

VICTIM OF "ANOTHER B.I.A. BLUNDER:"
INDIVIDUAL INDIAN TITLE AND THE GENERAL ALLOTMENT ACT

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Introduction

After being held in a concentration camp for nearly four years in Fort Sumner, New Mexico, the people of the Navajo Nation, in 1868, returned to their original homeland after signing a treaty with the United States.¹ The treaty terms reduced their ancestral land located in the Four Corners region of the United States from forty million acres to three and a half million acres. Because the reservation was so small and the Navajo population so large many Navajos resided outside the 1868 treaty reservation.² Off reservation land contiguous with the treaty reservation was not occupied by anyone other than Navajos. At the request of the Bureau of Indian Affairs, the President expanded the Navajo reservation with numerous executive orders affecting New Mexico, Arizona and Utah to provide grazing land for Navajos living off the treaty reservation.³ At the turn of the century white settlers clamored for land surrounding the Navajo reservation and implored Congress to allot those executive order reservations under authority of the General Allotment Act of 1887.⁴ Each Navajo would receive an allotment of 160 acres and the remaining unallotted portions of reservation land would be designated public domain land making it available for white settlement. But because the intense conflict between white settlers and Navajos over grazing land was about to erupt into a range war, the Bureau of Indian Affairs and the General Land Office hastily allotted certain lands already occupied by Navajos to other Navajos. The hasty allotments have created an unusual Indian land claims conflict.

In most Indian land claims the focus has been on whether Indian tribes will be able to succeed against non-Indian claims. But in this case tribal members from the same tribe assert title to the same tract of tribal land. Navajo tribal members are in dispute over tribal ancestral lands,

¹ Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667

² Kelley, pg. 17, *The Navajo Indians and Federal Indian Policy, 1900-1935* (1968); Bailey and Bailey, pg. 74, *The History of the Navajo* (1986).

³ Kelley, pg. 17-19, *The Navajo Indians and Federal Indian Policy, 1900-1935* (1968).

⁴ Kelley, pg. 23, *The Navajo Indians and Federal Indian Policy, 1900-1935* (1968); See also Herber J. Hagerman, *The Navajo Indian Reservation*, Senate Document 64, 72d Cong., 1st Sess., 1932, pg 29, 78.

one claiming a right from a federal allotment patent and the other asserting individual aboriginal rights.

In 1909, an allotment application for an allotment was made on behalf of Reuben Mariano for land then located outside the boundaries of the Navajo Indian reservation. The allotment patent was issued pursuant to the General Allotment Act⁵ for land in northwest New Mexico. Mariano never lived on the tract because Mary Bah Arviso⁶ and her family were settled there. Mariano argued that although his patent was not issued until 1964, his application for an allotment was accepted in 1909 which gives him a right to the land. Mary Bah Arviso and her daughter Grace Tsosie claim title to the land because Arviso and her family have aboriginal ownership that has not been extinguished by Congress.⁷

In 1994, the United States, acting as trustee, for Ruben Mariano, a Navajo allottee, brought a common law trespass and ejectment action against Grace Tsosie, also a Navajo, for land which is located outside of the Navajo 1868 treaty reservation boundaries but within an executive order reservation.⁸ On appeal, the Tenth Circuit held that the United States had to exhaust tribal court remedies⁹ prior to initiating a common law trespass and ejectment action in federal district court when the dispute involved Navajo tribal members over tribal land.¹⁰ The Tenth Circuit's ruling in favor of the tribal exhaustion doctrine,¹¹ requires the United States to pursue their claim in Navajo tribal court to eject Tsosie from land she claims to be her ancestral

⁵ 25 U.S.C. §331 (Supp.1999). In 1887, Congress enacted the General Allotment Act. "In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian."

⁶ Mary Bah Arviso died in 1987. Her daughter Grace Tsosie continues to occupy and assert rights to the area.

⁷ 18 U.S.C. § 1151(a)-(c) (Supp.1999) The land in question is located within an Executive Order reservation contiguous with the 1868 treaty reservation. Executive Order 2513, January 15, 1917. The United States argues that the tract is allotment 868.

⁸ *United States v. Tsosie*, 849 F.Supp. 768 (D.N.M. 1994).

⁹ *Tsosie v. United States*, 92 F.3d 1037 (10th Cir.1996).

¹⁰ *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

¹¹ *Id.*

home. The United States' argument is that a federal patent issued to a Navajo prevails over the traditional Navajo customary use rights to land held by another Navajo.

This paper will address Grace Tsosie's claim to her ancestral home, asserting "individual Indian title." Part I will address the Indian right of occupancy and how individual Indian title evolved from it. Part II covers the facts of Tsosie's individual Indian title claim and its litigation history. Part III discusses Tsosie's land claim under two theories: Navajo tribal customary use right and "individual Indian title." I will argue Tsosie has established both tribal customary use rights and "individual Indian title" and that they have not been extinguished by congressional action.

Part I

Indian Right of Occupancy

Individual Indian title is an individual right derived from the Indian right of occupancy doctrine,¹² which recognizes the interest in land held by an Indian tribe from time immemorial.¹³ The Indian right of occupancy is the right of Indian tribes to occupy and use their ancestral lands.¹⁴ In 1823, Indian tribal interests in real estate were first addressed in *Johnson v. M'Intosh*.¹⁵

In *Johnson*, the Court addressed Indian tribal rights to their land when a dispute between non-Indians arose over who had valid title to certain parcels of land. The plaintiffs claimed title through purchases and conveyances directly from two Indian tribes while the defendant asserted title based on a subsequently issued federal patent. Chief Justice John Marshall stated the issue as whether the Indian tribe's title and conveyance to the plaintiffs could be recognized in United States courts. The Court held that Indian title conveyed to a private person could not be recognized in United States courts. Moreover, the doctrine of discovery gave superior title to the government, valid against all. The doctrine "necessarily gave to the nation making the discovery

¹² "Indian right of occupancy" or "aboriginal title" has also been referred to as "original Indian title" or simply as "Indian title." Felix Cohen, *Handbook of Federal Indian Law*, 487 (1982 ed.). For purposes of this paper, reference to Grace Tsosie's aboriginal title claim shall be "individual Indian title."

¹³ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

¹⁴ *Id.* The Indian right of occupancy is one of six different interests held by Indian tribes to real estate. Felix Cohen, *Handbook of Federal Indian Law*, 472 (1982 ed.). Indian tribes hold interests in real estate by treaties, federal statutes, executive orders, aboriginal title, tribal purchases and land grants from prior sovereigns. This paper focuses on aboriginal rights to land.

the sole right of acquiring the soil from the natives and establish[ing] settlements upon it.”¹⁶ The ultimate dominion of power to dispose of the soil lay with the discoverer while the Indian inhabitants held a right of occupancy.¹⁷

The original inhabitants “were admitted to be the rightful occupants of the soil with legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”¹⁸

Under the Court’s ruling, tribes have a “legal and just” claim to occupy and use land subject to extinguishment by the United States. The Court provided: “the exclusive right of the United States to extinguish Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.”¹⁹ Therefore, Congress possessed the power, but whether it exercised that power was a matter of legislative discretion which the judiciary could not question. The decision diminished Indian sovereignty and diluted the strength of their land title.

