

WESTERN LEGAL HISTORY

THE JOURNAL OF THE
NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

VOLUME 21, NUMBER 2 2008

Western Legal History is published semiannually, in spring and fall, by the Ninth Judicial Circuit Historical Society, 125 S. Grand Avenue, Pasadena, California 91105, (626) 795-0266/fax (626) 229-7476. The journal explores, analyzes, and presents the history of law, the legal profession, and the courts—particularly the federal courts—in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

Western Legal History is sent to members of the NJCHS as well as members of affiliated legal historical societies in the Ninth Circuit. Membership is open to all. Membership dues (individuals and institutions): Patron, \$1,000 or more; Steward, \$750–\$999; Sponsor, \$500–\$749; Grantor, \$250–\$499; Sustaining, \$100–\$249; Advocate, \$50–\$99; Subscribing (nonmembers of the bench and bar, lawyers in practice fewer than five years, libraries, and academic institutions), \$25–\$49. Membership dues (law firms and corporations): Founder, \$3,000 or more; Patron, \$1,000–\$2,999; Steward, \$750–\$999; Sponsor, \$500–\$749; Grantor, \$250–\$499. For information regarding membership, back issues of *Western Legal History*, and other society publications and programs, please write or telephone the editor.

POSTMASTER:

Please send change of address to:

Editor

Western Legal History

125 S. Grand Avenue

Pasadena, California 91105

Western Legal History disclaims responsibility for statements made by authors and for accuracy of endnotes.

Copyright ©2008, Ninth Judicial Circuit Historical Society

ISSN 0896-2189

The Editorial Board welcomes unsolicited manuscripts, books for review, and recommendations for the journal. Manuscripts (three copies, and one disk in Microsoft Word for Windows, if possible) should be sent to the Editor, *Western Legal History*, 125 S. Grand Avenue, Pasadena, California 91105. Texts, including quotations and endnotes, must be double spaced. Notes must be numbered consecutively and appear in a separate section at the end of the text. Authors are requested to follow the style for citations used in this journal. Manuscripts that are no more than thirty pages in length, not counting notes, charts and tables, and photographs, are preferred. Also preferred are manuscripts not concurrently under consideration by another journal.

Whether because of prejudice or custom, writers in earlier times often used language considered strange or offensive today. Because *Western Legal History* publishes articles that present the historical record as accurately as possible, it occasionally publishes quotations containing such language. The publication of such is not to be construed as representing the attitudes of either the authors or *Western Legal History*.

Communication with the editor is encouraged before submission of any manuscript. At that time, other guidelines for the preparation and publication of an article may be discussed. Consultation about punctuation, grammar, style, and the like is made with the author, although the editor and the Editorial Board are the final arbiters of the article's acceptance and appearance.

Articles published in this journal are abstracted and indexed in *America: History and Life*; *Historical Abstracts*; the *Index to Legal Periodicals*; and the *Legal Resources Index*.

NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

BOARD OF DIRECTORS

HON. JAMES R. BROWNING
Chairman

San Francisco

MARC M. SELTZER, ESQ.

President

Los Angeles

JEFFREY M. FISHER, ESQ.

Vice President

San Francisco

JOHN FRANCIS CARROLL, ESQ.

Treasurer

San Pedro

GARETH T. EVANS, ESQ.

Secretary

Los Angeles

GERSHAM GOLDSTEIN, ESQ.

Immediate Past President

Portland

J. BRUCE ALVERSON, ESQ.

Las Vegas

SETH ARONSON, ESQ.

Los Angeles

LEROY J. BARKER, ESQ.

Anchorage

JEROME I. BRAUN, ESQ.

San Francisco

CHRISTINE W.S. BYRD, ESQ.

Los Angeles

JOHN CARSON, ESQ.

Los Angeles

HON. DAVID O. CARTER

Santa Ana

HON. RICHARD R. CLIFTON

Honolulu

WILLIAM I. EDLUND, ESQ.

San Francisco

HON. MORRISON C. ENGLAND, JR.

Sacramento

ROBERT H. FAIRBANK, ESQ.

Los Angeles

PARKER C. FOLSE III, ESQ.

Seattle

PAUL T. FRIEDMAN, ESQ.

San Francisco

FREDERICK P. FURTH, ESQ.

San Francisco

HON. LLOYD D. GEORGE

Las Vegas

HON. ALFRED. T. GOODWIN

Pasadena

HON. RONALD M. GOULD

Seattle

PETER R. HABEIN, ESQ.

Billings

RITA M. HAEUSLER, ESQ.

Los Angeles

HON. PROCTER HUG. JR.

Reno

HON. SUSAN Y. ILLSTON

San Francisco

CURTIS A. JENNINGS, ESQ.

Phoenix

HON. ROBERT J. JOHNSTON

Las Vegas

MICHAEL A. KAHN, ESQ.

San Francisco

ROBERT D. LOWRY, ESQ.

Eugene

TIMOTHY M. LYNCH, ESQ.

Anchorage

THOMAS J. MCDERMOTT, JR., ESQ.

Indian Wells

HON. M. MARGARET MCKEOWN

San Diego

GERALD T. MCLAUGHLIN, ESQ.

Los Angeles

HON. MARGARET M. MORROW

Los Angeles

HON. GERALDINE MUND

Woodland Hills

TERRY NAFISI

Los Angeles

HON. THOMAS G. NELSON

Boise

RONALD L. OLSON, ESQ.

Los Angeles

HON. DIARMUID O'SCANNLAIN

Portland

PER A. RAMFJORD, ESQ.

Portland

HON. MANUEL L. REAL

Los Angeles

HON. PAUL G. ROSENBLATT

Phoenix

HON. MARY M. SCHROEDER

Phoenix

GERALD K. SMITH, ESQ.

Phoenix

HON. CHRISTINA ANN SNYDER

Los Angeles

ROBERT S. WARREN, ESQ.

Los Angeles

MICHAEL A. WHITE, ESQ.

Saipan

DOUGLAS R. YOUNG, ESQ.

San Francisco

BOARD MEMBERS EMERITI

SHIRLEY M. HUFSTEDLER, ESQ.

Los Angeles

HON. SAMUEL P. KING

Honolulu

WESTERN LEGAL HISTORY

BRADLEY B. WILLIAMS, EDITOR
JUDITH FORMAN, COPY/PRODUCTION EDITOR

EDITORIAL BOARD

JUDITH AUSTIN

Boise

GORDON MORRIS BAKKEN

California State University,
Fullerton

MICHAL BELKNAP

California Western
School of Law

HON. JAMES R. BROWNING

Senior Circuit Judge,
U.S. Court of Appeals
for the Ninth Circuit

ELIZABETH J. CABRASER, ESQ.

San Francisco

LAWRENCE M. FRIEDMAN

Stanford Law School

CHRISTIAN G. FRITZ

University of New Mexico
School of Law

DALE GOBLE

University of Idaho
School of Law

HON. ALFRED T. GOODWIN

Senior Circuit Judge,
U.S. Court of Appeals
for the Ninth Circuit

PAUL BRYAN GRAY, ESQ.

Claremont

MICHAEL GRIFFITH, PH.D.

Oakland

STEPHEN W. HAYCOX, PH.D.

University of Alaska,
Anchorage

ARTHUR D. HELLMAN

University of Pittsburgh
School of Law

DAVID J. LANGUM

Samford University
Cumberland School of Law

CLARE V. MCKANNA, JR.

San Diego State University

R. JAMES MOONEY

University of Oregon
Law School

CLAUS-M. NASKE

University of Alaska, Fair-
banks

PAULA PETRIK, PH.D.

George Mason University

PETER L. REICH

Whittier Law School

JOHN PHILLIP REID

New York University
School of Law

HARRY N. SCHEIBER, PH.D.

University of California
Boalt Hall School of Law

MOLLY SELVIN, PH.D.

Santa Monica

ROBERT S. WOLFE, ESQ.

Santa Ana

JOHN R. WUNDER, J.D., PH.D.

University of Nebraska

WESTERN LEGAL HISTORY
VOLUME 21, NUMBER 2
2008

CONTENTS

The West Boundary of the Hualapai Indian Reservation <i>E. Richard Hart</i>	121
An Attorney of One's Choosing: Regulating Indian-Attorney Contracts in the 1950s <i>Jill E. Martin</i>	165
Mining and Pollution in the West: The Limits of Law Protecting the Environment <i>Gordon Morris Bakken</i>	209
Book Reviews	237
Articles of Related Interest	247
Memberships, Contributions, & Grants	251

Cover photo: Pictured is Laguna Pueblo, where tribal members, dissatisfied with BIA actions, hired attorney Felix Cohen, who was outside the Indian Bureau and was responsible only to the tribe. Indian-attorney contracts are the subject of Jill Martin's article. (Courtesy of Denver Public Library, Western History Collection, Ben Wittick, X-30260)

THE WEST BOUNDARY OF THE HUALAPAI INDIAN RESERVATION

E. RICHARD HART

On June 28, 1937, the United States Department of Justice filed a lawsuit that would have far-reaching implications for the Hualapai Tribe of Indians in Arizona and for almost all other tribes across the United States.¹ The lawsuit, *The United States of America, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona v. Santa Fe Pacific Railroad Company, a Corporation*, filed with United States District Court for the District of Arizona, contained two causes of action, both dealing with the concept of aboriginal title:

The first related to the odd-numbered sections inside the Hualapai Indian Reservation established by the Executive Order of January 4, 1883. The second related to the odd-numbered sections within an area to the west and south[west] of the reservation which, together with the reservation lands, had been claimed by the Hualpais from time immemorial.²

In his excellent, award-winning book *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory*, Christian McMillen deals primarily with the first cause of action and its impact on tribes and federal Indian law. As McMillen

¹The name of the Hualapai is sometimes spelled *Hualpai* or *Walapai*. I am using *Hualapai* in the text, except when quoting directly from a printed source.

²David L. Bazelon, "Memorandum for the Attorney General," December 26, 1946, RG 60, General Records of the Department of Justice, file no. 22723J/87, National Archives.

E. Richard Hart provides historical, ethnohistorical, and environmental historical services and expert testimony and is the owner of Hart West and Associates. He is the author of seven books, the most recent of which is the award-winning *Pedro Pino: Governor of Zuni Pueblo, 1830-1878*.

demonstrates, when the Supreme Court issued its fifteen-page opinion on this case in 1941, it not only made the Indian Claims Commission possible, it probably made it necessary and eventually led to the development of ethnohistory as a new discipline that combines elements of ethnographic fieldwork and historical research. Legal scholar Felix Cohen said it was "one of the most important cases ever to reach the Supreme Court in the history of our Federal Indian law."³

The second cause of action, which dealt with lands that were then designated as both public and private and not as reservation land, also was an important legal matter. The United States argued that Hualapai aboriginal title to this land had not been extinguished and that the railroad therefore did not have valid title to the lands it claimed. This paper will trace the history, development, and eventual outcome of the second cause of action.

INTRUDERS IN HUALAPAI TERRITORY

The aboriginal territory of the Hualapai people was bounded on the north and west by the Colorado River flowing through the Grand Canyon. The easternmost edge of their territory was near what is now the town of Seligman. To the south their land reached almost to the Bill Williams River. North of the Colorado River were the Paiutes. To the east of the Hualapai were their closely related neighbors the Havasupai. The Yavapai were south, and the Mohave were west.⁴

Hualapai territory was rugged and predominantly arid, although several perennial streams and the Colorado River flowed through it. Permanent Hualapai villages were located near sources of water. Two such villages were clustered around Clay Springs and Tinnakah, or Grass Springs.⁵ Hualapai land was remote from early Spanish settlements and trails, and the tribe had few non-Indian visitors until the middle of the nineteenth century.

³Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (Ithaca, NY, 2007), 192.

⁴Henry F. Dobyns and Robert C. Euler, *The Walapai People* (Phoenix, AZ, 1976), 3.

⁵Christopher Coder, "Ha Dooba," November 5, 1992, Tribal Historic Preservation Office Archives. Archaeological work carried out at the Clay Springs village, called Ha Dooba (or Hadúba), meaning "dry water," documented Hualapai use of the site during close to a thousand years.

In the 1820s and 1830s, several parties of trappers and fur traders passed through Hualapai territory.⁶ One account from that time indicated that a Franciscan priest was then living among the tribe.⁷

After the conclusion of the Mexican War, several official U.S. government parties crossed Hualapai territory in search of a practicable route for a transcontinental railroad. Later in the 1850s, for the first time, significant numbers of whites began to enter Hualapai territory, and gold and silver were found in the area. Fort Mohave was founded in 1859, and Arizona Territory was established in 1863.⁸ By 1865 there were reports of unprovoked attacks on Hualapai and the killing of men, women, and children by both soldiers and civilians. Indian agent John C. Dunn reported in 1865 that "wanton and intoxicated squatters" killed a Hualapai chief, precipitating some hostilities between the Hualapai and non-Indians.⁹

A year later, William H. Hardy made an agreement with the Hualapai leader Wauba-Yuba to allow his freight wagons to cross Hualapai territory safely on Hardy's two-year-old toll road. He signed a paper and gave it to Wauba-Yuba, who later showed it to a man named Sam Miller at Beale's Springs. Miller promptly pulled out a gun and killed the Hualapai leader. Authorities at Fort Whipple charged Miller with murder, but a Prescott grand jury had him released and gave him a "unanimous vote of thanks." As historian Donald E. Worcester said, "Many a miner and prospector had little reason to give thanks, for dozens of them were killed in retaliation. . . ."¹⁰ War with the Hualapai would continue for nearly a half-decade. Between 1866 and 1870, mining activities in

⁶Ann W. Hafen, "James Ohio Pattie," in *The Mountain Men and the Fur Trade of the Far West*, ed. LeRoy R. Hafen, vol. 4 (Glendale, CA, 1966), 240, documented Pattie in 1826; Dobyns, *Hualapai Indians I*, 34–38.

⁷Frederic E. Voelker, "William Sherley (Old Bill) Williams," in *The Mountain Men and the Fur Trade*, vol. 8, 379.

⁸Dennis G. Casebier, *Camp Beale's Springs and the Hualapai Indians* (Norco, CA, 1980), 19.

⁹"Extract from Letter of John C. Dunn, Indian Agent, Prescott, Arizona Territory, Dated May 23, 1865," U.S. Senate, "Walapai Papers: Historical Reports, Documents, and Extracts from Publications Relating to the Walapai Indians of Arizona," 74th Cong., 2^d sess., Senate Document no. 273 (Washington, DC, 1936) 34.

¹⁰Donald E. Worcester, *The Apaches: Eagles of the Southwest* (Norman, OK, 1979), 107; Agreement of July 15, 1865 between Wauba-Yuba, Hitchie-Hitchie and Sherum with Wm. H. Hardy, transcription, RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park; Casebier, *Camp Beale's Springs and the Hualapai Indians*, 21 and 205–206n.

northeastern Arizona stopped as a result of the war, a serious concern to government officials.¹¹

Because of a shortage of soldiers in Arizona Territory during the Civil War, there was considerable bloodshed among Hualapai and whites before Lieutenant Colonel William Redwood Price arrived with five hundred soldiers to take command of Camp Mohave in June 1867. Price immediately took to the field against the Hualapai, saying they "must be thoroughly whipped before they will be quiet."¹² He concluded that the only way the Hualapai could be defeated was to track them in winter "when they cannot Subsist as they do now on Cactus, Mescal, Mesquite, and berries whenever night overtakes them."¹³ During the ensuing campaign, Price and his men killed and captured many Hualapai and destroyed much of their stored food, corn and wheat fields, and gardens.¹⁴

Mail carrier Charles Spencer was involved in several skirmishes with the Hualapai around this time and was said to have been wounded six or seven times, but in a letter to the *Arizona Miner*, he later wrote,

I do not blame the Indians so much as some people think I ought. It was wartime for them, and their men, women and children had been killed by the whites; so why not retaliate . . . and besides, I have seen some of their children killed after having been taken captive. . . .¹⁵

Rather than holding animosity toward the Hualapai, Spencer married a Hualapai woman, became fluent in Hualapai, lived among the tribe, and became an important friend to and

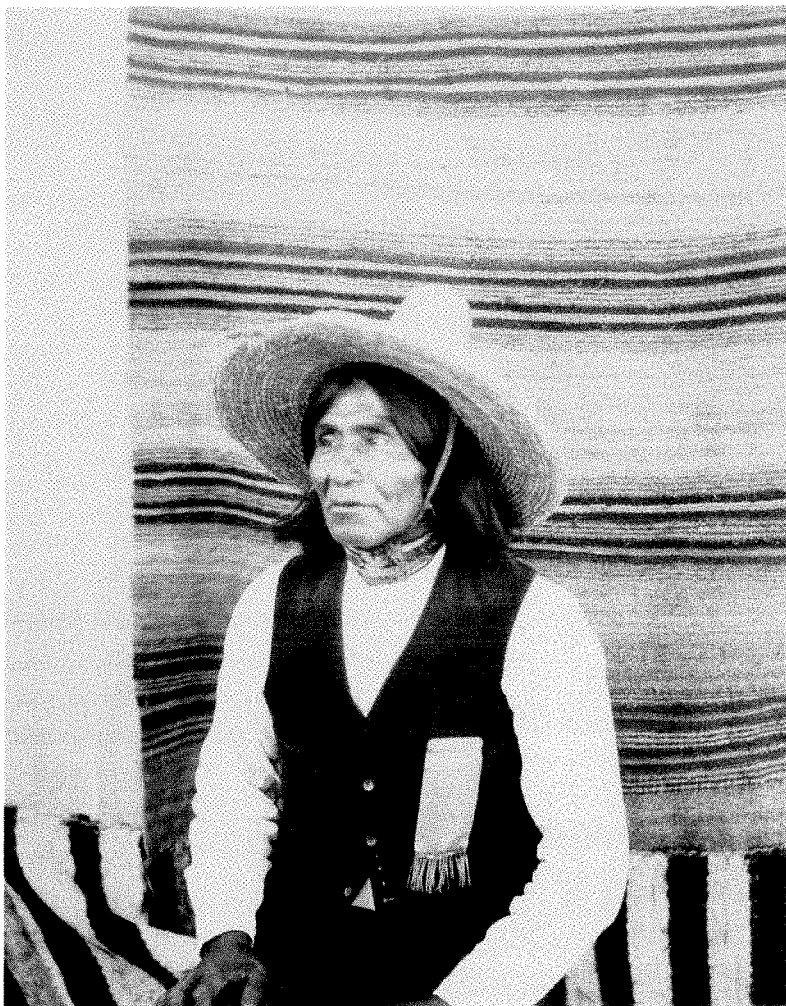
¹¹Hubert Howe Bancroft, *History of Arizona and New Mexico, 1530-1888* (facsimile reprint of 1889 edition; Albuquerque, 1962), 585.

