination Era. The Isletas could write their own water quality standards for the Rio Grande, as long as they were as stringent as those of New Mexico and the EPA. The Isletas wrote water quality standards for the Rio Grande that were tougher than any standards the city of Albuquerque had to follow in prior years. In response, Albuquerque sued, but the federal district court and the federal Appeals Court denied Albuquerque's claims, approving the EPA's ability to recognize the Isleta right to set water quality standards for the Rio Grande. Although it was operating during the Self-Determination Era, and the courts cleared the way, the EPA still did not recognize the Isletas' desire to control their own land. The EPA advised the Isletas to write their water quality standards based on the EPA's science. The Isletas did not have the freedom to write the standards outside of accepted federal science.

⁴⁵³ David H. Dinwoodie, "Indians, Hispanos, and Land Reform: A New Deal Struggle in New Mexico," *The Western Historical Quarterly* (July 1986), 295-299.

The Quapaw case study also illustrates how the federal government did not recognize the ability of Indians to make decisions about their land. The Quapaws lived on the one of the most profitable mineral fields in the United States, and in the early twentieth century mining companies fought for legal control to mine the ore. The district court in Tulsa agreed in 1928 that Secretary of the Interior Albert Fall had signed fair leases on behalf of the tribe with the Eagle-Picher Company, although the Quapaws received no more than ten percent on a lease. Meanwhile, the Eagle-Picher Company sub-leased the land at fifteen to thirty percent per annum. In the 1920s, the Skelton Mining Company stole ore from the Quapaws, yet Secretary of the Interior Joseph Dixon awarded the ore to the company, with just ten percent going to the land owners. In 1930, the Tenth Circuit Court decided in *Whitebird* that the secretary of the interior could sign mining leases *without the consent* of tribal heirs. In each case, the Quapaws pressed the BIA, the Interior Department, Congress, and the courts to give the tribe better royalties, but the federal entities did not recognize the tribe's right to make its own leases.

Not until the 1960s was pollution on the radar of the federal government and the Quapaws. The next stage in the Quapaw story was cleanup, but the EPA recognized only a limited role for the Quapaws to help in the Superfund process. Empty mines on Quapaw land flooded in the 1970s and toxic metals flowed to the surface. The EPA placed Tar Creek on the National Priority List in 1981, and from that point forward, soil remediation, and resettlement, took place. The EPA spent millions to clean the area, but refused to directly give money to the Quapaws to clean the area. The EPA, under CERCLA, was the only entity that could perform soil remediation and other environmental cleaning strategies. Federal law allowed the EPA to award the Quapaws

funds to take part in remedial investigations and feasibility studies, but the EPA did not allow the tribe to take the lead in cleaning their land. Just like the BIA before it, the EPA in Quapaw country did not allow the Quapaws to determine the future of their own land.

The Osage Nation case study has a similar conclusion as the first two. The Osages fought for control of their land throughout their relationship with the United States. In the nineteenth century, the federal government made a series of treaties with the Osage Nation that moved it to a small portion of what eventually became northcentral Oklahoma. Individual Osage land owners demanded that the BIA do something about oil pollution, but the Osages were not able to set the cost of repayment. Not until the late twentieth century did oil waste injection begin on Osage land. The Osages, along with the EPA, worked to control this process.

Then in 2005, President Bush signed the “Midnight Rider,” which forced the Osages to negotiate terms with the state of Oklahoma before it could control its own oil waste injection program, and essentially stalled Osage attempts to gain treatment as a state status and primary control of oil waste injection on the reservation. The Osage Nation, and other tribes around the country, lobbied for repeal of the Midnight Rider, which as of 2010 had not occurred.

The EPA did not support the efforts of Osages, and Indians leaders from around the United States, to overturn the Midnight Rider. The EPA sought ways to help the Osages, and other tribes of Oklahoma, broker deals with Oklahoma, as outlined in the Midnight Rider, to earn primacy and treatment as a state status, but did not defend the tribe as a sovereign entity. While the EPA must follow federal law, it also has the ability

to lobby for or against federal law. It saw its power to protect tribal land limited by the Midnight Rider, and it did not respond in protest.