The right of occupancy as defined in 1823 received increased attention during the westward movement of settlers. The strength of the right of occupancy was tested with settlers, the creation of new western states and the railroads moving into tribal territories.

In *Buttz v. Northern Pac. R.Co.*,²⁰ the Court held that “No private individual could invade [Indian title], and the manner, time and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals.”²¹

¹⁵ 21 U.S. (8 Wheat.) 543 (1823).

¹⁶ *Id.*

¹⁷ *Id.* The right of occupancy is acquired by the Indian tribes as the original inhabitants of the land and not by statute, treaty, or grant from the United States or from any other sovereign. See also *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941).

¹⁸ 21 U.S. (8 Wheat.) at 574.

¹⁹ *Id.* at 587. However, see *Delaware v. Weeks*, 430 U.S. 73 (1977), the Court held plenary power of Congress in matters of Indian affairs does not mean that all federal legislation concerning Indians is immune from judicial scrutiny or that claims, such as due process claims of Indians, are not justiciable.

²⁰ 119 U.S. 55 (1886).

²¹ *Id.* at 66.

Mr. Buttz asserted title to land by virtue of his settlement under the [homestead laws] of 1841²² against Northern Pacific railroad.²³ Although the dispute was between Mr. Buttz and the railroad company the underlying chain of title resolved the claim. The court followed the chain of title back to the Indian right of occupancy. The issue was whether Mr. Buttz's settlement on the land under the homestead laws of 1841²⁴ extinguished Indian title. The Court held that although Buttz established homestead rights in accordance with the homestead statute that did not extinguish the tribal right of occupancy.

The Supreme Court summarized the principles of the Indian right of occupancy in *Oneida Indian Nation v. County of Oneida*.²⁵ "It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign - first the discovering European nation and later the original States and the United States - a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States."²⁶

The right of occupancy provides Indian tribes with partial title although Congress may extinguish it at will. In *United States v. Santa Fe Pac. R. Co.*,²⁷ the Court said "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."²⁸ It would take plain and unambiguous action to deprive Indian tribes of their rights to their ancestral land. The Court held the creation of an executive order reservation at the request of the tribe and the tribe's acceptance of the reservation

²² Act of September 4, 1841, 5 Stat. 455 at 456, Sec. 11-15.

²³ See 119 U.S. at 56 (1886). Northern Pacific Railroad Company claimed title against Buttz. The court then addressed the underlying Indian title to resolve the conflict between Buttz and the railroad company.

²⁴ Act of September 4, 1841, 5 Stat. 455.

²⁵ 414 U.S. 661 (1974).

²⁶ Id. at 667. See *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Worcester v. Georgia*, 6 Pet. 515 (1832); *Mitchel v. United States*, 9 Pet. 711 (1835); *Chouteau v. Molony*, 16 How. 203 (1853); *Holden v. Joy*, 17 Wall. 211 (1872); *Buttz v. Northern Pac. R.Co.*, 119 U.S. 55 (1886); *United States v. ShoshoneTribe*, 304 U.S. 111 (1938); *Cramer v. United States* 261 U.S. 219 (1923) and *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941).

²⁷ 314 U.S. 339 (1941).

²⁸ 314 U.S. at 354 (1941).

amounted to a voluntary cession of any tribal claims to lands outside of the reservation boundaries.

Santa Fe Pac. R.Co. provides guidelines about extinguishment of the Indian right of occupancy. The mere fact that Congress created a reservation does not by itself extinguish all of a tribe's aboriginal rights.²⁹ The Court stated the federal government's policy has been to respect the Indian's right of occupancy. Although the Court held that the tribe's action was a "voluntary cession" of land outside the reservation boundary, there may still exist some remnant of a right outside the reservation. The Court provided in footnote twenty three "[Tribal occupancy rights] [a]s distinguished from individual rights of occupancy, if any, as were involved in *Cramer v. United States*,³⁰ but which, not being in issue here, are not foreclosed or affected by the judgment in this case."³¹ This case maintained an opening for individual Indians to claim aboriginal land outside of reservation boundaries.

"Individual Indian title" is the aboriginal right of an Indian, as opposed to an Indian tribe, to lands located outside of formal reservation boundaries. Until *Cramer*, Indian tribes, rather than individual tribal members, usually claimed the right of occupancy. The evolution of the right of occupancy was due to changes in United States policy. In the early part of the nineteenth century, United States Indian policy called for the removal of Indian tribes from eastern lands to reservations in the west.³² Removal of Indian tribes provided land for homesteaders by restricting tribes to reservations.

United States Indian policy during the latter half of the nineteenth century changed to allotment and assimilation. The means of accomplishing this policy was to individualize Indians, assimilate them into the mainstream of society; separate them from their communal tribal societies, destroy their cultures and give them tools for individual self-sufficiency. Congress enacted the General Allotment Act of 1887³³ which provided that Indian reservations were to be surveyed and allotted into individual parcels for tribal members. Generally, each

²⁹ "There is no Procrustean rule that the creation of a reservation rigidly stamps out aboriginal rights." *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386 at 1390 (Ct.Cl.1974).

³⁰ 261 U.S. 219 (1923).

³¹ 314 U.S. at 358 (1941).

³² See the Cherokee cases. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

parcel of land was 160 acres for heads of family and 80 acres for others.³⁴The Department of Interior, acting through its Indian agents, promoted the individual efforts of Indians to become farmers. The two policies of promoting assimilation and allotment of Indian lands lead the Executive to recognize individual Indian rights to land. The Interior Department cases support individual Indian occupancy rights on public lands. These cases played a significant part in laying the foundation for the holding in *Cramer v. United States*.³⁵

In 1923, the individual right of occupancy or individual Indian title was recognized in *Cramer v. United States*.³⁶ In *Cramer*, the United States, on behalf of individual Indians living outside of a reservation, brought a suit to cancel a United States patent issued to a railroad company because the patented land was occupied and used by the Indians continuously prior to 1859. The Court held that the federal statutory grant of land to the railroad in 1866 was subject to the individual Indians' pre-existing right of occupancy and that the individual Indian's occupancy was with the implied consent of the United States government.

The defendant, Cramer, claimed free and clear title through a United States land grant. Cramer argued the grant provided free and clear title to such lands with only a few exceptions which the individual Indians did not meet. The exceptions to Cramer's grant were those lands as "shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of."³⁷

The Court found the continuous occupation of the lands by farming Indians was an exception to the grant because such occupancy was considered to fall within the definition of "reserved or otherwise disposed of." The individual Indians, living outside the boundaries of a reservation and engaged in a farming lifestyle created a pre-existing right to the land. The Court stated: "It is true that this policy [federal government respecting Indian right of occupancy] has

³³ 25 U.S.C. § 331 (Supp.1999).

³⁴ Proponents of allotment were motivated by at least two sentiments. Some were contemptuous because tribes held many acres of reservation land that non-Indians were anxious to acquire. Others desired to help Indians move out of their poor social and economic state. Many Christians advocated for "civilizing Indians;" providing them with an education, Christianity and individual rights. The General Allotment Act provided land to individual Indians while reducing the size of reservations. Reservations were reduced in size when surplus land left over after all tribal members received an allotment was opened for non-Indian settlement.