¹²"Extract from Letter Book of William Redwood Price, Brevet Lieutenant Colonel, Major Eighth Cavalry, Commanding District of Upper Colorado, June 15, 1867, to July 5, 1869," "Walapai Papers," 42; Casebier, *Camp Beale's Springs and the Hualpai Indians*, 21-23.

¹³Price to Sherburne, July 20, 1867, "Walapai Papers," 46-47.

¹⁴Price to Sherburne, January 1868, "Walapai Papers," 59-61 and 70-71.

¹⁵*Ibid.*, 45n; Dan L. Thrapp, *Encyclopedia of Frontier Biography*, vol. 3 (Glendale, CA, 1988), 1345; Worcester, *The Apaches: Eagles of the Southwest*, 108; "Walapai Papers," 71.



Chief Quasula, above, was the son of Wauba-Tuba, whose murder by a white man precipitated a war between prospectors and the Hualapai. (Courtesy of Braun Research Library, Autry National Center of the American West, Los Angeles, A.45.13)

advocate for the people over the next twenty years. Spencer Canyon was named for him.¹⁶

¹⁶Thrapp, *Encyclopedia of Frontier Biography*, vol. 3, 1345; Worcester, *The Apaches: Eagles of the Southwest*, 108; Will C. Barnes, *Will C. Barnes' Arizona Place Names* (revised and enlarged by Byrd H. Granger) (Tucson, 1979), 233–34; Roman Malach, “Place Names in Kingman Resource Area” (revised and enlarged by Roman Malach, historian), Bureau of Land Management or Odle Senior Place Names (Kingman, AZ), 38.

Three years of military action took a heavy toll on the Hualapai. As fall 1868 drew near, at least one Hualapai leader approached Lieutenant Colonel Price and said he wanted peace. Hostilities continued, but in December, Price said, "The Hualapais will be prepared for any terms before Spring."¹⁷ Indeed, beginning in 1869 a peace was worked out between the Hualapai and the military. One historian estimated that during the Hualapai War, one of every three Hualapai was killed or died from war-related causes.¹⁸ Nonetheless, the record shows that the Hualapai did not feel defeated and did not negotiate from a position of weakness. Captain John G. Bourke, an early ethnologist who worked in the Southwest while serving in the army, reported that if the Hualapai ever went back to war "it would take half a dozen regiments to dislodge them from their rugged territory."¹⁹ Many years later, anthropologists Henry F. Dobyns and Robert C. Euler concluded that the Hualapai won all the major battles, carefully choosing their positions and only fighting "when they enjoyed equal or superior firepower and superior tactical position."²⁰

Eventually, under the agreement, the Hualapai moved to a temporary military reserve made up of an area of land one mile in each direction from Camp Beale's Springs. (Many Hualapai, however, stayed hidden in remote areas of their aboriginal homeland.) The small reserve was designated for the Hualapai until something more permanent could be established, and the military promised to feed them and protect them from whites.²¹

THE FIRST RESERVATION BOUNDARIES

After designating the post in March 1871, George Stoneman, commander of the new Department of Arizona, sent troops to Beale's Springs to establish the military camp, which came to be known as Camp Beale's Springs. Captain Thomas Byrne was in command.²² Born in Ireland, Byrne emigrated to the United States and enlisted in the army in 1854. He fought in the Civil

¹⁷"Walapai Papers," 82.

¹⁸Casebier, *Camp Beale's Springs and the Hualpai Indians*, 9.

¹⁹John G. Bourke, *On the Border with Crook* (1891; Lincoln, NE, 1971), 161.

²⁰Dobyns and Euler, "A Brief History of the Northeastern Pai," *Plateau* (Museum of Northern Arizona) 32:3 (January 1960): 50.

²¹"Walapai Papers," 82-93.

²²Casebier, *Camp Beale's Springs and the Hualpai Indians*, 23-24.

War and later was made a captain. With the 12th Infantry he was transferred to Fort Whipple in 1871, and took his company to Beale's Springs in July of that year.²³ Byrne was ordered to contact the Hualapai and maintain peace from the camp, which was thought, from the first, to be temporary. Byrne said his instructions were to "protect the Hualapais as they are friendly" and to "observe a strict impartiality and whether he be citizen or Indian who is wronged, either shall equally claim and have protection."²⁴

It is interesting that the two best white friends of the Hualapai in the late nineteenth century came from the ranks of the Indians' adversaries. Charles Spencer had fought them during the war, and Thomas Byrne was an officer in the military. But as historian Dan L. Thrapp said,

Byrne served most of the remainder of his life among the Hualapais, becoming their best white friend, confidante and general overseer. . . . To him goes credit for maintaining peace between those Indians and the whites and for securing them justice, full rations and as much happiness as their circumstances permitted.²⁵

Following his orders, Byrne contacted prominent Hualapai chiefs and studied their political positions, determining who encouraged war and who chose peace. He quickly developed a rapport with the Hualapai; within a short time, they were even assisting him in capturing deserters.²⁶

Captain Bourke later said of Byrne that, in spite of spare formal education, he "rarely failed to perform an allotted task much more successfully than officers of far greater polish."²⁷ In close contact with Byrne, the Hualapai established good relations with a number of other officers, including General George Crook, who reported that "these Indians are to play a very important part in the operations I am now inaugurating against the hostile Apaches. . . ." Byrne organized one hundred Hualapai to assist in Crook's campaign against the Apaches, including fifty guides and scouts.²⁸ The Hualapai's close relations with the military helped them to identify their reservation boundaries clearly.

²³Thrapp, *Encyclopedia of Frontier Biography*, vol. 1, 203–204.

²⁴Casebier, *Camp Beale's Springs and the Hualapai Indians*, 25.

²⁵Thrapp, *Encyclopedia of Frontier Biography*, vol. 1, 203–204.

²⁶Casebier, *Camp Beale's Springs and the Hualapai Indians*, 28–34.

²⁷*Ibid.*, 124.

²⁸"Walapai Papers," 92; Bancroft, *History of Arizona and New Mexico*, 546–47.

During the Hualapai War, whites and their cattle destroyed many of the Hualapai traditional food sources. Byrne realized that the Hualapai had to be provided with rations, or hostilities would be likely to resume. He first fed the Indians from the troops' own supplies (which may have encouraged desertions). General Crook's basic policy toward Indians was that they should be placed on reservations and fed. If the Indians did not agree to this, they would be hunted down and killed. In the case of the Hualapai, who were now providing scouts for Crook in his campaign against the Apaches and Yavapais, they were allowed to receive their rations of "one pound of beef and one pound of corn or flour, per capita daily" and then travel back to their traditional land so long as they did not commit depredations against whites.²⁹

Byrne also allowed the Hualapai to maintain arms and ammunition and, in fact, supplied some guns and ammunition to his tribal scouts, of whom he kept a company at Camp Beale's Springs. Crook said of Byrne, "Captain Thomas Byrne . . . has had their confidence to a remarkable degree and has used his best efforts to maintain the peaceful relations existing. . . ." Of the Hualapai, he stated, "Our Indian allies . . . will not be forgotten."³⁰

The federal Office of Indian Affairs was established in 1832 to carry out Indian policy. Originally it came under the jurisdiction of the War Department, but moved to the Interior Department in 1849. After the Civil War, with the inauguration of the "Grant Peace Process" and throughout the remainder of the 1870s, there was serious tension between the military and Indian Affairs. The military held authority if a tribe was engaged in hostilities or threatened hostilities. Indian Affairs held authority over peaceful tribes. Corruption among Indian agents helped make the military suspicious of Indian Affairs.

Indian Affairs began to exert pressure to move the Hualapai to an existing reservation considerably south of Hualapai territory at La Paz on the Colorado River, where the tribe would be under the jurisdiction of Indian Affairs instead of the military. Byrne resisted and exposed a corrupt agent who was selling Hualapai rations to white miners, but this embarrassment only strengthened Indian Affairs' resolve to remove them. After brief hostilities, Byrne convinced the Hualapai to at least give the La Paz Reservation a try.³¹

²⁹Casebier, *Camp Beale's Springs and the Hualpai Indians*, 37-49.

³⁰*Ibid.*, 71 and 80.

³¹*Ibid.*, 78-85, 164, and 172-94; Bourke, *On the Border with Crook*, 162-64.

The Hualapai left for the reservation on April 4, 1874, and settled down with Byrne stationed nearby to issue rations.³² But the Hualapai were not comfortable at La Paz. They were a mountain people, and, from their perspective, La Paz was very hot and desolate. Agent John A. Tonner greatly resented Byrne's role and any diminishment of his own authority. Byrne, for his part, quickly reported that this Indian agent was like the corrupt agent he had exposed at Camp Beale's Springs.³³

The situation deteriorated when Byrne had to leave the reservation temporarily for other duties. While he was gone, the agent moved the Hualapai from where Byrne had settled them to a location close to the agency. Without the protection of the army and without the promise of food from Byrne, the Hualapai feared for their future. Many of their horses had died, they were not getting sufficient rations, and they were being forced to stay on a hot desert reservation. Illness was rampant, and numerous tribal members had died. On April 20, 1875, exactly a year after they arrived at the reservation, they left. The commissioner of Indian affairs reported that the military refused to pursue them and that Byrne had supplied them with arms, so the agent was left powerless.³⁴

The Hualapai chief Cherum showed considerable diplomatic skill in informing the civil authorities that the tribe meant no harm to whites and was simply returning to their own country and would remain at peace if not harmed.³⁵ The secretary of war refused the Indian Affairs request for troops and supported Byrne's decision to let the Hualapai return to their own country.³⁶ Byrne, with Spencer assisting, helped the tribe establish a stable relationship with the commander of the Pacific, John M. Schofield, who concluded that "the management of Indian affairs, by temporary, poorly paid, irresponsible Agents, must

³²Casebier, *Camp Beale's Springs and the Hualpai Indians*, 87–99; "Walapai Papers," 96–98; Dobyns and Euler, *The Ghost Dance of 1889 Among the Pai Indians of Northwestern Arizona* (Prescott, AZ, 1967), 52. Some Hualapai stayed behind and hid from troops in the Grand Canyon.

³³"Walapai Papers," 99.

³⁴"Report from Annual Report of Commissioner of Indian Affairs, 1875," "Walapai Papers," 104; *Kathad Ganavi*, told by Elnora Mapatis, Robert Jackson, Bertha Russell, and Paul Talieje, transcribed and transliterated by Lucille J. Watahomigie, Malinda Powskey, Jorigine Bender, and Josephine Manakaja (Peach Springs, AZ, 1981), 448–53. *Kathad Ganavi* includes traditional narratives of the frightening story of the tribe's exodus from La Paz and the Colorado River Reservation; Casebier, *Camp Beale's Springs and the Hualpai Indians*, 110–12.

³⁵Safford to Kautz, May 8, 1875, "Walapai Papers," 104–105.

³⁶Byrne to assistant adjutant general, April 17, 1875, "Walapai Papers," 112.

mean, in general, extravagance, dishonesty, folly, injustice, inhumanity, and war." It was no surprise that President Ulysses S. Grant sided with the military authorities and ordered "that the Indians be permitted to remain where they now are, so long as they continue peaceable."³⁷ On May 10, 1875, Colonel Kautz, commanding the Department of Arizona, declared, "A reservation should be provided for them in their own country suitable to their habits and past mode of life and where they will be content to remain."³⁸

It was important to the Hualapai (and to Byrne) to avoid any possible violence between Indians and whites when the Indians returned to their homeland. The Hualapai needed to have an area they could call their own, where whites would not settle. With Colonel Kautz's order in mind, and in order to prevent bloodshed and provide the Hualapai with a portion of their homeland, Byrne reached an unwritten agreement with the tribe about what lands they could call their own. Both the tribe and Captain Byrne agreed that the tribe would have use of all the land inside certain boundaries.³⁹ Byrne, working with Charles Spencer and prospector Jim Smith, rode out with some Hualapai on horseback and marked the boundaries of the ad hoc reservation.⁴⁰

Because Hualapai territory has scant water, it was important to the tribe to identify boundaries that included key water supplies. The land on the west side of the proposed boundary

³⁷Byrne to assistant adjutant general, April 17, 1875, "Walapai Papers," 112; Letters Received by the Office of the Adjutant General, microfilm M666, roll 180, frames 1-89, National Archives; Letters Received by the Office of the Adjutant General, microfilm M666, roll 242, frames 1-8, National Archives; Casebier, *Camp Beale's Springs and the Hualapai Indians*, 112-20.

³⁸Suit to Quiet Title to Water of Peach Springs. Transmits affidavits, and Depositions of Indians and Whites as to Occupancy, Use, and Ownership of Lands and Water, By Wallapai Indians on the Present Wallapai Reservation-Submits views on the Same; letter from William Light to B.E. Marks, assistant U.S. attorney, Phoenix, Arizona, "Walapai Papers," 212.

³⁹For example, see Tomanata, affidavit, September 26, 1936, accompanying Joseph F. Schaffhausen, "Report on the Investigation of the Alleged Western Boundary of the Hualapai Indian Reservation," RG 75, Central Classified File 31229-21-313/4, box 27, National Archives.

⁴⁰W.B. Ridenour, statement, March 18, 1926, RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park; Brigadier General Crook, General Orders No. 3, Headquarters Department of Arizona, Whipple Barracks, Prescott, February 3, 1883, "Hualpai Reservation," RG 75, entry 107, Executive Order Files, box 4, National Archives; transcript of hearing, May 22, 1931, Subcommittee of the Committee on Indian Affairs, "Walapai Papers," 239-359, see especially 268, 302, 346, and quoted at 348; John Cureton Grounds, *Trail Dust of the Southwest* (Marysville, UT, 1977), 114-15, recalled Spencer building monuments marking the boundary.

contained several springs, including Clay Springs, Tinnakah Springs, and others along the Grand Wash escarpment.⁴¹ Securing these springs was all the more important because of the destruction to the environment caused by white-owned cattle that had poured across Hualapai territory.⁴²

It is interesting that in the 1920s and 1930s, several Hualapai Indians, as well as non-Indians, signed statements saying that the boundaries of the Hualapai Indian Reservation had first been marked out by one "Captain Burns" [Captain Byrne] in 1875 upon the Indians' return to their homeland.⁴³ A Hualapai named Jim Mahone recalled, in the 1930s, that Captain "Bourne" was put in charge of Camp Beale's Springs, that he was friendly with the Indians, and that he issued them rations. Byrne had tried to protect them for years, had armed them before they left the Colorado River Reservation,

⁴¹F.B. Kniffen, "Geography," in *Walapai Ethnography*, ed. A.L. Kroeber (Menasha, WI, 1935), 40, and Map 3, "Walapai topography and population,"

⁴⁴ Tinnakah Springs is located in Township 29 North, Range 16 West, Section 27. G.M. Stirling, "Divisions of the Walapai Territory," n.d., RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park [Stirling's list of "Divisions of Walapai Territory" included the "Matava-Kopai" ["North people"], whose "principal settlements" were Clay Springs and Meriwittica Canyon. They also used the Patterson Wells, Duncan Ranch, and Grass Springs area]; *The United States of America, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona v. Santa Fe Pacific Railroad Company, a corporation*, no. E-190, Prescott Division, "Stipulation and Agreement," RG 60, General Records of the Department of Justice, file no. 22723/87, National Archives. Clay Springs was the same as Attoo-bah Spring, as located on the 1881 map accompanying the Price reservation description; George M. Wheeler, *Preliminary Report Concerning Explorations and Surveys Principally in Nevada and Arizona*, 1871 (Washington, DC, 1872), 72-73, and map. Transcript in RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park. Wheeler reported that when he reached "Tin-na-kah Spring" in 1871, there was "a deserted rancheria with a small garden," but no Indians in sight. Wheeler also located Tin-na-kah Spring on his map of the region, placing it on a trail that goes south toward Pa-roach Spring (probably Clay Springs); Stirling, "List of places where Hualapai had gardens," n.d., RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park. The Indians had gardens at Clay Springs.

⁴²Dobyns and Euler, *The Ghost Dance of 1889*, 42.

⁴³Steve Levy Levy, transcript of statement, RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park; Ridenour, transcript of statement, March 18, 1926, RG 48, entry 824, box 2, National Archives at College Park; Jim Fielding, statement, October 12, 1927, RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park.

and knew their country well because he had been assigned to them for six years.⁴⁴

THE CREATION OF THE HUALAPAI MILITARY RESERVATION, 1880-81

Byrne began to spend much of his time on the ad hoc Hualapai Reservation, providing rations to the tribe throughout 1879, 1880, and 1881. Friction between whites and the Hualapai was exacerbated during the period when the Atlantic and Pacific Railroad began laying down a line of track that was to go near Peach Springs. Both the Hualapai and the military feared this would result in the loss of an important source of water for the Hualapai.⁴⁵ As more whites moved into the region, the potential for more hostilities increased.

Byrne, working with Spencer, had helped identify the land where the Hualapai could settle permanently. Then, on January 11, 1881, Byrne died.⁴⁶ The sudden death of Captain Byrne was of great concern to the Hualapai. During the decade he had been with them, he was instrumental in seeing that they were fed properly, were able to leave the Colorado River Reservation, and were able to live in their own territory. The loss of their friend Byrne, the imminent arrival of the railroad, and the increasing numbers of whites moving into the area led the tribe's leaders to arrange a meeting with the military about making their reservation permanent.