Overall, the federal government has never completely recognized the legal rights of the Isleta, Quapaw, and Osage peoples to control their land, but they did not stop pressing for their rights to self-rule. In spite of the statements by some EPA administrators that they recognize Indian sovereignty, their ability to do so was compromised by Congressional fiat and politics. The Isletas, Quapaws, and Osages insisted on self-determination, providing challenges to the BIA, Interior Department, and the EPA. Rather than a perceived loss of tribal authority, the Isletas', Quapaws', and Osages' continued traditions of asserting control over their own people, lands, and destiny should rightfully be considered a hallmark of the Self-Determination Era of American Indian history. It would serve historians well to not define American Indian history by federal legislation, but by analyzing tribal histories through the eyes of the sovereign tribal nations.

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Appendix A – EPA Organization

Office of the Administrator. It oversees both the Regional and Headquarter Offices

Regional Offices

Region I/ Boston, covers CT, ME, MA, NH, RI, VT

Region II/ New York, covers NY, Puerto Rico, US Virgin Islands

Region III/ Philadelphia, covers DE, DC, MD, PA, VA, WV

Region IV/ Atlanta, covers AL, FL, GA, KY, MS, NC, SC, TN

Region V/ Chicago, covers IL, IN, MI, MN, OH, WI

Region VI/ Dallas, covers AR, LA, OK, TX, NM

Region VII/ Kansas City, covers IA, KS, MO, NE

Region VIII/ Denver, covers CO, MT, WY, SD, ND, UT

Region IX/ San Francisco, covers AZ, CA, HI, NV, American Samoa,

Commonwealth of Northern Mariana Islands,

Federated States of Micronesia, Guam,

Marshall Islands, Republic of Palau

Region X/ Seattle, covers WA, OR, ID, Alaska

Headquarter Offices

Office of Administration and Resource Management

Office of Air and Radiation

Office of Chemical Safety and Pollution Prevention

Office of Chief Financial Officer

Office of Enforcement and Compliance Assurance

Office of Environmental Information

Office of General Counsel

Office of Inspector General

Office of International and Tribal Affairs

Office of Solid Waste and Emergency Response

Office of Water⁴⁵⁴

⁴⁵⁴ “EPA Organization Chart,” US EPA, accessed March 28, 2015, <http://www2.epa.gov/aboutepa/epa-organization-chart>.

Appendix B – EPA Enforcement

Step 1: The environment problem is identified.

Step 2: Congress creates laws to address problem.

Step 3: The EPA issues regulations to implement laws.

Step 4: The EPA provides compliance assistance to local government, tribes, college and universities and businesses. Often, the EPA identifies a state agency that can help the entity in question.

Step 5: The EPA provides compliance monitoring, which includes both on-site monitoring through inspections and off-site monitoring through data analysis.

Step 6: Enforcement actions are initiated when the regulated community does not comply with the required clean-up, which can include court procedures.⁴⁵⁵

⁴⁵⁵ “Enforcement Basic Information,” US EPA, accessed March 28, 2015, <http://www2.epa.gov/enforcement/enforcement-basic-information>.

Appendix C – Alphabetical List of Acronyms

AMC – American Mining Congress

BIA – United States Bureau of Indian Affairs

BPA – Bonneville Power Administration

CERCLA – Comprehensive Environmental Response, Compensation, and Liability Act

CERT – Council of Energy Resource Tribes

CWA – Clean Water Act

EIS – Environmental Impact Statement

EPA – United States Environmental Protection Agency

FDF – Fundamentally Different Factor

IGRA – Indian Gaming Regulatory Act

INS – United States Immigration and Naturalization Service

IRA – Indian Reorganization Act of 1934

ITEC – Inter-Tribal Environmental Council of Oklahoma

ITIOC – Indian Territory Illuminating Oil Company

MSHR – Federal Mine Safety and Health Review Commission

NPDES – National Pollution Discharge Elimination System

NRD – Natural Resource Damage

NTEC – National Tribal Environmental Council

NTOC – National Tribal Operations Committee

OCCA – Organized Crime Control Act

ODEQ – Oklahoma Department of Environmental Quality

OKDOT – Oklahoma Department of Transportation

OU – Operable Unit

OWRB – Oklahoma Water Resources Board

RCRA – Resource Conservation and Recovery Act

RI/FS – Remedial Investigation and Feasibility Study

ROD – Record of Decision

SAFETEA-LU – Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users

SDWA – Safe Drinking Water Act

TAS – Treatment as a State

VA – United States Veterans' Administration