³⁵ 261 U.S. 219 (1923).

³⁶ *Id.*

³⁷ Act of July 25, 1866, 14 Stat. 239, c. 242.

had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well.”³⁸ The Court provided that an Indian claim to any particular land does not turn upon a treaty, statute, or other formal government action.³⁹ “The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.”⁴⁰

The Court relied on the then current Indian policy of the assimilating Indians into the American agrarian society. “The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating and improving the soil and establishing fixed homes thereon was in harmony with the well understood desire of the Government... To hold that by so doing they acquired no possessory rights to which the Government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.”⁴¹

The *Cramer* decision rests upon the three United States policies. First, the long stated policy of respecting the Indian right of occupancy; second, the old policy of assimilating Indians; and third, the policy of protecting pre-existing land settlement rights. The third policy includes deference to the Land Department rulings “in land matters” where the court “has always given much weight.”⁴² Land Department⁴³ circulars provided strong support for the court’s conclusion.

The Land Department has exercised its authority by issuing instructions from time to time to its local officers to protect the holdings of non-reservation Indians against the efforts of white men to dispossess them. A Land Department circular issued in 1887⁴⁴ provides: “You are enjoined and commanded to strictly obey and follow the instructions of the above circular and to permit no entries upon land in the possession, occupation, and use of Indian inhabitants, or covered by their homes and improvements, and you will exercise every care and precaution to prevent the inadvertent allowance of any such entries. It is presumed that you know or can

³⁸ 261 U.S. at 227.

³⁹ *Id.* at 229.

⁴⁰ *Id.*

⁴¹ *Id.* at 227.

⁴² *Midway Co. v. Eaton*, 183 U.S. 602 (1902); *Hastings R.R. Co. v. Whitney*, 132 U.S. 357 (1889).

⁴³ Land Department governed the public domain land during the westward expansion of non-Indians and these rulings were consolidated within the Interior Department and called public lands decisions.

ascertain the localities of Indian possession and occupancy in your respective districts, and you will make it your duty to do so..."

In *Poisal v. Fitzgerald*,⁴⁵ the right of occupancy of an individual Indian was upheld as against an attempted homestead entry by a white man. The Land Department, relying on the circular issued in 1887,⁴⁶ upheld the prior settlement right of an Arapaho Indian woman, who had made improvements on her land, against a white settler who drove her off her land and appropriated all her crops.

In *State of Wisconsin*,⁴⁷ Congress granted to Wisconsin, in 1850, a tract of land containing swamp lands within the Lac de Flambeau Indian reservation. The issue was whether the state obtained clear and free title to the swamplands falling within the Indian reservation. In an 1842 treaty, the tribe ceded to the United States certain lands but stipulated for the right of occupancy of the lands ceded, until required by the President to remove from such lands. The Land Department held that because the President had not required the tribe to remove from the territory, Wisconsin took the swamp lands grant subject to the Indian right of occupancy.

In *Ma-Gee-See v. Johnson*,⁴⁸ In 1891, Johnson made a homestead entry on lands in Minnesota. Ma-Gee-See claimed he resided upon the land with his family long before Johnson's arrival.⁴⁹ The issue was whether Johnson's entry was confirmed by Congress. Johnson argued his 1891 entry on the land was permissible pursuant to a provision of the homestead laws. It was found that the Land Department had by circulars prohibited the allowance of entries by the whites on lands "in the possession, occupancy and use of Indian inhabitants" making such lands unappropriated.⁵⁰ It was held that under the circumstances the land was not unappropriated within the meaning of the statute, and therefore not open to entry.

⁴⁴ 6 Pub. Lands Dec. 341 (1887).

⁴⁵ 15 Pub. Lands Dec. 19 (1892).

⁴⁶ 6 Pub. Lands Dec. 341 (1887).

⁴⁷ 15 Pub. Lands Dec. 514 (1892).

⁴⁸ 30 Pub. Lands Dec. 125 (1900).

⁴⁹ Ma-Gee-See made improvements on his lands by cultivating the land, erecting a barn and making other farming improvements.

⁵⁰ See 30 Pub. Lands Dec. 125 (1900).

In *Schumacher v. State of Washington*,⁵¹ certain lands claimed by the State under a school grant, were occupied and had been improved by Schumacher, an Indian living apart from his tribe. Schumacher submitted an application for an allotment but it had not been made until after the State had sold the land. Schumacher alleged that he was the head of a family, over sixty years of age, and that he had made his home upon this land all his lifetime, and that his father and mother both resided upon this land until their death; that he is an Indian of the Skagit tribe and that no reservation has been provided for his tribe by treaty, act of Congress, or executive order, and that his application was made for actual bona fide settlement of the lands described for the exclusive use and benefit of himself and family. He was unaware of methods of acquiring title to the land but believed that he was fully protected by his occupancy and improvements, which had never been questioned until the year prior to the filing of his application. Representative of those claimants of the land took possession of his orchard and gathered and used the fruit grown upon the land.

The Land Department held that the grant to the State did not attach under the provision excepting lands "otherwise disposed of by or under authority of an act of Congress." Secretary Hitchcock, in deciding the case, said: "It is true that the Indian did not give notice of his intention to apply for an allotment of this land until after the State had made disposal thereof, but the purchaser at such sale was bound to take notice of the actual possession of the lands by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for allotment should be made."

The *Cramer* decision also relies on the policy of protecting pre-existing settlement rights for its holding to protect individual Indian title. The Court said "the right...flows from a settled governmental policy."⁵² In *Broder v. Water Company*⁵³, a railroad company brought an action of nuisance against a water and mining company for the operation of a canal on the railroad company's land. The Court acknowledged and confirmed rights-of-way for the construction of ditches and canals and declared it a pre-existing right. The government by its conduct recognized

⁵¹ 33 Pub. Lands Dec. 454 (1905).

⁵² *Broder v. Water Company*, 101 U.S. 274 (1879) furnishes an analogy.

⁵³ *Id.*

and encouraged such activity and protected such right. The general principle was that Congress could not be presumed to act at the expense of pre-existing rights. Those pre-existing rights, though imperfect, were still meritorious and had just claims to legislative protection.

After *Cramer*, only a handful of cases addressed individual Indian title.⁵⁴ The individual Indian title right laid dormant and was not asserted until the 1980s.

In *United States v. Dann*,⁵⁵ the United States brought a trespass action against ranchers, Mary and Carrie Dann, members of the Western Shoshone Tribe, for grazing their livestock on public lands without a permit. The Danns asserted a tribal right of occupancy defense to the trespass allegation.⁵⁶ The Ninth Circuit held that the Danns could not rely the tribal right of

⁵⁴ This discussion will include *Cramer v. United States*; *United States v. Dann*; and *United States v. Kent*, as they are most on point. Another case is *Pai 'Ohana v. United States*, 875 F.Supp. 680 (D.Hawaii 1995) In *Pai Ohana*, the court makes reference to the individual right of occupancy and rules against the family asserting the right. The court ruled the right is invalid because they did not raise the claim in sufficient time. "The existence and extent of tribal real estate rights under prior sovereignties is governed by the law of the sovereign upon whose authority the claim rests." The Act of 1851, adopted by Congress as a method of quieting land titles in California, is similar to the method established by the Hawaiian monarchy during the Great Mahele. "the failure of Pai 'Ohana's ancestors to apply for a Kuleana grant foreclosed Pai 'Ohana's claim for fee simple title to 'Ai'opio. The court finds that just as the Chumash Indians' aboriginal title was extinguished in *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir.1986), by failing to make a claim under the Act of 1851, so too was any aboriginal title that Pai 'Ohana may have claimed to 'Ai'opio extinguished by the government of Hawaii in 1854 when the allotted period to claim Kuleana title ended and Pai 'Ohana's ancestor's had failed to obtain Kuleana title to the land.