On May 30, 1881, Lieutenant Colonel Price was ordered to mark the Havasupai Reservation, to the east of the Hualapai, with monuments to help prevent trespass, and then to hold a council with the Hualapai. Accompanying Price were

⁴⁴Jim Mohone, "Narrative of Jim Mohone [circa 1938]," RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park; see also Jim Mohone, n.d., Peach Springs, RG 48, entry 824, box 2, National Archives.

⁴⁵Special Orders No. 14, Headquarters Department of Arizona, Whipple Barracks, Prescott, February 6, 1880, RG 393, Records of United States Army Continental Commands, 1821-1920; RG 94, Records of the Adjutant General's Office, Regular Army Muster Rolls, box 359, 12th Infantry, Company F, April 30, 1876, to October 31, 1903; Returns from Regular Army Infantry Regiments, 12th Infantry, microfilm M665, roll 137, National Archives; Returns from United States Military Posts, microfilm, M617, roll 788, Fort Mojave, 1879-80, National Archives.

⁴⁶Thrapp, *Encyclopedia of Frontier Biography*, vol. 1, 204; Casebier, *Camp Beale's Springs and the Hualpai Indians*, 124. Byrne died from alcohol-related causes. Thrapp, *Encyclopedia of Frontier Biography*, vol. 1, 203-204.

twenty-five cavalry troops, Dr. Elliott Coues (a surgeon, naturalist, and historian), and Lieutenant Carl F. Palfrey of the Army Corps of Engineers, who was expert at surveying and monumenting reservation boundaries. Charles Spencer joined the party as interpreter.⁴⁷

Between June 3 and June 14, the Price command traveled to the Havasupai's main village, where Lieutenant Palfrey had monuments constructed to show the boundaries of the Havasupai Reservation. The military party next traveled to Hualapai country, reaching Peach Springs on June 18. Along the way they found few sources of water and were relieved to have "pure living water" at Peach Springs.⁴⁸ Most of the command rested at Peach Springs on June 19, but Palfrey and Coues spent the day riding down the Diamond Creek drainage to the Grand Canyon and the Colorado River.⁴⁹

The following day, the command traveled eighteen miles to Milkweed Spring, where Spencer had his ranch and lived with his Hualapai wife. Price reported that the Hualapai "had kept themselves advised of all our movements" and that "a large number of these Indians had gathered at this place for a council. . . ." ⁵⁰

The main portion of the command remained at Milkweed Spring from June 20 through June 25. However, Coues and Palfrey reported traveling to Music Mountain and the "edge of Grand Canyon" before leaving on June 26. The Hualapai told

⁴⁷Special Orders No. 60, Headquarters Department of Arizona, Whipple Barracks, Prescott, May 30, 1881, RG 393, Records of United States Army Continental Commands, 1821–1920; William Redwood Price to Major S.N. Benjamin, AAG, Department of Arizona, July 1, 1881, RG 393, part 1, entry 181, Letters Received by the Office of the Adjutant General, box 10, letter 2399, National Archives. At the top of the letter is written, "Lt. Smith personal copy"; Peter Cozzens, ed., *Eyewitnesses to the Indian Wars, 1865–1890*, vol. 1, "The Struggle for Apacheria" (Mechanicsburg, PA, 2001), 227–35, contains an unattributed reprint of Price's report.

⁴⁸William Redwood Price to Major S.N. Benjamin, AAG, Department of Arizona, July 1, 1881, RG 393, part 1, entry 181, Letters Received by the Office of the Adjutant General, box 10, letter 2399, National Archives; First Lieutenant Carl F. Palfrey, Corps of Engineers, Engineer Office of the Department of Arizona, to AAG, July 1, 1881, Annual Report, Letters Received by the Office of the Adjutant General, RG 94, microfilm M689, roll 41, National Archives.

⁴⁹Francisco Tomas Hermenegildo Garcés, *On the Trail of a Spanish Pioneer: The Diary and Itinerary of Francisco Garcés, 1775–76*, trans. and ed. Elliott Coues (New York, 1900), reprinted in "Walapai Papers," 9; Paul Russell Cutright and Michael J. Brodhead, *Elliott Coues: Naturalist and Frontier Historian* (1981; Chicago, 2001), 222–23.

⁵⁰William Redwood Price to Major S.N. Benjamin, AAG, Department of Arizona, July 1, 1881, RG 393, part 1, entry 181, Letters Received by the Office of the Adjutant General, box 10, letter 2399, National Archives.

Price that more and more whites were coming into their territory and that it was important that a permanent reservation be established for them. After he had returned to Fort Whipple from his meeting with the Hualapai, Price drafted a report describing the council.

Price recalled the Hualapai War and said that, after peace was arranged, the Hualapai had assisted General Crook in the subjugation of a southern Apache tribe. He recalled the year they had spent on the Colorado River Reservation and their return to their home country. He said that since returning, they had caused no serious problems. Price described the council, saying a majority of the tribe wanted the authorities to know that white men were now appropriating water in their aboriginal territory, were bringing in cattle, and in some cases were fencing springs. Price reported that the Hualapai were worried that the railroad would bring more whites and further loss of their small springs, and therefore urged that a reservation be set aside for them. Price said that the land they wanted would "never be of any great use to the Whites; that there are no mineral deposits upon it, as it has been thoroughly prospect-ed." He said that he could confirm from his own observations and information that there was "little or no arable land" on the proposed reservation and "that the water is in such small quantities, and the country is so rocky and void of grass, that it would not be available for stock-raising." The Hualapai were destitute, said Price, and would continue to require rations. He "earnestly recommend[ed]" that the following reservation be set aside for them as soon as possible.

RESERVATION

Beginning at a point on the Colorado River 5 miles eastward of Tinnakah Spring, thence south twenty 20 miles to crest of high mesa, thence S. 40° E. 25 miles to North point of Music Mtns, thence E. fifteen miles, thence N. 50° E. 35 miles, thence north thirty 30 miles to the Colorado River, thence along said river to the place of beginning, the southern boundary being at least two miles S. of Peach Spring, and the eastern at least two miles east of Pine Spring.

All bearings and *distances* being approximate.⁵¹

Undoubtedly, the boundaries actually described by the Hualapai were those they worked out with Byrne and Spencer.

⁵¹Ibid.; Lieut. Wm. Redwood Price to Col. S.N. Benjamin, July 1, 1881, "Walapai Papers," 134-35, reprints the published version of Price's report.

While Price was at Milkweed Spring, part of the command under Lieutenant Palfrey went out and marked the boundaries of the reservation as they were understood by the Hualapai, constructing monuments and visiting the rim of the Grand Canyon and Music Mountain.⁵² In 1936, Tomanata, a Hualapai who was born in 1850, recalled the military identifying the boundaries. He lived at Tinnakah Springs and, as a young man, served as a scout during General Crook's Apache campaign. He said,

Generals Cook [Crook] and Miles ordered soldiers out of Prescott along with Colonel Brass [Price] and Captain Burns [Byrne] to establish the boundary and the engineering unit of this division built the stone markers which are now located in the Hualapai Valley.

I have been told by my people who have long since died that our chief made an agreement with the army as to the establishment of our boundaries.

Charlie Spencer was the first agent to the Hualapais and he married an Indian woman and lived at Milkweed Springs. Soldiers came and looked for Spencer. Spencer went with the soldiers to re-establish the line. This should be shown in the old records with official information on the boundary.⁵³

According to Tomanata's account, which is corroborated by the documentary record, the Hualapai informed Price of the boundaries that had been agreed on by the Hualapai and Captain Byrne. While Price remained in council with tribal leaders, Spencer went out with Palfrey and Coues, identified the location of the boundaries, and constructed stone monuments to mark those boundaries. They visited the rim of the Grand

⁵²In addition to the documents cited above, see unsigned and undated [ca. October–December 1882] note in "Supai (Havasupai) and Hualapai (Walapai) Reservations," special case 1, RG 75, National Archives.

⁵³Tomanata, affidavit, September 26, 1936, with Matuck, "Hualapai Indian Chief of Indian Police at Truxton Canyon" acting as translator, attached to Joseph F. Schaffhausen, "Report on the Investigation of the Alleged Western Boundary of the Hualapai Indian Reservation," RG 75, Central Classified File 31229-21-313/4, box 27, National Archives.

Canyon, the north point of the Music Mountains, and other points along the west and southwest boundary line.⁵⁴

It was important to the Hualapai that the new reservation boundaries encompass Clay Springs and Tinnakah Springs. Both Price and Palfrey drafted maps of the reservation boundaries.⁵⁵ Both maps make it very clear that the military reservation was meant to include Tinnakah (or Grass Springs), Clay Springs (At-too-bah), and Milkweed Spring (Pah-roach), and that the Indians understood the location of the proposed boundaries to include those springs. Major General Irvin McDowell wrote to the adjutant general on July 11, 1881, reiterating Price's statements regarding the condition of the Hualapai, and concluding,

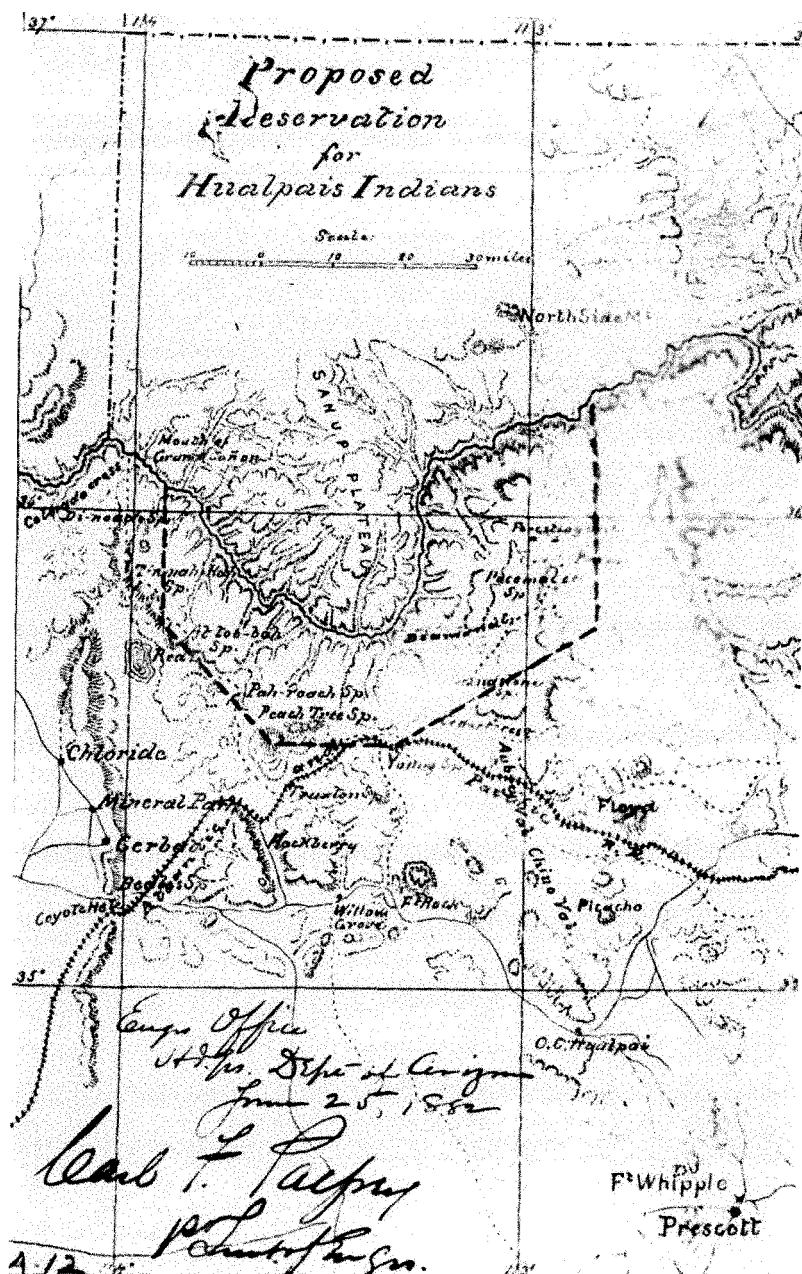
The military will take up Tinnakah, Peach, and Pine Springs—and the Country about there, otherwise worthless, at once as military Reservation, and request authority to feed the Hualapais half rations of beef during the summer and beef and flour, as heretofore in winter. Immediate action necessary.⁵⁶

On July 23, 1881, the secretary of the interior also expressly indicated that these two springs, where the Hualapai had large villages and gardens, were to be included in the reservation:

⁵⁴Cutright and Brodhead, *Elliott Coues*, 223. Coues reported going to the "edge" of the Grand Canyon on June 22; First Lieut. Carl F. Palfrey, Corps of Engineers, Engineer Office of the Department of Arizona, to AAG, July 1, 1881, Annual Report, Letters Received by the Office of the Adjutant General, RG 94, microfilm M689, roll 41, National Archives. Palfrey reported traveling to Music Mountain before returning to Fort Whipple. He also reported traveling at least fifty miles further than Price during the expedition. See also Carl F. Palfrey, June 30, 1882, Annual Report of the Department of Arizona Engineering Office, Letters Received by the Office of the Adjutant General, RG 94, microfilm M689, roll 90, National Archives.

⁵⁵William Redwood Price to Major S.N. Benjamin, AAG, Department of Arizona, July 1, 1881, attached map, RG 393, part 1, entry 181, Letters Received by the Office of the Adjutant General, box 10, letter 2399, National Archives. Price's map shows the railroad going south of the reservation boundary; "Proposed Reservation for Hualpais Indians," "Supai (Havasupai) and Hualapai (Walapai) Reservations," June 25, 1882, special case 1, RG 75, National Archives. The map was submitted to the adjutant general on July 12, 1882 (endorsement). Palfrey's map shows the railroad entering the far south boundary of the reservation.

⁵⁶Maj. General McDowell to Adjutant General, July 11, 1881, "Walapai Papers," 136.



Palfrey, Lieutenant Carl F., "Proposed Reservation for Hualpais Indians," "Supai (Havasupai) and Hualapai Reservations," June 25, 1882, Special Case 1, record group 75, National Archives.

The proposition that Tinnakah, Peach, and Pine Springs, and the adjacent country be taken up as a Military Reservation, has the approval of this Department.⁵⁷

The documentary record thus demonstrates that the Departments of War and Interior intended that the reservation for the Hualapai should include Tinnakah, Peach, and Pine Springs, and that the Hualapai believed the boundaries encompassed these three springs.⁵⁸

Although Price largely followed the wishes of the Hualapai in describing the proposed reservation, it is not known why he put the starting point five miles east of Tinnakah Springs. In any case, either intentionally or unintentionally, with that language he left that spring out, as well as Clay Springs. It is worth noting that, although Byrne had spent the previous decade protecting the Hualapai, Price had been the most active officer in the war against the Hualapai.⁵⁹ It is also worth noting that Price was a friend of Lieutenant Wheeler, who had made secret mining claims while surveying in the area in 1871.⁶⁰ In his report, Price said the proposed reservation did not conflict with mining interests. The Indians would not have had that knowledge. Price may have been attempting to protect his friend's mining interests.⁶¹

Within a week, under orders from General Willcox, Lieutenant Fred A. Smith, acting assistant adjutant general for the Department of Arizona, issued General Orders No. 16, saying,

⁵⁷Secretary of Interior Samuel J. Kirkwood to Secretary of War, July 23, 1881, "Walapai Papers," 133.

⁵⁸Price to Secretary of the Interior, July 19, 1881; Price to Secretary of the Interior, July 22, 1881; and Kirkwood to Secretary of War, July 23, 1881, "Walapai Papers," 132–33. For the Hualapai understanding, see, for example, Tomanata (Patimosmo), statement, n.d., Valentine, RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park.

⁵⁹Thrapp, *Encyclopedia of Frontier Biography*, vol. 3, 1174–75. Price was generally credited with a good military record. However, in 1874 General Miles relieved him of command, accused him of incompetence over a particular incident, and threatened to prefer charges against him but ultimately did not.

⁶⁰Doris Ostrander Dawdy, *George Montague Wheeler: The Man and the Myth* (Athens, OH, 1993), 57.

⁶¹Shenon and Full, "An Evaluation Study of the Mineral Resources in the Lands of the Hualapai Tribe of Indians of Arizona as Decided on November 19, 1962 Before the Indian Claims Commission," *The Hualapai Tribe of the Hualapai Reservation, Arizona v. The United States of America*, Indian Claims Commission docket no. 90, vol. 1, August 1964, RG 279, Records of the Indian Claims Commission, entry 11UD, box 1058, 135–42, National Archives, and map demonstrate that the mining districts were located just outside Price's western boundary line.

Subject to the approval of the President, the following described tract of country, in the Territory of Arizona, is hereby set apart as a Military Reservation for the subsistence and better control of the Indians. . . .⁶²

In the printed order, the military reservation boundaries were outlined almost exactly as Price had described them in his July 1 letter, with the west boundary east of Tinnakah Springs.⁶³

THE EXECUTIVE ORDER, 1881–83

Even after the military reservation was established, the secretary of the interior indicated that "Tinnakah, Peach, and Pine Springs, and the adjacent country" were to be part of the reservation.⁶⁴ The Hualapai also believed the reservation included the western springs, which were inside the boundary marked with stone monuments. General McDowell wrote that his "Hualapai scout, Charles Spencer, reports Indians well pleased with proposed reservation," and that the "whites are equally satisfied. . . ."⁶⁵ Rations continued to be distributed to the Hualapai throughout 1881 and 1882. Major J.W. Mason reported that the tribe continued to be peaceful, that Spencer was a good influence on them, and that their reservation should be made permanent.⁶⁶ On June 25, 1882, Palfrey completed his map of the proposed reservation, with Tinnakah and the other named springs shown inside the reservation boundaries.⁶⁷

⁶²Fred A. Smith, "General Orders No. 16," July 8, 1881, "Walapai Papers," 135–36.