⁵⁵ 873 F.2d 1189 (9th Cir.1989).

⁵⁶ The court details the long procedural history of the *Dann* case which started in 1974. In 1974, the Danns asserted tribal right of occupancy in defense of the trespass allegation. Concurrently, there was a pending claim that began in 1951 in the Indian Claims Commission by the Temoak Band on behalf of the Western Shoshone identifiable group. The Temoak Band argued for compensation for the taking of the Western Shoshone right of occupancy. The Danns, on the other hand, did not want compensation, they maintained the Western Shoshone title was valid and had not been extinguished. The district court ruled against the Danns for trespass, holding tribal right of occupancy had been extinguished by the Indian Claims Commission proceeding. The Danns appealed and the Ninth Circuit reversed the lower court and held the decision of the Indian Claims Commission was not yet final and remanded the case. During the remand, the Indian Claims Commission ended and awarded \$26 million to the General Accounting Office for compensation to the Temoak Band. The *Dann* case being on remand was then informed of the Indian Claims Commission decision and the district court entered judgment against the Danns for trespass, holding the certification of the \$26 million award extinguished aboriginal title. The Danns appealed again and Ninth Circuit held the issue of extinguishment had not actually been litigated in the Indian Claims Commission proceedings, but had been assumed. The Ninth Circuit opinion was then appealed to the S.Ct in where the court held the payment of \$26 million to the General Accounting Office was sufficient to constitute extinguishment of aboriginal title but left open the door for the Danns to claim Individual Indian title. "The Danns also claim to possess individual as well as tribal aboriginal rights and that because only the latter were before the Indian Claims Commission, the 'final discharge of § 22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action. Though we have recognized that individual aboriginal rights may exist in certain contexts, this contention has not been addressed by the lower courts and, if open, should first be addressed below. We express no opinion as to its merits." The Danns, for a third time, ended up in the Ninth Circuit, in 1989, where the court rendered an opinion which is addressed within the text of this paper.

occupancy but individual Indian title rights could be asserted where individual Indians show actual possession by occupancy, enclosure or other actions establishing a right to lands to the exclusion of adverse claimants. Thus, even if the tribal title had been extinguished, the individual Indian taking possession may acquire an individual occupancy right.⁵⁷

Individual Indian title is established when an Indian can show continuous occupancy commenced before the land in question was withdrawn from entry for purposes of settlement.⁵⁸ In *United States v. Kent*,⁵⁹ Ms. Kent, a Karuk Indian moved onto a site within the Klamath National Forest in 1984. She occupied and possessed the site with a trailer that was used for her living quarters, and planted a garden which yielded her sustenance. The United States charged Kent with unauthorized residential occupancy of a National Forest.⁶⁰

The Ninth Circuit held that Kent did not hold individual Indian title because she began her occupancy long after her tribe's title to the land had been extinguished and long after the land had been designated as a National Forest.⁶¹ The court noted no lineal ancestors immediately preceded her in occupancy and that *Cramer v. United States* provides protection for such ties in form of legal title only for those who maintained a presence of the land in question. Kent's occupancy could not be viewed as implicit consent from the government. The inception of a right of occupancy must begin with action taken prior to entry of a withdrawal of the particular area.

PART II

Origin of the Land Claim

In *Tsosie v. United States*,⁶² the land claims ultimately turn on whether "individual Indian title" has been extinguished by an allotment application initiated in 1909, although the federal allotment patent was not issued until 1964. The federal courts have stayed their hand in hearing the claims and opted to defer to the Navajo tribal courts to resolve the issue.⁶³

⁵⁷ 873 F.2d 1189 at 1195.

⁵⁸ *United State v. Kent*, 945 F.2d 1441 (9th Cir.1991).

⁵⁹ *Id.*

⁶⁰ 679 F.Supp. 985 (E.D.CA. 1987).

⁶¹ President Theodore Roosevelt created the Klamath National Forest by a proclamation issued on May 6, 1905, 34 Stat. 3001 (1905).

⁶² 92 F.3d 1037 (10th Cir.1996).

⁶³ *Id.*

Background

Grace Tsosie is a seventy-year-old Navajo woman who resides near Crownpoint, New Mexico.⁶⁴ She claims ownership of her ancestral land based upon the theory of “individual Indian title.” She is asserting a claim that her mother, Mary Bah Arviso, did before her. Tsosie was born on the land in 1929. She resides and claims interests to her traditional homeland that has been in her family since before 1868.

Rueben Mariano, also Navajo, in his nineties, makes a competing claim to the land. He asserts title to 160 acres of the area based upon a United States patent issued pursuant to the General Allotment Act. However, he has never made settlement on the land. The strength of his claim is that in 1909, the United States accepted his application for an allotment.⁶⁵

History of the Land

The disputed land has a complex history with many grants and conveyances attached to it.⁶⁶ However, in the beginning, it was held by the Navajo Nation. The Navajo Nation held aboriginal rights to nearly forty million acres prior to the 1860’s.⁶⁷ Navajos traditionally attach religious significance to their homelands, *Dinetah*. Tribal oral history details the origins of the tribe and places them within an area bounded by the four sacred mountains. Sierra Blanca Peak in the east is located near Alamosa, Colorado; Mount Taylor in the south, near Grants, New Mexico; San Francisco Peaks in the west, near Flagstaff, Arizona; and Mt. Hesperus in the north in southwestern Colorado. They claimed ownership to all land within their four sacred mountains. The mountains are also of deep religious significance to the Navajo tribe and represent boundaries of Navajoland or *Dinetah*.

⁶⁴ Crownpoint, New Mexico is within Indian country and is within an executive order reservation land. 18 U.S.C. § 1151(a)-(c) (Supp.1999). The disputed land at issue is part of Executive order land 2513, January 15, 1917.

⁶⁵ All of the court opinions state that the General Allotment Act of 1887 provided authority for providing Mariano's allotment. *Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, Interior Board of Indian Appeals*, IBIA 90-54-A (1991); *United States v. Tsosie*, 849 F.Supp. 768 (D.N.M. 1994); *Tsosie v. United States*, 92 F.3d 1037 (10th Cir.1996).

⁶⁶ It is important for purposes of this paper to acknowledge two important events about the land. It is not certain whether the land was granted to the Santa Fe Railway in 1866 or sometime between 1915 or 1916. See Act of July 25, 1866, 14 Stat. 239, c. 242. and *Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs, Interior Board of Indian Appeals*, IBIA 90-54-A (1991).

⁶⁷ In the Indian Claims Commission proceeding, the Navajo tribe claimed aboriginal title to forty million acres in the 1860’s. *Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 244 at 244 (1970).

In the summer of 1863, the United States initiated a military campaign to remove the Navajo tribe from that area known as Navajoland to Bosque Redondo or Fort Sumner, located about 180 miles southeast of Albuquerque, New Mexico. General James H. Carlton, commander of federal troops in the territory of New Mexico, initiated a massive military campaign against the Navajo tribe⁶⁸ after which the tribe was held captive at Fort Sumner for nearly four years.⁶⁹

In 1868, a treaty⁷⁰ was signed between the United States and the Navajo Nation whereby the United States accepted the tribe's terms to return to their original homeland. The Treaty of 1868 provided three and one half million acres of reservation land covering parts of Arizona and New Mexico. However, Navajo tribal territory was substantially smaller in size and located in the poorest region of what the tribe originally owned.⁷¹

Although the reservation was intended to control and concentrate the tribe within the boundaries, many families returned to their original homelands located outside the treaty reservation boundaries.⁷² "Even as the treaty was being discussed, officials in New Mexico recognized the inadequacies [of the size of] the reservation. If the Navajos were to rebuild their herds and reestablish their farms, they would need far more land than it provided. General Sherman recognized the problem and told Navajo leaders that their people would not be confined to the treaty reservation but would be allowed to use any off-reservation areas not occupied by white settlers. Since there were virtually no white settlers in northwest New Mexico or northeastern Arizona in the 1860's, Sherman's statement meant that most Navajo families could return to their former homes."⁷³

Grace Tsosie's maternal ancestors resettled on her land located near what is now known as Crownpoint, New Mexico. In 1901, Grace Tsosie's mother, Mary Bah Arviso, was born near Crownpoint, New Mexico and has sacred burial items in the area that are of religious

⁶⁸ Bailey and Bailey, pg. 9, *The History of the Navajo* (1986).

⁶⁹ *Id.*

⁷⁰ Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667.

⁷¹ Bailey and Bailey, *The History of the Navajo* (1986).

⁷² Kelly, pg. 17 *The Navajo Indians and Federal Indian Policy 1900-1935* (1968).

⁷³ Bailey and Bailey, pg. 26, *The History of the Navajo* (1986).

significance to the Navajo People. Mary Bah Arviso's umbilical cord is buried near present day Grace Tsosie's home.⁷⁴

After the 1868 treaty, many executive orders expanded the original treaty reservation boundaries in an effort to provide land for many of the Navajos living and herding livestock in northwestern New Mexico. Both the Indian office and the Secretary of Interior asked Congress and the President to provide such land.⁷⁵

During the same period, many conflicts arose due to the increased number of settlers and ranchers colliding with Navajo livestock herds. Grazing land disputes erupted between Navajos and non-Indian cattle ranchers. Under such pressure, the New Mexico congressional delegation proposed initiatives to curb the extension of reservation boundaries by executive orders. Additionally, they were able to pass measures that would allot portions of the executive order reservations to individual Navajos.⁷⁶

Between 1908 and 1910, under authority of the General Allotment Act of 1887⁷⁷ the United States accepted applications for allotments outside the treaty reservation boundary in northwestern New Mexico. In 1909⁷⁸ Reuben Mariano, at four years old, had an allotment application submitted to the General Land Office on his behalf which was accepted. It was not until 1964, however, that a federal patent was issued to Mariano.

Mary Bah Arviso was about seven or eight years old when Reuben Mariano's application for allotment was accepted in 1909. She resided on the land with her mother and sisters that Mariano now claims. None of the reported cases from the Interior Board of Appeals to the Tenth Circuit address whether she continuously resided on the land from 1901. However, the opinions indicate that as early 1928, she and her family continuously resided on the land and made improvements upon it. In 1929, Mary Bah Arviso gave birth to Grace Tsosie. The strength of

⁷⁴ United States v. Tsosie, 849 F.Supp. at 769 (D.N.M. 1994)

⁷⁵ Kelley, pg. 17-19, 23, *The Navajo Indians and Federal Indian Policy, 1900-1935* (1968). See also Herber J. Hagerman, *The Navajo Indian Reservation*, Senate Document 64, 72d Cong., 1st Sess., 1932.

⁷⁶ *Id.*

⁷⁷ 25 U.S.C. § 331 (Supp.1999).

⁷⁸ The reported decisions state his application was accepted sometime between 1908-1910, however, the exact date is not certain. In a letter from a BIA Superintendent, dated September 19, 1988, states Mariano was allotted his land on October 20, 1909 and was issued his patent on October 21, 1964. See *Grace Tsosie v. Navajo Area Director*, Bureau of Indian Affairs, IBIA 90-54-A (1991).

Grace Tsosie's aboriginal claim is based upon the fact that her maternal ancestors have occupied this land continuously since 1868 after her ancestors returned from military captivity at Fort Sumner.

In 1968, Mariano and Arviso entered into a lease agreement with Arviso leasing one acre of land from Mariano on his alleged allotment. The Eastern Navajo agency superintendent approved the lease. In 1970, Mariano informed the Bureau of Indian Affairs (BIA) that he wished to cancel the lease for non-payment and begin fencing his allotment. Arviso objected. By letter dated October 16, 1973, the Albuquerque Field Solicitor at the request of the superintendent addressed Mary Bah Arviso's claim to the area. The letter provided "The fact that the Arvisos had used the land for the past thirty years or so does not give them any legal claim to the lands. As you know, it has long been held that a claim of adverse possession cannot run against restricted Indian lands."⁷⁹

The letter provides some insight because it deems the area restricted Indian land but does not take into consideration any aboriginal claim of Arviso. In 1973, the only cases involving individual Indian title was *Cramer v. United States*⁸⁰ and *United States v. Santa Fe Pac. R. Co.*,⁸¹ at footnote twenty three.⁸²

In 1975, Arviso obtained a temporary restraining order from the Navajo Tribal Court restraining Mariano from fencing the allotment or harming their property pending the settlement of the case. However, the case was never settled in tribal court.⁸³ Mary Bah Arviso died intestate on November 13, 1987 and Grace Tsosie maintains her claim against Mariano. In 1988, the BIA notified Tsosie that she had to move off the land within 90 days. In 1991, Grace Tsosie appealed

⁷⁹ *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (1938); *United States v. Raiche*, 31 F.2d 624 (1928); *United States v. Schwarz*, 460 F.2d 1365 (1972).

⁸⁰ 261 U.S. 219 (1923).

⁸¹ 314 U.S. 339 (1941).

⁸² *Id.* at 358.