⁶³Lieut. Wm. Redwood Price to Col. S.N. Benjamin, July 1, 1881, "Walapai Papers," 134–35. Also found in "Extract from a Report of Lieutenant-Colonel Price, Sixth Cavalry," July 1, 1881, file 14489, "Supai (Havasupai) and Hualapai (Walapai) Reservations," special case 1, RG 75, National Archives.

⁶⁴Kirkwood to Secretary of War, July 23, 1881, "Walapai Papers," 133; Secretary of the Interior to Secretary of War, July 23, 1881, Letters Received by the Office of the Adjutant General, RG 94, microfilm M689, roll 41, National Archives.

⁶⁵McDowell to Adjutant General, July 30, 1881, "Walapai Papers," 136–37.

⁶⁶Capt. Chas. P. Eagan to AAG, August 10, 1881, annual report of the operations of the Subsistence Department, Letters Received by the Office of the Adjutant General, RG 94, microfilm M689, roll 67, National Archives; Mason to Assistant Adjutant General, June 16, 1882, "Walapai Papers," 140–42.

⁶⁷"Proposed Reservation for Hualpais Indians," "Supai (Havasupai) and Hualapai (Walapai) Reservations," June 25, 1882, special case 1, RG 75, National Archives. The map was submitted to the adjutant general on July 12, 1882 (endorsement).

In June 1882, General Willcox forwarded both Mason's letter and Palfrey's map to the adjutant general and asked that the president confirm the reservation. He said, "[I]t would be a disgrace to our institutions to neglect these loyal, peaceful, and promising people. . . ." ⁶⁸ Although he delayed acting, in September 1882 the commissioner of Indian affairs finally reported that he had submitted the military order to the president and had recommended that an executive order make the reservation permanent. ⁶⁹

In late 1882, Charles Spencer wrote letters to military authorities, saying that the Hualapai again desperately needed rations to survive. ⁷⁰ These letters reached the desk of the secretary of war, who asked the Department of the Interior to provide assistance. ⁷¹ The commissioner of Indian affairs responded that he had no funds to provide relief to the Hualapai and asked the War Department to provide subsistence for the tribe. ⁷² Although the Department of the Interior and the Office of Indian Affairs again failed miserably to provide any assistance to the Hualapai, the Spencer letters seem finally to have prompted the secretary of the interior to encourage action on the part of the president. On January 4, 1883, President Chester A. Arthur signed into law an executive order creating the Hualapai Indian Reservation. The language was the same as was used in the military order. ⁷³ On February 3, 1883, General Crook issued an order to publish the boundaries of the Hualapai Indian Reservation "for the information and guidance of all concerned." ⁷⁴

Although Department of Interior and Department of War correspondence maps show that Tinnakah, Clay, and Peach Springs were meant to be inside the reservation, the president's executive order, using Price's language, established the west

⁶⁸Willcox to Assistant Adjutant General, June 30, 1882, "Walapai Papers," 139.

⁶⁹"Extract from Annual Report of Commissioner of Indian Affairs, 1882," "Walapai Papers," 138.

⁷⁰Spencer to Department Commander, September 20, 1882, and Spencer to Assistant Adjutant General, November 14, 1882, "Walapai Papers," 144-45.

⁷¹Crook to Asst. Adj. General, November 25, 1882, and Martin to Secretary of the Interior, December 12, 1882, "Walapai Papers," 145-46.

⁷²Price to Secretary of the Interior, December 15, 1882, "Walapai Papers," 146.

⁷³Charles Joseph Kappler, *Indian Affairs, Laws and Treaties*, vol. 1 (*Laws*) (Washington, DC, 1904), 804. For an examination of the roots of the president's authority to issue such executive orders, see E. Richard Hart, "The Dawes Act and the Permanency of Executive Order Reservations," *Western Legal History* 12:1 (Winter/Spring 1999): 11-47.

⁷⁴Brigadier General Crook, General Orders No. 3, Headquarters Department of Arizona, Whipple Barracks, Prescott, February 3, 1883, "Hualpai Reservation," RG 75, entry 107, executive order files, box 4, National Archives.

boundary of the reservation "five miles eastward of Tinnakah Springs. . . ."⁷⁵ Whether the error in the language of the order was deliberate or accidental, Colonel Price could no longer correct it. He had died on December 30, 1881.⁷⁶

First Byrne and then Palfrey had gone out with the Indians and marked the reservation boundaries on the ground, so that the Hualapai would know where the boundaries were located. But as a result of error or deception, the executive order excluded Tinnakah and Clay Springs. An unsigned sheet of paper in the file accompanying the executive order, drafted at some point between 1882 and 1883, sheds light on the difference between Palfrey's map and monuments and the executive order language:

The *scale* of the map does not agree with the fieldnotes in the report of Lieut. Palfrey; but the Executive Order can be made reducing the reserve, to the limits recommended. . . .⁷⁷

This document is important because it shows that authorities at the highest level were aware that the reservation had been intended to be larger, but that it had been reduced due to the language in the executive order. It also suggests both that Price adjusted the language of the order when he returned to his post and that Palfrey adjusted his field notes on his return to the fort. Palfrey's field notes are missing from the file where they should be located.⁷⁸

The Hualapai continued to believe their western boundary was located at the stone monuments, and they continued to use and occupy Tinnakah and Clay Springs and the adjacent country throughout the 1880s. In 1889, a large ghost dance took place at Tinnakah, with more than five hundred Hualapai

⁷⁵Kappler, *Indian Affairs, Laws and Treaties*, vol. 1, 804.

⁷⁶O.B. Willcox, *Annual Report of Bvt. Maj.-Gen. O. B. Willcox, Commanding the Department of Arizona for the Year 1881-82* (Prescott, Arizona Territory, 1882), found in Letters Received by the Office of the Adjutant General, RG 94, microfilm M689, roll 149, National Archives; Thrapp, *Encyclopedia of Frontier Biography*, vol. 3, 1174-75.

⁷⁷Unsigned and undated [ca. October-December 1882] note in "Supai (Havasupai) and Hualapai (Walapai) Reservations," special case 1, RG 75, National Archives.

⁷⁸Palfrey's full report and field notes are missing from the file box in which they were indexed. They should have been located in file no. 2609, Records of the United States Army Continental Commands, 1821-1920, RG 393, part 1, entry 181, Letters Received, 1882, National Archives.

people participating over a period of several months.⁷⁹ But shortly thereafter, whites began to seize the springs, bring in more cattle, and force the Hualapai to leave.⁸⁰

THE FIRST SURVEY OF THE HUALAPAI RESERVATION, 1884–1902

Charles Spencer built a home in Meriwhitica Canyon, and in subsequent years tried to keep trespassers and their cattle off the reservation. Spencer threatened one man who lived nearby, and ordered him not to come onto the reservation. But Charles Cohen did enter the reservation and, on November 26, 1886, in Truxton Canyon, killed Spencer with a knife.⁸¹ With Spencer and Byrne now gone, the Hualapai were left without a strong non-Indian advocate.

It would be more than seventeen years before the Hualapai Indian Reservation was surveyed. The Office of Indian Affairs paid little attention to the tribe, and it was not until 1895 that an agent was even assigned to the reservation. That agent, Henry Ewing, knew the location of the military boundary monuments and considered them to be the markers of the reservation boundary. He worked to evict white cattlemen that used land inside of those boundaries.⁸²

⁷⁹Dobyns and Euler, *The Ghost Dance of 1889*, 1–8 and 32. Another ghost dance took place there in 1891; Paulus and Neal to Commissioner of Indian Affairs, February 7, 1944, RG 49, Individual Hualapai Claims, box 7528, National Archives, with attached affidavit from Queen Imus; Captain A.H. Howiuan to Asst. Adj. Gen'l, September 11, 1889, Bureau of Indian Affairs, Phoenix Area Office; Kroeber, *Walapai Ethnography*, 199–200; Dobyns and Euler, *The Walapai People*, 69–70; Robert C. Euler, foreword to *People of the Blue Water: A Record of Life Among the Walapai and Havasupai Indians*, by Flora Gregg Iliff (1954; Tucson, AZ, 1985), xiv.

⁸⁰Paulus and Neal to Commissioner of Indian Affairs, February 7, 1944, RG 49, Individual Hualapai Claims, box 7528, National Archives, with attached affidavit from Queen Imus; *ibid.*, with attached affidavits from Kalaka, Indian Sampson, and Mrs. Captain Jack; *Tinnakah (Tinyika, Tainnekah, or Tinyaka)* means grass in Hualapai, and the spring has also been known as Grass Spring. It is located on twentieth-century maps as Duncan Ranch or Grapevine Spring, near Patterson Well in Township 29 North, Range 16 West, Section 28. Many other Hualapai resided in the vicinity of Clay Springs in Township 27 North, Range 15 West, Section 15. Hualapai who lived at Clay Springs also reported that white cattlemen forced them to leave the area in about 1890.

⁸¹Barnes, Will C. Barnes' *Arizona Place Names*, 223–24; Thrapp, *Encyclopedia of Frontier Biography*, vol. 3, 1345.

⁸²[Ewing] to Grounds, June 12, 1899, RG 75, Truxton Canyon Agency, Letter Press Books, Letters 6, 1899–1900, box 1, National Archives and Records Administration, Pacific Region.

The reservation was finally surveyed in 1900. The surveyor general instructed Deputy Surveyor Albert T. Colton to go five miles east of Tinnakah Springs, create a north-south line from that point to the Colorado River, and place a monument on the south bank of the river. Colton was also instructed to make the line go two miles south of Peach Springs and two miles east of Pine Springs.⁸³

Colton conducted his survey over very rough country between August 1 and September 17, 1900, but it would be many months before he submitted field notes to justify his survey.⁸⁴ When Colton completed his survey, Henry Ewing immediately complained to the commissioner of Indian affairs that the survey had not been conducted correctly. Ewing reviewed the language of the executive order and said that Colton's survey line was incorrect. He stated that the line was intended to go to "certain fixed points, as 'the crest of high mesa' and 'a point of Music Mts' . . . regardless of the angles and distances."

And to strengthen this opinion the Military officers from Fort Whipple who made the preliminary survey, or location, had large, plain monuments placed on the "crest of the high mesa," and on the "point of Music Mts." referred to, and these monuments are plainly visible [sic] today. Citizens locating on the public domain prior to the last survey have taken these points as fixed points of the boundary of the reservation, and have entered upon the Public Domain and made homes, improvements, such as storage reservoirs, wells, fences, houses, &c.⁸⁵

In response to Ewing's letter, the commissioner of Indian affairs wrote to the commissioner of the General Land Office, saying Indian Affairs deemed Ewing's statement "to

⁸³Surveyor General to Colton, November 6, 1899, "Special Instructions to Albert T. Colton, D.S., for survey of the boundaries of the Hualapai Indian Reservation under Contract No. 60, Arizona, dated November 6, 1899," Surveyor General of Arizona, Letters Sent, 1871-1923, RG 49, box 9, folder 35, National Archives, Pacific Region.

⁸⁴"Hualpai Indian Reservation, Ex. Order, Jan'y 4, 1883," map, RG 75, central map file 2227, National Archives at College Park, Cartographic Division. The surveyors' record is recorded on the map.

⁸⁵Ewing to Commissioner, November 5, 1900, RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park.

be of the utmost importance in determining the true lines." "In fact," the commissioner continued, "it is not seen how these monuments can be ignored, if they exist as stated by Mr. Ewing."⁸⁶

This correspondence from the commissioner of Indian Affairs surely must have been an embarrassment to the commissioner of the General Land Office, as well as to the surveyor general of Arizona and the deputy surveyor. Between February 14 and March 1, 1901, General Land Office Special Agent E.L. Faison, Jr., executed an examination of Colton's survey. Faison had been directed to look for the monuments established by the military.⁸⁷ But his actions may have been influenced by an effort to avoid departmental blame. Instead of consulting with Indians who had seen the monuments constructed and were still alive, Faison talked to whites who were claiming land both adjacent to and actually on the Hualapai Indian Reservation. One of the people Faison talked to had killed one—possibly several—Hualapai Indians and was one of the ranchers who had driven Hualapai away from land on the west side of the reservation.⁸⁸ Faison consulted only with the Indians' most important enemies, people who would benefit greatly if the reservation line were found to be east of Tinnakah and Clay Springs.

In the end, Faison saved the General Land Office from the embarrassment and expense of rejecting Colton's survey. He said he could find no military monuments showing that the boundary was supposed to be further west.⁸⁹ It is interesting that, even some thirty years later, tribal members were readily able to locate the monuments.⁹⁰ In fact, some of them are

⁸⁶Commissioner of Indian Affairs to Commissioner of the General Land Office, November 22, 1900, RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park.

⁸⁷E.L. Faison, Jr., "Field Notes of the Examination of Surveys in Arizona executed by A.T. Colton, U.S. Deputy Surveyor, under Contract No. 60 . . . as examined by E. Faison, Jr., Special Agent," RG 49, Records of the General Land Office, Division "E," entry 518, Examination Surveys, New Series Contracts, 30-70, box 5, National Archives.

⁸⁸Sam J. Crozier, S. Nelson, and J.H. Johnson to H.S. Walton, January 23, 1888, RG 48, Department of the Interior, Office of the Secretary, entry 824, box 2, National Archives at College Park; Bob Schrum, n.d., Peach Springs, RG 48, entry 824, box 2, National Archives at College Park; Sampson, transcript of an interview by Katherine Edmunds, April 27, 1936, with Fred Mahone acting as interpreter, RG 48, entry 824, box 2, National Archives at College Park; case 6123 (part 2), RG 123, Records of the United States Court of Claims, box 486, National Archives.

⁸⁹Faison, "Field Notes."

⁹⁰Joseph F. Schaffhausen, "Report on the Investigation of the Alleged Western Boundary of the Hualapai Indian Reservation," RG 48, entry 824, box 2, National Archives at College Park.

still in place today. Agent Ewing continued to complain that stockmen were trespassing on the reservation as a result of the incorrect survey.⁹¹ He would likely have been surprised to learn that Faison had consulted only with those stockmen and not the Hualapai themselves.

THE SANTA FE RAILROAD LITIGATION, 1902–1947

In 1866 Congress passed an act granting lands to the Atlantic and Pacific Railroad Company to encourage the construction of a rail line. The railroad was granted alternate sections within forty miles on either side of the railroad's tracks, but only on land where Indian aboriginal title had already been extinguished. In the early 1880s, when the tracks were finally laid through western Arizona by the Santa Fe Pacific Railroad Company, successor to the Atlantic and Pacific, they passed near the southern boundary of the Hualapai Reservation. Even though the reservation had been made permanent by the 1883 presidential executive order, the Santa Fe Pacific Railroad Company now claimed ownership of alternate sections inside the Hualapai Reservation.⁹²

When the Hualapai learned of the railroad's claims, they protested loudly and vehemently that they owned all lands within the reservation's exterior boundaries. They also stated that the west boundary was supposed to be located further west. Attorneys with the Justice Department began investigating the claims of the Hualapai as early as 1926. Truxton Agency Superintendent William A. Light submitted a number of affidavits and depositions to the Justice Department.⁹³

In these documents, tribal members and non-Indians testified about the location of the west boundary. In March 1926, in a dictated and witnessed statement, a white person named

⁹¹Ewing to Commissioner of Indian Affairs, July 21, 1901, RG 48, entry 824, box 2, National Archives at College Park.

⁹²*The United States of America, as Guardian of the Hualapai Indians of Arizona v. Santa Fe Pacific Railroad Company*, Supreme Court of the United States (314 U.S., 339; 62 S. Ct. 248; 86 L. Ed. 260; 1941 Lexis 1124); Christian W. McMillen, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory* (New Haven, CT, 2007) provides an excellent account of the entire case.

⁹³Light to Marks, May 8, 1928, "Walapai Papers," 209–18; Suit to Quiet Title to Water of Peach Springs. Transmits affidavits, and Depositions of Indians and Whites as to Occupancy, Use, and Ownership of Lands and Water, By Wallapai Indians on the Present Wallapai Reservation-Submits views on the Same; letter from William Light to B.E. Marks, Assistant U.S. Attorney, Phoenix, Arizona, "Walapai Papers," 209–18.

W.B. Ridenour recalled that Captain Byrne, Charles Spencer, and a prospector named Jim Smith marked the boundaries of the reservation on horseback in 1875.⁹⁴ In a statement made in 1927, Hualapai leader Jim Fielding also recalled that Byrne, Smith, and Spencer "marked a piece of land as an Indian Claim against the new comers. . . ." He said that, after the reservation was marked out, circulars were printed, and he and Charles Spencer "took these circulars and gave to every settlers [sic] in our country. . . ."⁹⁵ Fielding stated that, in 1881, the Hualapai asked military leaders to have their reservation surveyed, made permanent, and "protected against the railroad which may bring white people," and as a result of their efforts the military issued an order establishing the reservation.⁹⁶

As the railroad began to carry out subdivisional surveys within the Hualapai Reservation in the early 1920s, the Department of Justice became more concerned that the tribe might lose half of its land and end up with a hopelessly mangled reservation of alternate sections. By 1929 the department was actively involved in the reservation land issue. Kate Crozier, a Hualapai, was sixty-seven at the time of his 1929 Department of Justice deposition. He had been taken to La Paz and had acted as an army scout for Captain Byrne. He remembered when soldiers erected monuments to mark the reservation boundaries and said General Willcox had informed them that they could expel white people from the reservation.⁹⁷

In May 1931, senators on an Indian Affairs subcommittee met in Valentine and talked with some Hualapai about their claims. Hundreds of whites in the region had signed petitions supporting the Hualapai's claim to the entire reservation. Again, Hualapai tribal members reported that Captain Byrne had led the party that first marked the reservation in 1875. Superintendent D.H. Wattson testified before the subcommittee that when the army first established the reservation, Clay Springs was within the

⁹⁴Ridenour, statement, March 18, 1926, RG 48, entry 824, box 2, National Archives at College Park. The statement was dictated to William Grant and was in the possession of Hualapai Chief Jim Fielding.