⁸³ In 1981, Mariano filed, inter alia, a writ of mandamus requiring BIA officials to cancel the homesite lease. *Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs; Interior Board of Indian Appeals, IBIA 90-54-A* (1991). The United States defended the BIA officials and removed the action to federal district court. The district court dismissed the BIA officials and remanded the case back to tribal court after the BIA declared the homesite lease null and void.

administratively and the decision was affirmed.⁸⁴ She was again notified that she had to move but she did not respond and continued to occupy the land.⁸⁵

In 1992, the United States filed trespass and ejectment action on behalf of Mariano in federal district court. The district court dismissed the action sua sponte under the tribal court exhaustion doctrine⁸⁶ and the Tenth Circuit affirmed.⁸⁷ The court ruled against the United States because the cause of action arose within Indian country and the dispute involves two tribal members and involved tribal customs and traditions. The district court opinion stated: "As a non-Navajo, unschooled in the foundations of Navajo culture which...constitutes Navajo common law, I am unqualified to interpret the law and rule on many of the legal issues which should arise in this case. As noted in the *LaPlante* case,⁸⁸ tribal courts are best qualified to interpret and apply tribal law."⁸⁹

The court continued "The Bureau of Indian Affairs has taken actions which are inconsistent, one with the next, as to who is entitled to possessory and ownership interests in the land. This case is but one example of how the BIA has mishandled land for the Indians. The facts of this case are a sad commentary on the incompetence to which Native Americans in this country have been long subjected."⁹⁰ Grace Tsosie continues to live on the land. The case is still unresolved.

PART III

Land Claim Theories

Grace Tsosie can assert a claim to her ancestral lands under two theories: individual Indian title under federal common law and a customary use right under Navajo common law. Assuming that title will be decided by a Navajo court applying Navajo law, the question is whether Mariano's application for an allotment extinguished either of her rights.

Navajo Common Law

⁸⁴ Grace Tsosie v. Navajo Area Director, Bureau of Indian Affairs; Interior Board of Indian Appeals, IBIA 90-54-A (1991).

⁸⁵ Id.

⁸⁶ 849 F.Supp. at 770 (D.N.M. 1994).

⁸⁷ 92 F.3d 1037 (10th Cir.1996).

⁸⁸ Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 at 18 (1987).

⁸⁹ Id.

Navajo Nation statute provides that “In all cases Navajo Nation courts shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws.⁹¹ However, Navajo courts must follow Navajo case law where possible.⁹² The courts may “adopt and develop law that best meets the needs of the Navajo people.”⁹³ The term “Navajo common law” is preferred because it “properly emphasizes the fact that Navajo custom and tradition is law, and more accurately reflects the similarity in the treatment of custom between Navajo and English common law....”⁹⁴

The laws of the Navajo Nation are interpreted in light of Navajo experience and the Navajo common law.⁹⁵ The word land in Navajo is Shi keyah or “that which is beneath my feet.”⁹⁶ “The most valuable asset of the Navajo Nation is its land, without which the Navajo Nation would [not] exist.... Land is basic to the survival of the Navajo People. While it is said that land belongs to the clans, more accurately it may be said that the lands belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its lands and assets belong to those who use it and who depend upon it for survival-the Navajo People.”⁹⁷ Under Navajo common law, Tsosie could claim customary use rights.

The ownership of the land always remains vested in the Navajo Nation as a whole.⁹⁸ However, the Navajo courts have recognized individual Navajo use rights to land within the reservation for those who use or improve the land with buildings, corrals, fences and other improvements.⁹⁹ “The custom of the Navajo Tribe is that improvements of individual Navajo Indians on unwithdrawn Navajo Tribal lands are considered as the personal property of such

⁹⁰ 849 F.Supp. at 770 (D.N.M. 1994).

⁹¹ 7 N.N.C. § 204 (1995).

⁹² Sells v. Sells, 5 Nav. R. 104 (1986).

⁹³ Id. at 108.

⁹⁴ In the Matter of the Estate of Belone, 5 Nav. R. at 161 (1987).

⁹⁵ In the Matter of Sharon Harvey, N.L.R. Supp. 273 (Nav. Sup. Ct. 1991).

⁹⁶ Id. at 274.

⁹⁷ Hood v. Bordy, N.L.R. Supp. 229 (Nav. Sup. Ct. 1991).

⁹⁸ Yazzie v. Jumbo, 5 Nav. R. 75, 77 (1986).

⁹⁹ Id.

Indians and not of the Tribe...."¹⁰⁰ Such personal customary use rights have been found to be compensable if diminished by the sovereign, the Navajo Nation.¹⁰¹

In the Matter of the Estate of Charley Nez Wauneka, Sr.,¹⁰² the Navajo Nation Supreme Court addressed a probate issue involving disputed ownership interests asserted by the heirs to a customary use area. The court, in dicta, expounded on Navajo customary use rights. The court said "Land use on the Navajo reservation is unique and unlike private ownership of land off the reservation, while individual tribal members do not own land, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his usage and occupancy of land to an area traditionally inhabited by his ancestors. This is the customary use area concept."¹⁰³

In *Yazzie v. Catron*,¹⁰⁴ the court stated, "use and occupancy of reservation land traditionally inhabited by a person's family [is] known as a customary use area." The *Yazzie* Court addressed a dispute over a grazing permit boundary line between tribal members. The Court outlined land use within the reservation boundaries: "The Navajo Nation government grants permits for agricultural use within irrigation project areas and for livestock grazing across the reservation. Navajos use their customary use areas for small agricultural plots, homesites, and grazing."

The Court held that unless a Navajo has a grazing or agricultural use permit, homesite lease, business site lease or rights to a customary use area, he or she has no rights or interest in trust land beyond those of every other member of the Navajo Nation.¹⁰⁵

It appears Tsosie can easily establish customary use rights to the land when Mariano has never lived on the land. Her use and occupancy is confined to an area traditionally inhabited by her ancestors. She and her mother's family have made improvements on the land beginning in the late 1800's. Their occupancy was evidenced by the burial of Tsosie's mother's umbilical cord on the land, an action recognized significant as Navajo traditional law.

¹⁰⁰ Id. at 233.

¹⁰¹ *Dennison v. Tucson Gas and Electric Company*, 1 N.L.R. 28 (Nav. Ct. App. 1974).

¹⁰² 5 N.L.R. 38 (Nav. Sup. Ct. 1986).

¹⁰³ Id.

¹⁰⁴ N.L.R. Supp. 311 (Nav. Sup. Ct. 1992).

¹⁰⁵ Id.

In 1909, at the time Mariano's application was made, the land was not within Navajo reservation boundaries. This raises the question of whether Tsosie could have established a Navajo customary use right outside of the 1868 treaty reservation boundaries.

The tribe ceded their aboriginal claim to land outside of the 1868 treaty reservation.¹⁰⁶ However, many tribal members lived outside of the reservation boundaries.¹⁰⁷ The Bureau of Indian Affairs agreed that Navajos could live outside the reservation boundaries as long as there were no settlers in the area.¹⁰⁸ When General Sherman was discussing the 1868 treaty with Navajo leaders he told them that they would not be confined to the treaty reservation and would be allowed to use off-reservation land not occupied by white settlers.¹⁰⁹ Additionally, nothing in the 1868 treaty ceded tribal jurisdiction over tribal members living within the four sacred mountains, which under Navajo tradition and common law define Navajo country.¹¹⁰ Tribal members governed themselves in accordance with tradition and customs. Thus, in Navajo tradition Tsosie's maternal ancestors, living within the four sacred mountains, established a customary use right to their land.¹¹¹

"Individual Indian title"

In addition to establishing a customary use right under tribal law, Tsosie can also establish individual Indian title under federal common law. Individual Indian title is a question of fact.¹¹² Tsosie's claim for individual Indian title is strong because she "can show that she or her lineal ancestors continuously occupied a parcel of land, as individuals, and that the period of continuous occupancy commenced before the land in question was withdrawn from entry for purposes of settlement."¹¹³ Her claim primarily relies on *United States v. Cramer*,¹¹⁴ *United*

¹⁰⁶ Article IX, Treaty with the Navajo Indians, June 1 1868, 15 Stat. 667.