⁹⁵Brigadier General Crook, General Orders No. 3, Headquarters Department of Arizona, Whipple Barracks, Prescott, February 3, 1883, "Hualapai Reservation," RG 75, entry 107, Executive Order Files, box 4, National Archives. Crook ordered that the boundaries of the Hualapai Reservation be published "for the information and guidance of all concerned."

⁹⁶Jim Fielding, statement, October 12, 1927, Peach Springs, RG 48, entry 824, box 2, National Archives at College Park.

⁹⁷*The United States of America, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona v. Santa Fe Pacific Railroad Company, a corporation*, no. 139, Prescott Division, deposition of Kate Crozier, August 17, 1929, RG 75, box 30B, F:1/5, National Archives, Laguna Niguel.



Chief Jim Fielding, above, and Charles Spencer distributed circulars to settlers showing the reservation boundaries. Photo by G.W. James. (Courtesy of Braun Research Library, Autry National Center of the American West, Los Angeles, A.45.20)

boundaries. Another non-Indian reported that Spencer, Byrne, and Jim Smith had marked out the boundary of the reservation, riding from point to point and keeping track of the time it took in order to estimate the mileage.

The Walapai Reservation west line was started at a given point near the mouth of the Grand Canyon. Jim Smith rode south to the highest point in the Music Mountains: from Music Mountain in a southeasterly direction to a high point or mountain southeast of Peach Springs: from there in a due east direction to another natural land mark: from there in a northeasterly direction to a point east of Pine Springs: then due north to the south rim of Grand Canyon.⁹⁸

Hualapai complaints also reached the Indian Rights Association, which helped arrange a meeting with Commissioner of Indian Affairs Charles J. Rhoads in 1932. The completion of the railroad's surveys not only made the Hualapai people aware of the railroad's claims to alternate sections; it made them more aware of the fact that their west boundary was further east than they believed it should be. On July 12, 1932, Rhodes, along with Matthew K. Sniffen of the Indian Rights Association and other Bureau of Indian Affairs officials, including the superintendent, met with approximately eighty Hualapai at Peach Springs. Speaking through an interpreter, Kate Crozier again described how the original reservation line was to the west of Clay Springs. He asked the commissioner to help the Indians protect their reservation.⁹⁹

Another Hualapai named Huyá said Captain Byrne had been a friend to the Hualapai and that Hualapai had joined the United States in the war against the Apaches. He described the tribe's subsequent move to La Paz and said Charles Spencer was involved in marking out the reservation's first boundaries.

Spencer said, "Your country is big and the Railroad is coming but I do not know when. I am going to make a boundary. It is going to be small. You may have war and you must stand ready to protect your country. But nobody will probably bother you." Col. Brass [Price] . . . was sent to make the boundary lines and a bunch of soldiers came and marked the boundaries. We were told the railroad will come through anybody's land but it will not bother our reservation. It will merely go through from the east to the west. He told us, "You must live

⁹⁸Transcript of hearing, May 22, 1931, Subcommittee of the Committee on Indian Affairs, "Walapai Papers," 239359; see especially 268, 302, 346, and quoted at 348.

⁹⁹"Minutes of Meeting of Hon. Chas. J. Rhoads, Commissioner of Indian Affairs, with Walapai Indians at Peach Springs, Arizona, July 12, 1932," RG 75, CC file 31229, National Archives.

within this reservation that I make for you. If any horses come through and if any cattle come through, you must kill it and eat it. They cannot trespass through your reservation." Henry Ewing [the first agent] came and he enforced those rules, and I was policeman and I did not let any white men come on to the reservation, but now there are a lot of white people.¹⁰⁰

Huya said he had shown Sniffen both the west and east sides of the reservation. Other Hualapai also testified about the establishment of the Hualapai Reservation by Captain Byrne. Jim Smith (not the local white man of the same name) described boundary markers. Jim Mahone also recalled Captain Byrne's efforts in behalf of the Hualapai and his promises to them.¹⁰¹

In response, Commissioner Rhoads told the Hualapai gathered at Peach Springs that he was having the Interior Department's solicitor, the Bureau of Indian Affairs, and the Justice Department study the matter to see if the tribe could be helped. He explained that, in order to defeat the railroad's claims, the Hualapai would have to prove that their aboriginal title to the reservation had never been extinguished.¹⁰²

Armed with the extensive affidavits and testimony of both tribal members and non-Indians, R.H. Hanna, special attorney for the Justice Department, set out to do just that—show that Hualapai aboriginal title to the reservation had never been extinguished, and therefore the railroad grant could not apply to reservation land. Hannah spent years preparing for the litigation. He was later joined by famed Indian law expert Felix Cohen along with Nathan Margold. After investigating the Hualapai's claims, the Justice Department filed a lawsuit with several causes of action. The United States sued to quiet title to the checkerboarded sections inside the reservation, asserting that the tribe had unextinguished aboriginal title to the land from 1866 to 1883, and therefore the railroad could not have obtained title to the land under terms of the congressional grant. After listening to testimony of Hualapai elders, the Justice Department also asked the court to quiet title to checkerboarded lands within a ten-mile strip of land to the west and southwest of the Hualapai Reservation. They argued that aboriginal title to that land also had not been extinguished because the Hualapai had not voluntarily ceded it when the reservation was formed.

¹⁰⁰Ibid.

¹⁰¹Ibid.

¹⁰²Ibid.

The Justice Department amassed considerable evidence that has a bearing on the original location of the reservation's west boundary. Hanna worked with Gene M. Stirling, of the Soil Conservation Service, to obtain many statements from Indians and non-Indians concerning the original location of the west boundary, which the attorneys now concluded should have begun at a point five miles west of Tinnakah Springs, not five miles east. Fred Mahone, who was especially helpful in organizing the Hualapai statements, said he could locate a monument near Clay Springs. Another Hualapai said the line passed by Patterson Well, where a monument still stood. Other Hualapai also said they could identify the locations of monuments.¹⁰³ Tomanata, whose wife had died at La Paz, remembered the Byrne survey and said Clay Springs, the Tinnakah Springs area, and Patterson Well were all originally inside the reservation boundaries.¹⁰⁴ Considerable additional documentary evidence and individual statements corroborated the location of the original west boundary.¹⁰⁵

Now that numerous Hualapai had documented the original location of the 1875 west boundary of the reservation, Hanna and Stirling had surveyor and engineer Joseph F. Schaffhausen assigned to investigate the west boundary under a technical cooperation agreement with the Bureau of Indian Affairs. On September 28, Schaffhausen submitted a report:

This was occasioned by persistent rumors on the part of the Indians of the reservation, to the effect that the boundary of the reservation as it now stands has deprived them of valuable supplies of water originally

¹⁰³Hanna to Sterling, March 31, 1938, RG 48, entry 824, box 2, National Archives; John Boston, statement, n.d., Peach Springs, RG 48, entry 824, box 2, National Archives; Augie Smith, statement, n.d., Peach Springs, RG 48, entry 824, box 2, National Archives; Fred Mahone, statement, n.d., Peach Springs, RG 48, entry 824, box 2, National Archives; Mitchell, *Architect of Justice: Felix S. Cohen*, 194-98, pointed out that Hanna was an attorney from New Mexico, an expert in federal Indian law, and a partner of William Brophy. Margold first recommended bringing a lawsuit in 1934.

¹⁰⁴Tomanata (Patimosmo), statement, n.d., Valentine, RG 48, entry 824, box 2, National Archives.

¹⁰⁵For example, see Casebier, *Camp Beale's Springs and the Hualpai Indians*, 148-52; Colonel August V. Kautz, Annual Report of Colonel August V. Kautz (Eighth Infantry,) Brevet Major-General U.S. Army, Commanding Department of Arizona for the Year Ending August 31, 1875, Prescott, 1875, file P518, special case 1, RG 75, National Archives; Steve Levy Levy, statement, n.d., RG 48, entry 824, box 2, National Archives; Mrs. Seth Mapatis, statement, n.d., Peach Springs, RG 48, entry 824, box 2, National Archives.

allotted to them, and demands by them that the investigation be conducted to regain this water.¹⁰⁶

Hualapai who had given statements and affidavits to Stirling and Hanna also provided information for Schaffhausen, testifying that the west boundary was originally miles further west and that when the boundary was moved, it deprived the tribe of valuable water sources. Schaffhausen hired a Hualapai to show him "the location of the alleged original monuments." Schaffhausen reported, "He took me into the Hualapai Valley and pointed out a pile of stone about five and one half miles west of Clay Springs."

Schaffhausen disassembled the monument to see if anything was buried within it and, finding no documentation, rebuilt the structure. He then carefully took survey measurements and located what he called the Clay Springs Monument on a map.¹⁰⁷

Schaffhausen found the next prominent rock cairn monument on a high peak. He named this the Peak Monument and also documented its location. A third monument he called the Patterson Well Monument. Having identified three monuments on the original west boundary, Schaffhausen now reported difficulties. He was able to see what he believed was a fourth monument, but a non-Indian landowner would not let him approach it. When he returned to the agency office and consulted maps, he said he was surprised to discover that the monuments he had surveyed formed a straight line parallel to the reservation's southwest boundary but five and one-half miles further west. When he went back into the field several days later, he found that someone had destroyed the North Rim Monument. He "was told by a man on horseback that

¹⁰⁶Schaffhausen, "Report on the Investigation of the Alleged Western Boundary of the Hualapai Indian Reservation," RG 48, entry 824, box 2, National Archives; Schaffhausen, "Report on the Investigation of the Alleged Western Boundary of the Hualapai Indian Reservation," RG 75, Central Classified File 31229-21-313/4, box 27, National Archives; Schaffhausen, Junior Agricultural Engineer, "An Investigation of the Alleged Original Western Boundary of the Hualapai Indian Reservation," September 28, 1936, RG 114, Records of the Natural Resources Conservation Service, entry 185, box 17, Hualapai, folder E (Reports Hualpai), National Archives at College Park.

¹⁰⁷Schaffhausen, "Report on the Investigation of the Alleged Western Boundary of the Hualapai Indian Reservation," RG 48; Schaffhausen, map titled "Resurvey-Alleged Original West Boundary Hualapai Indian Reservation," September 28, 1936, Soil Conservation Service, T.C.-B.I.A., Bureau of Indian Affairs, Phoenix Area Office; Pierre Cantou to Richard Hart, March 15, 2007, "Memorandum" on the Schaffhausen report, with attached copy of Schaffhausen's above-mentioned map, with plane table calculations recreated from Schaffhausen's survey notes. Clay Springs Monument was located in Section 36, Township 27 North, Range 16 West.

he didn't think it was advisable for my health to go prowling around in that area. I reported this to Superintendent Hobgood and he advised caution, so I gave it up."¹⁰⁸

One old Hualapai submitted an affidavit with Schaffhausen's report, saying he too remembered when the monuments were built under Captain Byrne's direction. Others repeated similar traditional tribal stories that they had heard from elders now deceased.¹⁰⁹

After reviewing Schaffhausen's report and affidavits, Hanna drafted a memorandum on the west boundary issue. He reported that elderly members of the tribe had told him they were "very positive" about the "fraudulent" or "mistaken change in the Western Boundary of the reservation." If the initial point on the executive order was five miles west of Tinnakah Springs and not five miles east, the original west boundary was ten miles west of the current boundary. Schaffhausen had located stone markers showing that the southwestern boundary was originally more than five miles west of the current boundary.

Hanna concluded that the original southwestern boundary had been monumented by the military prior to 1881 and was located at least five miles west of where Colton's survey located the line. He added, "It was significant in this connection that all of the Springs on the Western side of the Reservation, between the two lines referred to had been cut out of the Reservation by the latter survey." He said Clay Springs was the most important of the springs.¹¹⁰ Ruth D. Kolling, from the Soil Conservation Service, also reported that Clay Springs and the grazing land around it were particularly important to the Hualapai; she said one monument marking the original boundary could still be found near the Colorado River.¹¹¹ Independent, scholarly research carried out under prominent anthropologist Alfred A. Kroeber at about the same time corroborated

¹⁰⁸Schaffhausen, "Report on the Investigation of the Alleged Western Boundary of the Hualapai Indian Reservation," RG 48; Schaffhausen, map titled "Resurvey"; Cantou to Hart, March 15, 2007, "Memorandum." Peak Monument is located in Section 17, Township 26 North, Range 15 West.

¹⁰⁹Tomanata, affidavit, September 26, 1936, accompanying Schaffhausen, "Report on the Investigation of the Alleged Western Boundary of the Hualapai Indian Reservation," RG 75; Peter Grounds, affidavit, ca. September 26, 1936, accompanying Schaffhausen, "Report on the Investigation of the Alleged Western Boundary of the Hualapai Indian Reservation," RG 75.

¹¹⁰R.H. Hanna, "Memorandum for Colonel Blue, Re: Western Boundary, Walapai Reservation," n.d., RG 48, entry 824, box 2, National Archives.

¹¹¹Ruth D. Kolling to Woelke, Chief of Operations Project for Technical Cooperation with the Bureau of Indian Affairs, April 8, 1936, RG 114, Project Records, 1936-39, 4.8.1936, box 17, National Archives.

the claim that Captain Byrne and Charles Spencer had helped monument the reservation.¹¹²

Hanna spent five days on the Hualapai Reservation in May 1936, interviewing elders, who confirmed his understanding of the erroneously located west boundary and convinced him to file a lawsuit against the railroad to quiet title to railroad checkerboarded lands outside the reservation. He first informed the commissioner of Indian affairs that the executive order language and survey had been in error; then, on June 28, 1937, the United States filed its complaint, with both causes of action (for land inside and to the west of the reservation).¹¹³

In 1938, the railroad filed a motion to dismiss the case, and on March 1, 1939, Judge David Ling did just that, saying the tribe did not have congressionally granted title to the land. Although the Department of Justice did file an appeal to the Ninth Circuit, Hanna was ignored and eventually fired, and the weak appeal was denied, with the Ninth Circuit upholding the lower court's ruling. The half-hearted work of the Justice Department finally resulted in the case being handed over to Felix Cohen, then assistant solicitor for the Interior Department, who worked with Margold and Hanna (rehired) to file what would be a successful petition for certiorari with the Supreme Court on January 23, 1941.¹¹⁴

On December 8, 1941, when the Supreme Court issued its fifteen-page opinion on *United States v. Santa Fe Pacific Railroad Company*, it not only set the stage for the massive cases presented to the Indian Claims Commission, but helped mold the discipline of ethnohistory. Felix Cohen and Nathan Margold had spent two days in November arguing the case before the Court for the United States, in behalf of the Hualapai tribe. Just three weeks later, Justice William O. Douglas, writing for a unanimous Court, included a short statement that would have a far-reaching impact on the Hualapai and on general tribal litigation in the twentieth century. He said the Court had concluded that "occupancy necessary to establish aboriginal

¹¹²Kroeber, *Walapai Ethnography*, 207–26.

¹¹³McMillen, *Making Indian Law*, 136–37. McMillen's work provides an excellent history of the case of the United States for lands inside the Hualapai Reservation boundaries as surveyed; Special Attorney, "Memorandum for Carl McFarland, Assistant Attorney General," May 7, 1937, RG 75, CC file 31229, National Archives; Bazelon, "Memorandum."

¹¹⁴*The United States of America, as Guardian of the Hualapai Indians of Arizona v. Santa Fe Pacific Railroad Company*; Bazelon, "Memorandum"; McMillen, *Making Indian Law*, 144–59; Mitchell, *Architect of Justice: Felix S. Cohen*, 196–98, indicates that Norman Littell was responsible for the Justice Department's effort to "lose" the case.

possession is a question of fact to be determined as any other question of fact."¹¹⁵

The decision meant that the checkerboarded lands within the Hualapai Reservation would remain part of the reservation. The railroad quickly quitclaimed title to those contested sections to the United States.¹¹⁶ But that did not end the dispute over the lands in the strip between the 1875 monumented boundary and the 1900 surveyed boundary of the reservation. The Supreme Court ruled that, when the reservation was established in 1883, the Hualapai acceptance of the reservation resulted in the extinguishment of aboriginal title to lands outside the reservation boundaries by "voluntary cession. . . ."¹¹⁷ But the Justice Department concluded that the strip of land had not been voluntarily ceded by the Hualapai because they believed the 1875 line to be the reservation boundary.

When the case was remanded to district court, officials with the Justice Department claimed "title to . . . a 10-mile strip bordering the western boundary of the reservation upon the theory that when the Indians surrendered their other aboriginal lands for a definite reservation they understood that the 10-miles strip was included and hence there was never any valid surrender of the strip."¹¹⁸ The United States argued before the Court that the monumented line had first been "informally established in 1875 by the duly constituted authorities of the United States Army."¹¹⁹ The Justice Department concluded that the beginning point in the Hualapai executive order was meant to be "five miles west of Tinnakah Springs" and not five miles east of the spring, described the ten-mile strip with

¹¹⁵*The United States of America, as Guardian of the Hualapai Indians of Arizona v. Santa Fe Pacific Railroad Company*; Bazelon, "Memorandum"; McMillen, *Making Indian Law*, 159–65.

¹¹⁶Bazelon, "Memorandum"; Abe Barber, law examiner, General Land Office, and Felix S. Cohen, assistant solicitor (approved by Oscar L. Chapman, assistant secretary), "Examiners' Report on Tribal Claims to Released Railroad Lands in Northwestern Arizona together with Transcript of Final Hearing and Exhibits," May 28, 1942, RG 279, Indian Claims Commission, docket 90, box 1054, Plaintiff's Exhibit 73, National Archives; William S. Greever, *Arid Domain, the Santa Fe Railway and Its Western Land Grant* (Stanford, CA, 1954), 138. The railroad asserted that it gave up its claim to the checkerboarded lands in order to obtain better freight rates from the government.

¹¹⁷*The United States of America, as Guardian of the Hualapai Indians of Arizona v. Santa Fe Pacific Railroad Company*.

¹¹⁸Bazelon, "Memorandum."

¹¹⁹*The United States of America, as Guardian of the Indians of the Tribe of Hualapai in the State of Arizona v. Santa Fe Pacific Railroad Company, a corporation*, no. E-190, Prescott Division, "Amended Complaint," January 11, 1943, RG 21, Records of District Courts of the United States, box 38, F3, National Archives.

metes and bounds, and argued that because the tribe had held exclusive use and occupancy of the land since time immemorial, it held aboriginal title to the land, and thus the railroad's title was invalid and the tribe's claim to title to the strip was superior to the railroad's claim.¹²⁰

As a result of the litigation, a new round of investigation and interviews began on the Hualapai Reservation. Both the Hualapai Tribal Council and an official with the Bureau of Indian Affairs said they believed that if the west boundary were fully explored on the ground, additional monuments from 1875 could be located, further documenting the original boundary.¹²¹

In 1943 and 1944, George M. Paulus, associate attorney with the Indian Service, and James W. Neal, field examiner for the General Land Office, took additional statements from tribal members at Hualapai and evaluated the tribal claim to the ten-mile strip. They reported to the commissioner of Indian affairs that many Hualapai elders made use of the ten-mile strip for decades after the 1881 executive order, claimed the western springs were supposed to be within the reservation, and recalled the efforts of Byrne and Spencer in the tribe's behalf.¹²²

But the Indian policy that Felix Cohen had helped design under the Roosevelt administration began to erode under Truman. Cohen, who is credited with creating the field of federal Indian law, also drafted the Indian Reorganization Act and formulated the "Indian New Deal." Now, under Truman, Congress and the government were moving toward the disastrous policy of "termination." After three years of legal maneuvering, on November 21, 1946, the railroad proposed to settle the claim for the ten-mile strip of land along the west boundary, offering by convey in trust a 6,381.52-acre tract of land, which included Clay Springs and was adjacent to the reservation, to the United States in trust for the Hualapai tribe.¹²³

¹²⁰*The United States of America, as Guardian of the Indians of the Tribe of Hualapai in the State of Arizona v. Santa Fe Pacific Railroad Company, a corporation*, no. E-190, Prescott Division, "Stipulation and Agreement"; Bazelon, "Memorandum."

¹²¹Woehlke to Hanna, May 31, 1943, enclosing Tapija to Commissioner, May 1, 1943, RG 48, entry 824, box 2, National Archives; Tapija to Commissioner, May 1, 1943, RG 48, entry 824, box 2, National Archives.

¹²²For example, see Paulus and Neal to Commissioner of Indian Affairs, February 5, 1944, RG 49, Individual Hualapai Claims, box 7528, National Archives; Paulus and Neal to Commissioner of Indian Affairs, December 4, 1943, RG 49, Individual Hualapai Claims, box 7528, National Archives; Paulus and Neal to Commissioner of Indian Affairs, February 7, 1944, RG 49, Individual Hualapai Claims, box 7528, National Archives, with attached statements.

¹²³Bazelon, "Memorandum."

With Cohen gone, a U.S. attorney recommended acceptance. On December 10, 1946, the solicitor of the Department of the Interior reported that the Hualapai tribe had agreed to the settlement.¹²⁴ Assistant Attorney General David L. Bazelon explained how the department now regarded the matter:

[I]t is the contention of the Government that certain army officers who negotiated with the Indians during the period from 1875 to 1881 told them that their proposed reservation would include Tinnakah Springs and it was with this understanding that they abandoned their other haunts and agreed to go upon the reservation. Some very old Indian witnesses can testify that their fathers told them of this understanding and it seems probable that there was such an understanding because Tinnakah Springs was the site of one of their main villages.

But some of the documentary record tended to prove otherwise, said Bazelon in a memo to the attorney general. He cited the Price description, which left Tinnakah Springs five miles outside the reservation to the west. On the other hand, he also pointed out that in 1881, both Major General McDowell and the secretary of the interior said that Tinnakah Springs was supposed to be within the reservation.

It is clear of course that the Court in this case would have no power to reform the Executive Order. But if the Court should find that the Indians believed they were retaining Tinnakah Springs then it could not be said that they voluntarily surrendered it as a part of the consideration for establishment of the reservation. Accordingly, under the Supreme Court decision, *supra*, they would have a better title than the Railroad Company to the strip including the springs. In effect, the Court would be required to hold that the Indians relinquished only lands lying outside of the reservation proper and outside of the strip which includes the springs.

However, Bazelon ignored the years of work carried out by Cohen, Hanna, and others, and concluded that the Justice Department should proceed no further with the case:

In view of the elapsed time it is believed to be extremely doubtful whether the Government could offer evidence

¹²⁴*Ibid.*

sufficiently strong to refute the presumption created by the description Lieutenant Colonel Price's report, General Order 16, and the Executive Order.¹²⁵

Bazelon said the acreage the railroad was willing to give up "is by far the most valuable portion of the ten-mile strip, and included Clay Springs, one of three principal sources of water for reservation grazing land," which "the Indians have been leasing . . . from the Railroad Company for that purpose for many years." He concluded that while officials had intended Tinnakah Springs to be inside the reservation, it was farther from good grazing land and not as desirable as Clay Springs. Under the agreement, white ranchers would continue to be able to use one of the three Clay Springs. Without explaining the change, Bazelon now told the attorney general that the claim was not for a ten-mile strip of land but a five-mile strip, and that the settlement acreage was about one-tenth of the area that could be recovered.¹²⁶

Bazelon concluded,

The white man's civilization brought to the Hualpai Indians more real hardship than that suffered by almost any other tribe. They were persuaded to settle on the most barren and worthless part of their country, only to find that (1) their reservation was not as large as they had thought, and (2) the Executive Order setting it aside conflicted with a previous grant to the Railroad Company which, if valid, would leave them with only a checkerboard area made up of even sections. This led to the costly litigation described above which after almost ten years, and two trips to the Supreme Court, is back in the district court for trial.

The proposed settlement will put an end to the litigation in a manner satisfactory to the Railroad Company, the Indian Tribe, and the Department of the Interior. I believe the offer represents more than the United States could hope to recover after years more of litigation which would no doubt go again through the circuit court of appeals to the Supreme Court. Accordingly, I concur in the recommendations of the United States Attorney and the Department of the Interior that the offer be accepted.¹²⁷

¹²⁵Ibid.

¹²⁶Ibid.

¹²⁷Ibid.

On January 1, 1947, Attorney General Tom C. Clark approved the recommended settlement.¹²⁸ It was ratified and confirmed in open court, and the judgment was entered on March 13, 1947, by United States District Judge Howard C. Speakman.¹²⁹

THE INDIAN CLAIMS COMMISSION, 1947–1968

The Indian Claims Commission Act was passed by Congress early in 1946. As Felix Cohen was finishing his work on the Hualapai/Santa Fe Pacific Railroad case, he worked to see passage of the act. Four years earlier, he and Abe Barber, a law examiner for the General Land Office, had drafted a report for the railroad case in which they had concluded, on the basis of their ethnohistorical work, that the Hualapai had held aboriginal title to a large area of territory.¹³⁰ So it is not surprising that the Hualapai filed an early claim, in August 1946, soon after the new commission was established. Historian Christian McMillen observed,

If it is true that the great outpouring of Indian history that resulted from the formation of the Indian Claims Commission (ICC) marks the more or less formal birth of ethnohistory, then the discipline was conceived during the Hualapai case.¹³¹

The tribe claimed a large territory in what is now northwestern Arizona, including all of the Hualapai Indian Reservation, as well as the disputed lands along the west boundary. Sixteen years later, on November 19, 1962, the Indian Claims Commission issued Findings of Fact. The commissioners found that all of the western portion of the Hualapai Reservation, as well as the disputed lands west of the survey line, were part of Hualapai aboriginal territory and that

Indian title to the Hualapai Tribe to the lands . . . outside of the Hualapai Reservation, was extinguished by the

¹²⁸Ibid.

¹²⁹*The United States of America, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona, Plaintiff v. Santa Fe Pacific Railroad Company, a corporation*, Defendants, no. E-190, Prescott Division, "Stipulation and Agreement," RG 227, docket 90, box 1054, Pet. Ex. 74, National Archives.

¹³⁰Barber and Cohen, "Examiners' Report."

¹³¹McMillen, *Making Indian Law*, xv.

United States on January 4, 1883, when the President of the United States by Executive Order set aside and reserved for the Hualapai Indians and the Hualapai Tribe accepted the reservation. . . .¹³²

In 1966 the commission concluded that the Hualapai total claim included 4,459,500 acres. It valued the land, as of January 4, 1883—the date of the Hualapai Executive Order—at \$2.8 million, or sixty-two cents per acre.¹³³ The commission also ruled in a second Hualapai docket that the tribe was owed an additional \$150,000 for damages due to trespass. In a general meeting, the tribe agreed to the total settlement, and on June 18, 1968, the commission approved payment to the tribe.¹³⁴ Attorneys for the Hualapai Tribe, who now had represented them in the case for twenty-two years, were awarded 10 percent, or \$295,000, so the tribe received a total of \$2,655,000.¹³⁵

The commission was aware of and briefly discussed the Justice Department's claim in the *Santa Fe Railroad* case for lands to the west of the surveyed boundary. In *United States, As Guardian of the Hualapai Indians of Arizona, v. Santa Fe Pacific Railroad Co.*, the United States claimed that aboriginal title to private checkerboarded sections immediately to the west of the reservation, totaling nearly 72,000 acres, had not been extinguished in 1946 and should still be held in trust for the tribe by the United States. Given the argument that aboriginal title had not been extinguished in 1946 and that the commission's taking date was 1883, lands in the ten-mile strip could not have been included in the claim area for which the tribe was paid. That conclusion is borne out by calculating the acreage of the claim area and deducting the reservation acreage within that area.

¹³²Indian Claims Commission, "Findings of Fact," November 19, 1962, *Hualapai Tribe v. United States*, docket 90, box 507, ICC, RG 279, National Archives; Indian Claims Commission, "Opinion of the Commission," November 19, 1962, *Hualapai Tribe v. United States*, docket 90, box 507, ICC, RG 279, National Archives.

¹³³Indian Claims Commission, "Opinion of the Commission," December 21, 1966, *Hualapai Tribe v. United States*, National Archives.

¹³⁴Indian Claims Commission, "Additional Findings of Fact on Compromise Settlement of All Claims of the Hualapai Tribe of the Hualapai Reservation, Arizona," June 18, 1968, *Hualapai Tribe v. United States*, National Archives.

¹³⁵Indian Claims Commission, "Order Allowing Attorneys' Fees," October 18, 1968, *Hualapai Tribe v. United States*, National Archives.

THE LOCATION OF THE ORIGINAL WEST BOUNDARY MONUMENTS

On March 15, 2007, Pierre M. Cantou, paralegal specialist with the Bureau of Indian Affairs' Western Regional Office in Phoenix, located the map prepared by Joseph F. Schaffhausen on September 28, 1936, to accompany his report on the Hualapai tribe's original west boundary.¹³⁶ Schaffhausen had carefully mapped what he had called the "Clay Springs Monument" and the "Peak Monument." Cantou then recreated Schaffhausen's plane table, which enabled him to locate the two monuments precisely.¹³⁷

Armed with this information, the Hualapai tribe authorized an on-the-ground investigation to determine if these monuments still existed. On April 4, 2007, Travis Majenty, from the tribal archaeology department; tribal elder Grant Tapija; and Jerrold E. Knight, a registered land surveyor, traveled to the location identified by Cantou. There they found a distinctive peak that rose some three hundred feet above the valley floor. When they climbed to the top of the peak, they found a monument constructed of stone, approximately four feet square. This is the "Peak Monument" located by Schaffhausen in 1936.

The party then traveled to the location on the valley floor where Schaffhausen had mapped what he called the "Clay Springs Monument," although he had reported that cattlemen had torn down some monuments. At the location surveyed by Schaffhausen, the tribal party located a pile of stones that they believed were the remains of the monument Schaffhausen had described. Both the Peak and Clay Springs Monuments are approximately five and one-half miles west of the southwestern surveyed reservation boundary.

On May 1, 2, and 15, 2007, the group again looked for monuments marking the original military boundary of the Hualapai Reservation. Following the forty-degree angle in line with the Clay Springs and Peak Monuments and traveling northwest by helicopter, the group located a monument on the crest of Black Mesa, approximately nine and one-half miles west of the western surveyed boundary of the Hualapai Reservation and approximately five miles west of Tinnakah Springs. The group then

¹³⁶Schaffhausen, "Resurvey-Alleged Original West Boundary"; Cantou to Hart, March 15, 2007, memorandum.

¹³⁷Pierre Cantou, plane table to accompany the 1936 Schaffhausen map, 2007; Cantou to Hart, March 15, 2007, Memorandum. The Clay Springs monument was located in Section 36, Township 27 North, Range 16 West, and the Peak Monument was located in Section 17, Township 26 North, Range 15 West.

flew due north to a remote location on a butte on the rim of the Grand Canyon, where they located another monument and adjacent rock constructions, including one spelling out the word *ARMY* using rocks gathered from the surrounding countryside.

On September 12, 2007, I accompanied two archaeologists and a tribal member on a visit to the *ARMY* site. In his report, archaeologist T.J. Ferguson carefully documented the site and concluded that it was consistent with instructions to late-nineteenth-century surveyors. He noted the presence of what appeared to be four "witness mounds," with charcoal still present inside them, a large stone that appeared to be the central upright marker, and *ARMY* spelled with large rocks.¹³⁸ This was the northernmost monument created by the army parties.

CONCLUSION

The physical evidence, combined with the documentary evidence cited above, shows that between 1875 and 1881, Captain Thomas Byrne of the United States Army, working with tribal members and local whites, marked out the western and southwestern boundaries of the Hualapai Reservation using stone monuments. In 1881, Lieutenant Carl F. Palfrey's corps of engineers party also built boundary monuments. The original west boundary was approximately nine and one-half miles west of the surveyed boundary. The original southwestern boundary was approximately five and one-half miles southwest of the surveyed boundary.

These boundaries included Tinnakah and Clay Springs within the reservation and were the boundaries that the Hualapai understood to be those of their reservation in 1881, when the military reservation was established, and in 1883, when the presidential executive order was signed and they agreed to give up their aboriginal territory outside the boundary line.

In 1866, Congress made a grant of alternate sections forty miles on each side of a rail line that would be run through northwestern Arizona. The railroad claimed that the grant entitled it to alternate sections within the Hualapai Reservation. The United States filed a lawsuit to quiet title to the reservation land. During the ensuing investigation, the Departments of Justice and Interior determined that the original west boundary of the reservation had been further to the west. The United States claimed in court that aboriginal title to these lands had

¹³⁸T.J. Ferguson, "Arizona State Museum Archaeological Site Card" for *ARMY* site, September 12, 2007.

never been extinguished, and sought to have the railroad's alternate sections returned to the tribe in trust.

The United States argued that, because the Hualapai believed their reservation contained the land in the strip between the monuments and the survey line, the tribe had not voluntarily abandoned that land, and aboriginal title to that land had never been extinguished. In that case, the railroad could not have obtained title to the lands. Under the same logic, aboriginal title to the public land within the same strip had also not been extinguished. Although the United States Department of Justice made a claim in behalf of the Hualapai for the railroad sections within the ten-mile strip, it took no action to secure the alternate public sections within the strip.

After an important decision by the Supreme Court, the railroad quitclaimed title to all lands it had claimed within the reservation survey lines. The United States continued to claim that the Hualapai held title to alternate sections up to ten miles west of the western reservation survey line. In 1946, a settlement was reached, whereby the railroad provided title to about 6,400 acres, including Clay Springs, and kept title to approximately 65,000 acres.

At about the same time as the settlement of the *Santa Fe Railroad* case, the Hualapai tribe was also pursuing an action before the Indian Claims Commission. The commission's decision in that case resulted in an award to the tribe for aboriginal lands taken from them without compensation outside of their reservation. The tribe was awarded about sixty-two cents an acre, with a taking date of 1883.

The taking date for the disputed western strip of lands is obviously inconsistent with the United States' own declaration that aboriginal title to the ten-mile strip had not been extinguished as of 1946. The acreage of the overall claim area is also less than it would be with the ten-mile strip included. Both the taking date and the acreage for which the tribe was paid show that the tribe was not paid for the ten-mile strip.

In the railroad cases, the United States argued in federal court that aboriginal title had not been extinguished in the ten-mile strip and that, as of 1946, the tribe had the superior claim for title to the odd-numbered sections of land claimed by the railroad. Under the same logic, the Hualapai tribe also had a superior claim to title to the even-numbered public sections.

A number of boundary monuments constructed between 1875 and 1881 have been located on the ground. The boundary of the actual strip of land originally intended to be part of the reservation contains a little more than 200,000 acres. Subtracting the private land leaves an approximate total of at least 100,000 acres of public land. Today, apparently because

of land consolidations, much of the entire strip to the west of the reservation is public land, administered by the Bureau of Land Management.

AN ATTORNEY OF ONE'S CHOOSING: REGULATING INDIAN-ATTORNEY CONTRACTS IN THE 1950S

JILL E. MARTIN

When a person wants to hire an attorney, he usually asks friends for references, or looks in the yellow pages. He then meets the attorney, talks with her, and decides if he wants to employ her. Some states require that attorney-client contracts be in writing. Until the year 2000, when an Indian tribe needed an attorney, it had to take extra steps. Contracts between attorneys and tribes had to be approved by the secretary of the interior or his authorized representative. Depending on the tribe and how it was organized, the secretary had different approval requirements. If the tribe was organized under the Indian Reorganization Act of 1934, the secretary could approve the choice of counsel and the fixing of fees. If the tribe was not organized, the secretary had the authority to approve the entire contract.