¹⁰⁷ Bailey and Bailey, pg. 26, *The History of the Navajo* (1986).

¹⁰⁸ Bailey and Bailey, pg. 88-90, *The History of the Navajo* (1986); Kelley, pg. 23-30, *The Navajo Indians and Federal Indian Policy, 1900-1935* (1968).

¹⁰⁹ *Id.*

¹¹⁰ Treaty with the Navajo Indians, June 1 1868, 15 Stat. 667.

¹¹¹ In 1991, the Navajo courts adopted a new Code of Judicial Conduct which exhibits traditional Navajo legal values. The first canon provides a Navajo Judge should decide and rule between the four sacred mountains. See Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 *Okla.City U.L. Rev.* at 151 (1994).

¹¹² "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *Santa Fe Pac. R Co. v. United States*, 314 U.S. 339 at 345 (1941).

¹¹³ *United State v. Kent*, 945 F.2d at 1444 (9th Cir.1991).

States v. Santa Fe. Pac.R. Co.,¹¹⁵ and the Land Department circulars that protect individual Indian occupancy of lands in the public domain.

Tsosie's mother, Mary Bah Arviso, was born on the land in 1901 and has buried her umbilical cord on the land according to Navajo custom and tradition. In 1929 Tsosie was born on the same land. Tsosie's family has lived on the land in question and has grazed animals there as far back as the late 1800's. Tsosie can prove actual possession and continuous occupancy of the land in question before the land patent was issued to Mariano. She and her maternal ancestors have taken actions establishing a right to the exclusion of others.¹¹⁶ The next question is whether her individual Indian title was extinguished by congressional action.

Individual Indian title is as "sacred as fee simple."¹¹⁷ Only Congress can extinguish it¹¹⁸ and extinguishment must not be lightly implied.¹¹⁹ There are two possible instances when Tsosie's title could have been extinguished: the congressional grant of land to Santa Fe Pacific Railroad in 1866,¹²⁰ or the General Allotment Act of 1887.¹²¹

1866 Railroad Grant

Tsosie's makes two claims when discussing the 1866 railroad grant. First, she claims that the land could not have been allotted to Mariano because Santa Fe Pacific was granted the land in 1866. Therefore, if Santa Fe Pacific owned the land it could not be allotted to Mariano in 1909. Second, she argues that although the railroad was granted the land, it remained subject to her individual Indian title which has not been extinguished.¹²²

¹¹⁴ 261 U.S. 219 (1923).

¹¹⁵ 314 U.S. 339 (1941).

¹¹⁶ *United States v. Dann*, 873 F.2d 1189 (9th Cir.1989).

¹¹⁷ *Mitchel v. United States*, 34 U.S. at 746 (1835). But see *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955) where the court held tribal aboriginal title does not rise to any recognized right of compensation under the fifth Amendment.

¹¹⁸ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 587.

¹¹⁹ 314 U.S. at 354 (1941).

¹²⁰ Act of July 27, 1866, 14 Stat. 292.

¹²¹ 25 U.S.C. § 331 (Supp.1999).

¹²² Section two of the 1866 railroad grant provides that "the United States would extinguish as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under operation of this act...." Act of July 27, 1866, 14 Stat. 292.

There is no exact date the railroad received the grant¹²³ but assuming Santa Fe Pacific received a grant in 1866, it was when the Navajo tribe was held captive at Fort Sumner. In 1868, the tribe signed a treaty ceding their aboriginal right to all land outside the reservation.¹²⁴ Therefore, it can be argued that the railroad received their title free and clear of the Navajo aboriginal title in accordance with section two of the 1866 grant.

However, there is an opening to claim “individual Indian title” even when tribal aboriginal rights were ceded. Footnote twenty three in *United States v. Santa Fe Pac. R.Co.*,¹²⁵ provides an opportunity to establish individual Indian title even when the tribe has voluntarily relinquished their Indian right of occupancy.

In *United States v. Santa Fe Pac. R.Co.*,¹²⁶ the Court held the creation of a reservation at the request of the Walapai tribe and their acceptance amounted to a relinquishment of the right of occupancy. However, the Court noted that after the creation of the reservation many tribal members did not reside within the boundaries. “A few of them thereafter lived on the reservation; many of them did not.”¹²⁷ This fact is similar to what happened with the Navajos after 1868; many Navajos returned to their original homes located outside the reservation.¹²⁸ In footnote twenty three, the Court provides that tribal right of occupancy was extinguished but that was “[a]s distinguished from individual rights of occupancy, if any, as were involved in *Cramer v. United States*, ...but which, not being in issue here are not foreclosed or affected by the judgment in this case.” Thus Grace Tsosie’s ancestors returned to their original homeland after being held captive at Fort Sumner and reestablished their individual aboriginal right. Tsosie, then, still has an “individual Indian title” claim despite the Navajo Nation relinquishing its tribal

¹²³ In the Interior Board of Indian Appeals decision, the court mentions Santa Fe Railroad receiving the land grant sometime during 1915-1916. *Grace Tsosie v. Navajo Area Director*, IBIA 90-54-A (1991).

¹²⁴ Article IX, Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667.

¹²⁵ 314 U.S. 339 (1941).

¹²⁶ 314 U.S. 339 (1941).

¹²⁷ 314 U.S. at 357.

¹²⁸ Kelley, pg. 23-30, *The Navajo Indians and Federal Indian Policy, 1900-1935* (1968); Bailey and Bailey, pg. 26, *The History of the Navajo* (1986).

occupancy right. Her individual Indian title was not extinguished or voluntarily surrendered because the railroad did not use the tract for any purpose.¹²⁹

General Allotment Act

The Tenth Circuit and the United States on behalf of Mariano erred when they claimed Mariano's allotment was made under the authority of section one of the General Allotment Act (GAA).¹³⁰ Section one of the GAA provides for allotments in areas "located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order..." However, in 1909, when Mariano's application was filed, the land was not within a reservation. It was not until January 15, 1917 that the disputed area was designated a reservation by executive order 2513.¹³¹ The executive order does not extinguish Tsosie's individual Indian title because it was not pursuant to congressional authority.¹³²

Since the land in question was not within a reservation in 1909, the more likely source of authority of Mariano's allotment was section four of the General Allotment Act (GAA)¹³³ which governs public domain allotments. Mariano's 1909 application for allotment is the strength of his argument.¹³⁴ He cannot rely on his issued patent in 1964 because the allotment policy is no longer valid.¹³⁵

¹²⁹ Santa Fe Pacific Railroad relinquished the tract to the United States under exchange serial number SF 065068 pursuant to congressional act; Mar. 3 1921, 14 Stat. 1239. A railroad tract was built further south of Tsosie's land and therefore her use and occupancy was not disturbed.

¹³⁰ 25 U.S.C. § 331 (Supp.1999).

¹³¹ Executive Order 2513, January 15, 1917. Woodrow Wilson. "It is hereby ordered that the following described lands situated in the State of New Mexico, which belong to or may hereafter be acquired by the United States, are hereby withdrawn from settlement and sale and are set apart for the use and occupancy of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon...."