If the tribe was one of the Five Civilized Tribes, the secretary of the interior approved attorney contracts, except those involving "the prosecution of claims against the United States."¹ There are still regulations in the Code of Federal Regulations dealing with attorney contracts with the Five Civilized Tribes.²

Attorney contracts with tribes became a national issue in the early 1950s, when new regulations were proposed by the then-commissioner of Indian affairs, Dillon S. Myer. Myer became commissioner in May 1950 and in November proposed new regulations. Attorneys who represented Indians were furious and demanded hearings before the secretary of the interior.

¹66 Stat. L. 323, ch. 549 (1952). See also 36 Stat. L. 1058, ch. 210 §17 (1911).

²25 C.F.R. ch. 1, pt. 89 (2008).

Jill E. Martin is professor and chair of legal studies at Quinnipiac University. She writes on issues of federal Indian law and policy. She is admitted to the New York and Connecticut bars.

They also went to the press. The Senate eventually began hearings about attorney contracts, and the American Bar Association appointed a committee to review the ethical issues raised by the regulations. Former commissioner of Indian affairs John Collier wrote letters damning Commissioner Myer. Former secretary of the interior Harold Ickes also spoke out against the regulations. Felix Cohen, attorney for the Association of Indian Affairs, former associate solicitor in the Interior Department, and author of the *Handbook of Federal Indian Law*, was one of the attorneys with contracts approved by the Bureau of Indian Affairs (BIA).

EARLY REGULATIONS

The requirements of attorney contract approval date back to 1872. The government was making treaties with tribes and moving them onto reservations, and did not want the tribes to be taken advantage of by anyone else. The law passed then referred to all contracts with the tribes, not just attorney contracts.³ The contract had to be in writing, executed before a judge of a court of record, and approved in writing by both the secretary of the interior and the commissioner of Indian affairs. It had to include the names of all parties, their residence and occupation, the time and place where the contract was made, the particular purpose for which it was made, the fee, and any contingent agreements on which it was based. All contracts had to have a fixed time limit, and were not assignable. For the person to be paid by the government out of tribal funds, he or she had to file a sworn statement setting forth the date and details of the acts contracted for and how they were accomplished. Attorney contracts would fall within these regulations.

The purpose of the regulations was to protect the Indians. The report by the House of Representatives Committee on Indian Affairs found that

[g]reat frauds and wrongs have been committed with impunity in the past by means of exorbitant and fraudulent contracts for nominal services as attorneys, obtained by persons more or less familiar with the management of the Indian Office, either as agents or attorneys, by which the Indians were the sufferer, and which have caused much bad feeling and distrust between them and our Government and people,

³25 U.S.C. §81; 17 Stat. L. 136, ch. 177, 42^d Cong., 2^d sess. (May 21, 1872).

and greatly retarded the progress of the Indians in a civilization that they doubted.⁴

The committee recommended the passage of the 1872 legislation requiring secretary approval of all contracts. In 1911, a specific provision was added for the Five Civilized Tribes, requiring that the president approve contracts for attorney legal services.⁵

The regulations were not changed until the 1930s, under the Indian Reorganization Act. When Franklin D. Roosevelt became president, he appointed Harold Ickes secretary of the interior, and John Collier commissioner of Indian affairs. Collier was involved in Indian affairs prior to his appointment and was a critic and gadfly of the previous administration. He believed strongly in the Indian way of life and that the tribes should be allowed to exist as political and social entities. He was against the allotment and assimilation policies the government had followed since the 1870s. Under Roosevelt's New Deal, the Indian Reorganization Act of 1934, or IRA, opened the way for tribes to become organized and recognized as tribes.⁶ Felix Cohen, then an assistant solicitor in the Interior Department, was involved in the drafting of the IRA. Under Secretary Ickes, the Interior Department now viewed the Bureau of Indian Affairs' purpose as helping the tribes succeed as tribes. It recognized the Indians as having the right to be Indians. This was a new era.

However, the Indian Bureau remained paternalistic. It wanted to help the Indians but still believed that the Indians needed help. Although all Indians had been granted citizenship in 1924, many still did not speak or read English, and most were uneducated. When Collier and others went to the different reservations to encourage support of the IRA, many of the talks had to be translated by interpreters. For these reasons, the IRA still required parts of attorney contracts to be approved by the Interior Department. If a tribe was organized under the IRA, it would follow the new law of 1934. This required that the secretary of the interior approve the choice of counsel and the fixing of fees.⁷ A legal opinion from the Interior Department solicitor confirmed that the IRA superseded the 1872 law on attorney contracts.⁸

⁴*Investigation of Indian Frauds*, House of Representatives, 42^d Cong., 3^d sess. (1873), H. Report 98, p. 2.

⁵36 Stat. L. 1058, ch. 210 (March 3, 1911).

⁶48 Stat. L. 984, ch. 576, 73^d Cong., 2^d sess. (June 18, 1934).

⁷*Ibid.*, §16.

⁸*Solicitor's Opinion*, January 23, 1937, quoted in Memorandum to Secretary from Solicitor, p. 4, June 22, 1951, reel 42, III-844, John Collier Papers, Yale University Manuscripts and Archives, pp. 1170-74.



John Collier, center, commissioner of Indian affairs under President Franklin Roosevelt, believed strongly in the Indian way of life and opposed Dillon Myer's new regulations regarding Indian-attorney contracts. (Courtesy of Library of Congress, Harris & Ewing Collection, LC-DIG-hec-28781)

The purpose of the IRA regulations regarding attorney contracts "was to give the tribes a greater degree of responsibility in their dealings with attorneys than they had enjoyed under sections 2103–2106 of the Revised Statutes, with the result that the organized tribes may contract with attorneys subject only to the limitations imposed by section 16 of the 1934 act, *supra*. The power conferred upon the Secretary by section 16 is merely a veto power over the choice of counsel and the fixing of fees. . . ."⁹ If a tribe was not organized under the IRA, the 1872 regulations giving the secretary approval over the entire contract still applied.

⁹*Opinion of the Solicitor* (Warner W. Gardner, solicitor), Interior Department, January 22, 1946, "Delegation of Authority to Perform Certain Functions Relating to Attorney Contracts with Indian Tribes," referencing Memo, *Solicitor's Opinion*, January 23, 1937.

Under the IRA, the Interior Department adopted regulations about the negotiation and execution of attorney contracts in 1938, dividing them into contracts with IRA-organized tribes and non-organized tribes.¹⁰ The regulations for organized tribes were short and general. If the tribe decided it needed a contract, it entered negotiations with an attorney. The attorney had to be admitted to practice before the Interior Department and the bureau. If fees and expenses were to be paid, the tribal council needed to pass an appropriation act. After the contract was signed, the local superintendent sent a copy to the commissioner with a report about the attorney and the superintendent's recommendation as to approval of the contract. If the tribe wanted to see an attorney contract form, it could receive one from the bureau, but this was a decision left to the tribe.

Tribes that were not organized had to adhere to more regulations regarding attorney contracts—both to their form and the manner in which a tribe would enter a contract. They had to follow the requirements set forth and codified in 1872, necessitating a written agreement executed before a judge, certified by the judge, and approved by both the secretary and the commissioner. It had to contain the names of the parties, their residence and occupations, the tribal authority, the time and place where the contract was made, the purpose of the contract, the amount of the fee, and the time limit of the contract. It had to be signed in quintuplicate. In order to enter a contract with an attorney, the tribe needed to inform the superintendent of its intent to negotiate with attorneys and the reasons it intended to do so. Any attorney who wanted to negotiate with the tribe had to inform the commissioner prior to negotiations. The attorney had to be a reputable member of the bar, admitted to practice before the Interior Department and the bureau, and "competent to carry the case through the Court of Claims, and to the Supreme court [sic] of the United States if necessary."¹¹ The tribal council had to select the attorney at an open meeting and pass a resolution to that effect, with the superintendent present and stenographic notes taken of the meeting. Once the contract was approved, it was sent to the superintendent, who independently reviewed the attorney and sent a report with a recommendation to the commissioner. The commissioner and secretary then reviewed and approved it, sending copies back to the attorney and the superintendent. At

¹⁰*Regulations Governing Negotiation and Execution of Attorney Contracts with Indian Tribes*, May 2, 1938, issued by William Zimmerman, Jr., Assistant Commissioner of Indian Affairs, approved May 14, 1938, by Oscar L. Chapman, Assistant Secretary of the Interior. Attached as Exhibit A, to Memorandum on the Indian's Right to Counsel, reel 42, III-843, John Collier Papers, pp. 1110-30.

¹¹*Ibid.*, p. 5, sec. 22.

this point, the contract was valid. Contracts that did not follow this format were invalid and would not be enforced. Employing an attorney was a lengthy, time-consuming, and bureaucratic affair.

Attorney contracts were generally approved by the secretary of the interior, as long as the attorney was admitted to a bar and was in good standing. The purpose of the IRA was to give the tribes more power and autonomy, and the bureau tried not to add administrative delays to the process of contracting for attorneys. Secretary of the Interior Julius Krug, who followed Secretary Ickes, testified before Congress about the position of the Interior Department regarding attorney contracts. He believed that "the selection of counsel is one of their basic rights that I have nothing to do with."¹² He stated,

If an Indian tribe comes to me and wants a certain attorney to represent them, their claim is that they need an independent counselor. They perhaps feel that they need protection against the Interior Department as much as against any other agency or outside individual or firm. They want a certain lawyer to represent them. I have no real basis for turning that man down if he is an attorney in good standing in his profession. If you can find such a basis for me, I wish you would give it to me. If I turn him down on any other grounds, I either appear to desire a "yes man" for the Interior Department or to dish our patronage for an Indian tribe among the legal profession. If there are any other standards that I can use, I certainly would like to have this committee lay them out on the table.¹³

THE INDIAN CLAIMS COMMISSION ACT

If an Indian tribe wanted to sue the federal government, it needed a special act of Congress to bring a case in the United States Court of Claims. The act of Congress would grant jurisdiction to the court, thereby allowing a specific tribe to sue. Without this special act, the court had no jurisdiction to hear the case. The Indian Claims Commission (ICC) Act, adopted in 1946, created a special commission to hear and determine

¹²Senate Subcommittee of the Committee on Interior and Insular Affairs, *Hearings on S. 2037 and S.J. Res. 162*, 80th Cong., 2^d sess., 1948; "Statement of Honorable Julius A. Krug, Secretary of the Interior," March 5, 1948, p. 572, CIS-No: 80 Sini-1.

¹³*Ibid.*, 575, quoted in Memorandum on the Indian's Right to Counsel, p. 2, December 14, 1950, reel 42, III-843, John Collier Papers, pp. 1110-30.

claims the Indian tribes had against the United States. The commission was given jurisdiction over the following:

(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and executive orders of the president; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant, without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.¹⁴

So if a tribe believed that the federal government had taken land under a treaty that was entered into because of fraud or duress, the tribe could now sue. If the tribe believed that it had not been properly paid for the land ceded in a treaty, it could now sue.

The ICC Act required tribes that wanted to sue to file a claim within the following five years. Then the government would know the extent of the claims against it, and the claims could be resolved expeditiously. The act allowed tribes to retain attorneys, subject to the current laws and regulations, again depending on whether the tribe was organized under the IRA or not. The tribes wanted attorneys to represent them, as the lawyers from the attorney general's office would be representing the United States. This resulted in an increase in the number of attorney contracts being submitted to the commissioner for approval. Even attorneys who had been representing tribes prior to the ICC Act would need their contracts for ICC work approved. And since the claims had to be filed within five years, real concern arose if and when the commissioner did not approve the contract or held it up without explanation.

Tribes and the attorneys were under a time constraint. By the deadline, 852 claims were filed, eventually consolidated

¹⁴60 Stat. L. 1049 [1946].

into 600 claims.¹⁵ This allowed the government to know the nature and extent of the claims being brought by the tribes. It was hoped that the ICC would be able to act informally and settle claims quickly, providing justice and bringing finality to Indian claims. But for the tribes, the first step to filing a claim was to hire an attorney, whose contract needed to be approved. The claims in response to the ICC appeared to many to be a rush by attorneys to find lucrative business, rather than tribes seeking assistance to protect their interests.

The ICC was passed during a time when the policy of termination was becoming more prominent. Termination took many forms, but it generally meant that members of tribes would be assimilated into the general population. Laws and regulations that treated Indians differently from the rest of the population, both by limiting opportunities and by providing specific services, would be eliminated. Services provided by the BIA would be provided by state or local governments. The federal responsibility for and relationship with specific tribes would end. The most extensive form of termination meant that the tribes themselves would cease to exist as their members integrated into society.

Termination was a process that would happen over time. Supporters of the policy believed they were freeing the Indians and ending discrimination. Opponents of termination viewed the policies as destroying Indian culture and communities. Dillon Myer, as commissioner, was fully committed to the termination process. This created tensions with the New Dealers, who, as a group, were supportive of Indian self-determination and against the governmental withdrawal of support without the tribes' agreement. The New Deal had tried to strengthen the tribes and tribal governments. The ultimate goal of termination was to disband tribes and their governments. The New Dealers saw the work they had done on behalf of Indians being challenged, disregarded, and changed. Self-determination and termination were opposite policies. The leadership in Interior and the bureau had changed.

THE 1950S REGULATIONS

On November 9, 1950, Commissioner Myer sent a nine-page memo on the subject of "Contracts between Attorneys and In-

¹⁵H.D. Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* (New York, 1990), 115.

dian Tribes" to bureau and tribal officials.¹⁶ Dillon S. Myer had become commissioner of Indian affairs in May 1950. Although he was a skilled administrator, he had no prior experience with Indians. During World War II, he had run the War Relocation Authority (WRA), which was responsible for the relocation of Japanese-Americans from the West Coast to internment camps. During his tenure, the WRA was sued over regulations it had promulgated dealing with internees. The Supreme Court found the regulations unconstitutional, since they denied American citizens of Japanese descent their constitutional rights.¹⁷

Collier, Cohen, Ickes, and others who had worked on Indian affairs during the New Deal were disappointed in the appointment of Myer. They believed he would administer the Indian reservations as he had the WRA camps and stop the progress the tribes were making in self-government. Myer replaced many of the New Deal Indian Bureau employees with people he had worked with at the WRA. Many of his appointees did not have prior experience working with Indians.

The new regulations were the first example of the way Myer would run the Bureau of Indian Affairs. The regulations proposed were to reflect policies that had been developed and applied informally over the years in regard to attorney contracts. They would formalize those policies and make them obvious and available to all attorneys who might enter into contracts with Indian tribes. According to the memo, "most of the policies itemized below represent no substantial departure from those hitherto generally applied by the Bureau."¹⁸ The underlying purpose of the regulations was "fulfilling our statutory responsibility to serve best the interests of the Indians in their selection of attorneys and the negotiation of fair and equitable contract arrangements."¹⁹

The regulations were divided into two sections: claims contracts and general counsel contracts. The regulations for claims contracts included sixteen parts. In a claims contract, the attorney would represent the tribe in claims against the United States for land taken from the Indians, with or without treaty, for which the Indians were not adequately compensated. The

¹⁶Memorandum, Bureau of Indian Affairs, United States Department of the Interior, November 9, 1950, "Contracts between Attorneys and Indian Tribes," pp. 1-9, reel 42, III-843, John Collier Papers, pp. 1099-1103.

¹⁷*Ex Parte Endo*, 323 U.S. 283 (1944).

¹⁸Memorandum, Bureau of Indian Affairs, United States Department of the Interior, November 9, 1950, "Contracts between Attorneys and Indian Tribes," p. 1.

¹⁹*Ibid.*

attorney would bring an action on the tribe's behalf before the Indian Claims Commission and against the government and its attorneys. The BIA wanted all claims contracts to set forth the duties of the attorney, stating that the attorney could not make a compromise or settlement without the approval of the commissioner. The attorney had to submit reports, at least twice a year, to the tribe and the commissioner "indicating the work done by the attorney under the contract and evaluating his progress in the investigation and prosecution of the claims."²⁰ Fees had to be contingent—completely based on the recovery by the tribe. The contingent fee would be set by the ICC or the court or the commissioner of Indian affairs, after the case was concluded. The fee could be up to a maximum of 10 percent of recovery, but no minimum fee could be prescribed.

Expenses incurred by the attorney in the investigation and prosecution of the case were to be paid by the attorney and reimbursed only upon recovery by the tribe, subject again to the determination of the ICC or court or commissioner. The contract had to be for a set term, not to exceed ten years. The commissioner could terminate the contract with the consent of the tribe, with sixty-day notice to the attorney. No cause was required. If the attorney had associates working with him, they too had to be approved by the commissioner, and the fee the associates would receive must be disclosed. The attorney must be qualified for admission to the bar of the tribunal or court before which he would appear. To facilitate evaluation of the attorney's qualifications, he could be asked to supply information about "the nature of his practice, the size of his office staff, his experience, and his ability to finance adequately the investigation and prosecution of the claim on a contingent fee basis."²¹ Attorneys could not solicit contracts.

General counsel contracts had to be separate documents, even if the same attorney was representing the tribe in a claims case. As general counsel, an attorney would advise and represent the tribe on any issues, other than claims, that came before it. General counsel might draw up contracts for employment of a tribal secretary or policeman, or for the tribe to lease land or timber or gas. Counsel could advise the tribe on its rights regarding federal or state benefits. A general counsel contract could be broad enough to cover all issues for which the tribe wanted legal advice.

For general counsel contracts, the regulations were similar regarding reports by the attorney, solicitation, assignment of

²⁰*Ibid.*, 4.