¹³² *United States v. Dann*, 873 F.2d 1189 at 1196 (9th Cir. 1989). Aboriginal title can be extinguished only by Congress or with the authorization of Congress, and if an executive official or agency attempts to extinguish aboriginal title without congressional authorization, titleholder is able to protect their title by asserting aboriginal title against the official or agency.

¹³³ 25 U.S.C. § 334 (Supp.1999).

¹³⁴ *Hooks v. Kenard*, 114 P. 744 (Okla. 1911), the court holds the selection of and the filing upon an allotment of land is the inception of the title of the Indian allottee or his heirs, and when the patent, which is only the evidence of title, is issued, it relates back to the inception of the title.

¹³⁵ Allotment policy was repudiated in 1934 with the Indian Reorganization Act. 25 U.S.C. § 461 (Supp.1999). Also in 1945, the United States granted Tsosie's mother, Mary Bah Arviso, a grazing permit for the land which confirms the government implicitly consented to her use of the area at that time. See 92 F.3d 1037 at 1040 (10th Cir 1996).

Section four of the GAA, ¹³⁶ provides: “Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States *not otherwise appropriated*, he or she shall be entitled, upon application to the local land office ... to have the same allotted to him or her....”

In this instance, Mariano fits into section four because he was not residing on the Navajo treaty reservation in 1909. However, he does not prevail because he had to make settlement on the land before his title would vest which did not occur because he was four years old at the time of the application. Furthermore, he did not subsequently make settlement because the opinion indicates he never resided on the land.¹³⁷ Mariano, however, could argue that constructive settlement was made when the United States acting as trustee accepted his application for an allotment.

Even assuming he did make settlement on the land, section four of the GAA provides that no allotment will be granted if the land is “otherwise appropriated.”¹³⁸

Tsosie’s claim depends on whether her individual Indian title is sufficient to constitute “otherwise appropriated.” The language of “otherwise appropriated” is an exception to section four public domain allotments. Tsosie’s maternal ancestors had prior use and occupancy of the land as a settlement. It is no different than other settlement exceptions provided in land grants made to the railroad companies which were at issue in the *Cramer*¹³⁹ and *Santa Fe Pacific Railroad*¹⁴⁰ cases and the Land Department cases.

In *Cramer v. United States*,¹⁴¹ a congressional grant provided a railroad company land for railway purposes but excepted from the grant those lands that were “found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of.” The Court upheld the use and occupancy of individual Indians making settlement on land outside

¹³⁶ 25 U.S.C. § 334 (Supp. 1999).

¹³⁷ *Kale v. U.S.* 489 F.2d. 449 (9th Cir. 1973). Even if he did settle on the land, “Congress did not intend that an Indian acquire a vested right to an allotment simply by settling on a piece of land and then filing an Indian allotment application.”

¹³⁸ 25 U.S.C. § 334 (Supp. 1999).

¹³⁹ 261 U.S. 219 (1923).

¹⁴⁰ 314 U.S. 339 (1941).

¹⁴¹ 261 U.S. 219 (1923).

of a reservation with the implicit consent of the government. Their occupancy was considered to be “reserved or otherwise disposed of” in accordance with the congressional grant at issue. The railroad grant by itself did not extinguish the individual Indians right of occupancy. Tsosie’s use and occupancy is a mirrored image of the use and occupancy involved in *Cramer*.

Three United States policies support *Cramer’s* conclusion of implicit governmental consent of individual Indian occupancy. These policies are key for Tsosie’s individual Indian title. The United States has not changed its policy of respecting the Indian right of occupancy. The second policy of assimilation no longer exists. However, in 1909 it did exist, and Tsosie’s ancestors were a prime example of individual Indians attempting to make settlement on lands outside of reservation boundaries. Tsosie’s ancestors made settlement on the land, making improvements by building a house and corral fences and grazing animals in the area.

Additionally, during the 1868 treaty negotiations General Sherman representing the United States told Navajo leaders that Navajos could live off of the treaty reservation land so long as there were no white settlers in the area.¹⁴²

The Land Department cases provide additional support for her claim. *Cramer* noted deference to the Land Department in “land matters.” Four Land Department circulars strongly support Tsosie’s claim: *Poisal v. Fitzgerald*,¹⁴³ *Schumacher v. State of Washington*,¹⁴⁴ and *Ma-Gee-See v. Johnson*¹⁴⁵ and the circular directing Indian agents to protect Indian use and occupancy against entries by settlers.¹⁴⁶

The Land Department circulars hold that entry by settlers on lands “in the possession, occupancy and use of Indian inhabitants” is prohibited thus making those lands appropriated and not open to entry.¹⁴⁷ Tsosie’s use and occupancy qualifies as a prior existing settlement that is not subject to appropriation by another individual and is with the implicit consent of the government.

¹⁴² Bailey and Bailey, pg 26, *The History of the Navajo* (1986); Kelly, pg 17 *The Navajo Indians and Federal Indian Policy, 1900-1935* (1968).

¹⁴³ 15 Pub. Lands Dec. 19 (1892).

¹⁴⁴ 33 Pub. Lands Dec. 454 (1905).

¹⁴⁵ 30 Pub. Lands Dec. 125 (1900).

¹⁴⁶ 6 Pub. Lands Dec. 341 (1887).

¹⁴⁷ *Ma-Gee-See v. Johnson*, 30 Pub. Lands Dec. 125 (1900).

In each instance these Land Department cases¹⁴⁸ examined congressional acts that provided title to land. However, in each of the congressional acts, there were provisions that made exceptions. In each exception, individual Indians making settlement on land outside reservation boundaries were protected and exempted from the acts.

Section four of the General Allotment Act provides an exception for public domain allotments: those lands “otherwise appropriated.” Tsosie’s ancestor’s settlement on the land prior to Mariano’s application in 1909 falls directly within the section four exception. Her maternal family’s settlement, in 1909 was the type of use and occupancy the United States intended to protect and implicitly consented to.

Conclusion

At the turn of the century, the United States encouraged Indians to abandon their “nomadic ways” and take up an agrarian lifestyle and embrace individual rights. But in *United States v. Tsosie*,¹⁴⁹ it is ironic the United States desires to eject an Indian women from her homeland who has demonstrated efforts to engage in farming and cattle operations in favor of an Indian allottee who has never lived on the land. Tsosie and her maternal ancestors have established individual Indian title and Navajo customary use right to the land. Her right should be protected when her and her family had openly and notoriously taken possession of the area prior to Mariano’s application for allotment. Her prior existing right remains valid and has not been extinguished by any congressional action either with the 1866 railroad grant or section four of the General Allotment Act.

¹⁴⁸ *Poisa v. Fitzgerald*, 15 Pub. Lands Dec. 19 (1892); *Schumacher v. State of Washington*, 33 Pub. Lands Dec. 454 (1905); *Ma-Gee-See v. Johnson*, 30 Pub. Lands Dec. 125 (1900); 6 Pub. Lands Dec. 341 (1887)(Circular directing Indian agents to protect Indian use and occupancy against entries by settlers).

¹⁴⁹ 92 F.3d 1037 (10th Cir.1996).