²¹*Ibid.*, 5.

the contract, employment of other attorneys, and the number of contracts held by one attorney. But other regulations differed. A general counsel contract would not be approved if the tribe needed the attorney only for a specific or limited purpose. Fees could be for a definite sum or an indefinite sum based on the value of the attorney's services. In the latter case, the contract had to have a maximum annual amount. Payment for attorney services could be made only with the commissioner's approval, after he had received an itemized bill from the attorney. Expenses could be paid by the tribe, but the type of expenses had to be listed, and there had to be a maximum yearly limit. Attorneys were paid by the commissioner, based on the sworn statement of the attorney regarding the hours worked and the work done. The obligation of the tribe to pay fees and expenses was "subject to the availability of funds in the tribal treasury or an appropriation of funds by Congress."²²

Additionally, the commissioner recommended that the tribes consider hiring local counsel to assist them, on the theory that someone local would have a "more intimate knowledge of local and state affairs and personalities" and would be more available to the tribe.²³ If the tribe chose someone other than a local counsel, the contract with the non-local attorney required that he provide a local counsel who was acceptable to the commissioner, and the tribe had to supply a detailed justification for hiring an attorney who was not local. The contract could be renewed for up to three years, and the commissioner made decisions about renewal based on the service provided under the prior contract and the need for such services in the future.

The commissioner also would look at the number of claims and general counsel contracts held by a given attorney and decide if "the contract will burden the attorney or tax his facilities to the extent that the performance of his duties under other contracts may be impaired."²⁴

Attorneys who represented Indians went into an uproar. They believed that the regulations were beyond the scope of the commissioner's power and constituted a major change in the way the Interior Department did business. Many of the regulations were viewed as compromising the attorney-client relationship.

After the regulations were proposed, they needed to be published first in the *Federal Register* and then approved by the secretary of the interior, Oscar Chapman. Chapman had worked in Interior with Collier, Cohen, and Ickes. John Collier

²²Ibid., 7.

²³Ibid., 8-9.

²⁴Ibid., 5.

had been a reformer on Indian issues and a thorn in the side of the BIA when he was appointed commissioner in 1933. He was an advocate for the Indians retaining their own culture, religion, and way of life. He was commissioner of the BIA until 1945, when he resigned and became executive director of the Institute of Ethnic Affairs, which he had established to bring research and social science methodology to bear on solving ethnic issues. Collier believed in social science research, and he and his board decided what issues to address and study. The institute gave Collier a forum to continue speaking on Indian affairs and other issues on which he had distinct opinions.

Harold Ickes was secretary of the interior from 1933 to 1945. As secretary, he was involved in Interior's many departments and issues, one of which was the Bureau of Indian Affairs. Felix Cohen came to the Interior Department in 1933 and served as assistant solicitor, associate solicitor, and, at times, acting solicitor. He was the author of the *Handbook of Federal Indian Law*, the first compilation and research guide for practitioners in Indian law. He left Interior in January 1948 and went into private practice. Since he had drafted the ICC Act and represented the department's position in favor of the ICC before Congress, he did not want to take any claims cases. He specifically told the firm he worked with that he would not do any claims work that would be paid by the tribes. But he was an expert in Indian law, and this would be his main interest in private practice. Cohen became general counsel to the Association on American Indian Affairs and the All-Pueblo Council, and represented tribes in numerous cases until his early death in 1953 at the age of 47.

But the New Deal policies were changing, and the current administration in Indian affairs was moving to support termination. It was unclear what Secretary Chapman would do. Collier, Cohen, Ickes, and others involved in Indian affairs worked to have the new regulations overturned.

EFFORTS TO OVERTURN THE REGULATIONS

Opponents of the proposed regulations started efforts to overturn them. One way was through publicity. They sent many articles and letters to the *New York Times* and targeted other newspapers in Washington and the western states. The same letters often appeared in more than one newspaper. The *New York Times* published an article on November 18, 1950, entitled "Bureau's New Rules for Indians Stir Row." It quoted Oliver LaFarge, president of the American Indian Affairs As-

sociation, stating that Commissioner Myer "was attempting to dictate to the Indian people what attorneys they may hire with their own money, or whether they shall be permitted to have any attorney at all."²⁵

Another *New York Times* article, dated two days later, referred to Theodore H. Haas, former chief counsel of the Indian Bureau and friend of Cohen and Collier: "Mr. Haas asserted that it would make it impossible for some tribes to hire lawyers to press their claims because attorneys just won't take cases if their payment depends upon a victory."²⁶ A *Times* article of December 2, 1950, reported, "Mr. [John] Collier said the policy added up to 'a complete imprisonment of Indian litigation and legal representation within the Indian Bureau. No Indian commissioner before Mr. Myer has viewed and treated the Indian Service so nearly as personal patronage, and no predecessor has viewed and treated Indian legal representation as personal patronage.'"²⁷

Charles Black, a Columbia Law School professor and chairman of the legal committee of the Association on American Indian Affairs, sent a letter to the editor of the *New York Times* stating that the proposed regulations were "a long step backward toward a well-forgotten paternalism in Indian affairs."²⁸ Black addressed the issue of the number of contracts an attorney might have, based on his success in representing Indians: "A lawyer wanted by a tribe may be forced to submit to the bureau elaborate data on himself. If he has a large Indian business (the usual consequence of giving satisfaction) he is to be investigated with especial thoroughness, with a view to determining whether the tribe should be forced to take its business to some lawyer whose merits have not placed him in the position of enjoying a large Indian practice."²⁹ The practice of Indian law was a specialty and was not known by all attorneys. To restrict the tribes' ability to hire the specialists seemed backward.

The attorneys who represented Indians also challenged the regulations. Cohen was part of a group of attorneys called the Joint Efforts Group, which consisted of certain law firms that were handling claims cases. With the approval of the then-commissioner of Indian affairs, they had joined together and hired Cohen and his firm to do legal research and preparation of briefs and petitions for the claims cases. Cohen was paid by

²⁵*New York Times*, November 18, 1950.

²⁶*New York Times*, November 20, 1950.

²⁷*New York Times*, December 2, 1950.

²⁸*New York Times*, January 14, 1952.

²⁹*Ibid.*

the attorneys, not by the tribes, for legal work done. He was not involved in any contingency fees with the tribes.

On behalf of the Joint Efforts Group, Cohen wrote a thirty-page legal memorandum on the Indians' right to counsel. It was addressed to Secretary of the Interior Oscar Chapman and signed by Cohen, Haas, Charles Black, and fifteen law firms.³⁰ The signers asked Chapman not to approve the regulations, and set forth four arguments: the proposals "transcend the authority given by existing law; these proposals violate important statutory prohibitions and public policies adopted by Congress; these proposals violate the ethics of the legal profession and would deprive Indians of the assistance of those attorneys who are most concerned with maintaining professional standards; and these proposals are unfair to the Indians affected and to their attorneys."³¹ Each of these arguments was made repeatedly over the next two years, until Secretary Chapman finally made a decision on the regulations.

The argument that the commission did not have the authority to regulate the content of the contract referred to the two statutes governing contracts, the 1872 law³² and the 1934 law.³³ The 1872 law referred specifically to "Indians not citizens of the United States." The memo argued that, because all Indians had become citizens in 1924, the 1872 law should no longer apply.³⁴ Citizens, and groups of citizens such as tribes of Indians, should be able to retain any attorney they wished.

Even if the 1872 law did apply, it had been the policy of the Interior Department to disapprove contracts only if the attorneys were not in good standing, or if they charged exorbitant fees. Cohen and Haas, both working in the Interior Department for more than ten years, knew the formal and informal policies applied during that period. The memo could confidently state, "During the 25 years from 1924-1949 no record has been found of any tribal attorney contract having been disapproved except for one or more of the foregoing reasons."³⁵

As to tribes organized under the IRA, the statute specifically limited the approval of the secretary to the choice of counsel and the fixing of fees. So the 1950 regulations requiring reports of attorneys, the scope of the attorney's duties, the association

³⁰Memorandum on the Indian's Right to Counsel, December 14, 1950, reel 42, III-843, John Collier Papers, pp. 1110-30.

³¹*Ibid.*, 1.

³²25 U.S.C. 81 (1872).

³³25 U.S.C. 476 (1934).

³⁴43 Stat. 253, 8 U.S.C. sec.3 (1924).

³⁵*Ibid.*, p. 2.

of other attorneys, the length of the contract, and the reimbursement of expenses would all exceed the approval requirements of the 1934 law. Tribes that organized under the IRA adopted constitutions. Many also became chartered as municipal corporations under the act. The charters tended to be consistent in language, and most stated the ability of the tribe to sue and be sued and to enter into contracts without departmental approval if the contract was for an amount separately stated by the tribe. If the tribe could enter into agreements with a local businessman for up to \$5,000, why couldn't it enter into an agreement with an attorney for that same amount?

Cohen wrote,

One of the most basic constitutional rights is the right to petition Congress. That right requires for its effective exercise the opportunity freely to consult with those who are skilled in the laws and procedures of Congress. Indians seeking to make known their wishes, which are often different from the wishes of the Indian Bureau, have a fundamental constitutional right to consult with counsel, of which Congress could not, if it would, constitutionally deprive them. So, too, with many other constitutional rights which are often endangered by administrative action, such as the right to non-discriminatory participation in public schools, social security, and other public services, the right to just compensation for private property taken for public use, the right to vote, the right to trial before juries from which Indians have not been excluded, and all the other rights that make up the due process of law. All of these rights would evaporate without the right to counsel, which Federal courts have zealously guarded, especially in cases involving Indians and other under-privileged minorities.³⁶

The Indians should be able to choose their own attorneys. The Indian Bureau and the Indians often had differences of opinion, and the Indians wanted someone to represent their opinion, often before the bureau. The commissioner should have only a minimal ability to regulate that choice.

The purpose of the Indian Claims Commission Act was to provide tribes a place to present claims against the federal government. The requirement that the tribes gain the approval of the secretary on issues like litigation expenses

³⁶*Ibid.*, 13–14, citing *Rice v. Olson*, 324 U.S. 786; *Powell v. Alabama*, 287 U.S. 68; *Chambers v. Florida*, 309 U.S. 227.

and contingency fees appeared to violate the legislative purpose of the ICC. The proposed regulations also implied that Indian tribes were not smart enough or did not have enough common sense to enter into a contract with an attorney. Other citizens did not need the approval of a governmental agency to hire an attorney. The purpose of the IRA was to give the Indians more responsibility for their own rights and powers. Requiring this extensive commissioner approval was a regressive step in policy.

Every attorney admitted to a state bar must follow the state's code of professional ethics. Many states adopted the ethical code established by the American Bar Association. The proposed regulations created a number of ethical violations, which raised genuine ethical concerns for the attorneys representing Indian tribes. Canon 35 of the then-existing ethics code stated that "the professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer."³⁷ The requirement that the contract be approved by the commissioner allowed control by the commissioner. The necessity for semiannual reports would put the government between the Indian client and the attorney and would give the commissioner control over the attorney-client relationship. The attorney would have to reveal confidential information to the commissioner, in violation of another ethical canon. The tribe then might not be forthcoming or truthful about its positions, affairs, and confidences if it knew that the attorney would have to inform the commissioner. This interference in the attorney-client relationship meant that the attorney would not be able to represent his client zealously, and the result would be a failure of justice.

Under the proposed regulations, in claims cases the commissioner was to determine the fee received by the attorney, after the work was already done. Would the commissioner approve a smaller fee if he did not like the attorney or the attorney had bested the government by winning for the Indians? Would the attorney feel that he had to please the commissioner rather than his client, because the commissioner controlled his fee? This was a real ethical concern for the lawyers. Again all of these situations put a third party, the commissioner, in the middle of the attorney-client relationship. When a tribe brought a claim against the federal government—of which the commissioner was an agent—the

³⁷*Ibid.*, 26, quoting from the American Bar Association Code of Professional Ethics, Canon 35.

adversarial party would appear to have control over the fee paid to the opposing attorney.

In claims cases, the regulations recommended the employment of a local attorney. Many of the tribes did not want to hire local attorneys because there was still discrimination against Indians, and it was particularly manifest in the towns surrounding the reservations. A local attorney who represented a tribe against local interests would seriously compromise his livelihood and his social standing. An out-of-town or Washington lawyer would not be concerned about riling local interests. And many of the tribes wanted their attorneys to lobby and negotiate with the Indian Bureau or Congress, in Washington. An attorney based in Washington was more useful than a local attorney, who might know the reservation but probably did not know the political machinations needed to represent Indians in Congress.

Another canon of ethics concerned expenses. Canon 42 prevented a lawyer from paying the expenses of litigation. An attorney could advance expenses, but the client ultimately had to be responsible for expenses. The purpose was to make the client responsible for the lawsuit and to prevent the attorney from holding the same stake in the outcome as the client. The proposed regulations would violate this canon, since the reimbursement of expenses was not guaranteed by the terms of the attorney contract the commissioner approved.

The overall effect of the proposed regulations was to put attorneys in an ethical bind; they would be violating the code of ethics if they entered into a contract as proposed by the commissioner. One purpose of the regulations was to protect the Indians from unscrupulous and unethical attorneys, yet the regulations themselves would exclude the most ethical.

Cohen's memo argued that the regulations were unfair. They would take the choice of counsel away from the Indians by making it subject to the approval of the commissioner. The Indians wanted to retain lawyers who were not under the control of the Indian Bureau. The commissioner should not have had the right to approve attorneys who would then be suing the government on behalf of the Indians. The regulations appeared to allow the government to control both sides of the litigation.

Bob Yellowtail, chairman of the Crow Tribal Council, summed up this argument in a letter:

Let us carry the logic of Commissioner Myer to its logical conclusion. Here it is: Two parties get into a lawsuit over land claims involving many millions of dollars. The defendant, which in this case is the United States, has

the temerity to go over to the complainant, the Indians in this case, and say to them: "Any attorney that you select must be approved by me or I refuse to be sued. I have a law passed by Congress in colonial times which gives me that right." There you have it. That is exactly what the United States says through Dillon Myer.³⁸

The Joint Efforts Group memo was widely distributed to other interested parties, including attorneys who represented Indian tribes and other interested organizations, both those dealing with Indians and those dealing with minority rights. The memo became a set of "talking points" for others.

John Collier was one of those who received the memo. In a letter to Secretary of the Interior Oscar Chapman, Collier submitted a list of twenty questions that he wanted Chapman to consider. These were both general ("How many attorney contracts have been turned down in the last three months?") and very specific ("Does or does not, the Bureau of Indian Affairs, as a general practice, communicate to the Department of Justice, for use in defeating Indian claims, information which the Indians' attorneys secure from Interior Department files in connection with the claims of their clients? And, if so, is this practice consistent with respect for the 'highly personal relationship' of which the Commissioner speaks or with the Code of Ethics of the American Bar Association?")³⁹ Collier encouraged Chapman to review the proposed regulations in the interest of the welfare of the American Indians.

BUREAU AND DEPARTMENT RESPONSES

Myer responded to the memorandum of the Joint Efforts Group with a reply brief and a ten-page statement, in which he refuted the arguments made by the group.⁴⁰ The bureau was using a standard contract form that had been in existence in the department for many years. It was a form that had been signed by many of the firms in the Joint Effort Group without

³⁸Weekly newsletter to all Indians, "Selection of Indian Counsel—Pro and Con," by Bob Yellowtail, chairman, Crow Tribal Council, attached with letter to Felix Cohen, October 2, 1952, box 94, file 1503, Felix S. Cohen Papers, Western Americana Collection, Beinecke Library, Yale University.

³⁹John Collier to Oscar Chapman, December 29, 1950, reel 42, III-843, John Collier Papers, pp. 1136-37.

⁴⁰"Statement by Commissioner of Indian Affairs D.S. Myer, on Proposed Attorney Contract Regulations," reel 42, III-844, John Collier Papers, pp. 1144-49.

problem. In most of the cases where there were deviations, the bureau objected, and the contract was revised and signed by the attorney. Tribes had not been deprived of counsel. Myer quoted the numbers: "I am informed that between May 8, 1950, when I took office, and December 15, 1951, approximately 90 tribal attorney contracts were approved. These included, as summarized below, a considerable number of contracts that had been earlier returned unapproved or with conditions attached before the Bureau's approval became effective."⁴¹ He then discussed how many contracts were approved with no changes, how many with changes with conditions, and what the conditions were. Myer believed that the conditions supplied bargaining power for the tribes to obtain more favorable terms, which was a benefit.

The Joint Efforts Group brief argued that more than one hundred tribes had not been able to find competent counsel because of the regulations. Myer explained how he asked Felix Cohen to provide a list of the tribes, and Cohen "demurred on the stated ground that most of the information must be in Bureau files," and then later, that Cohen "refused to supply it."⁴² Myer's search of the records found only one tribe that had been unable to find counsel, and that appeared to be based on the lack of a good claim.

Myer wryly commented that the Joint Efforts Group made no constitutional argument against the IRA section requiring secretarial approval of choice of counsel and fixing of fees. Many of those in the Joint Efforts Group had been involved in the passage of the IRA and would be loath to criticize it. Myer noted that, in an earlier version of the IRA, the tribes had complete discretion with attorney contracts, but Congress changed that and added secretarial approval. He wrote,

The legislative history of the Indian Reorganization Act shows that three major reasons were mentioned for maintaining Secretarial control over tribal attorney contracts: (1) the interest of the Federal government as guardian of tribal assets, (2) a feeling that control should be retained until the tribes are "turned loose," and (3) a background of tribal ambulance-chasing and stirring up of litigation by Washington and local lawyers.⁴³

⁴¹Ibid., 3.

⁴²Ibid., 4.

⁴³Ibid., 6.

So Myer believed he had to approve contracts to uphold the protection of the tribes. The proposed regulations were reasonably related to the choice of counsel and fixing of fees.

Myer also disagreed with the claim that the department was often the adversary when a tribe employed an attorney. He saw the role of the department as a protector of tribal interests. Certainly in general counsel cases, the tribal business to be done was generally not with the department but with other business interests. Regarding claims cases, he refuted the argument that the department was using the approval of contracts against the tribes, calling it "illusory." He wrote,

We know of no instance in which the Department or the Bureau has used its approval power in an effort to weaken the prosecution of tribal claims against the Government; on the contrary, vigorous efforts have been made to inform all tribes with potential claims of the deadline for filing them and such tribes have been urged by the Bureau to retain attorneys and proceed with the filing before the deadline. We know of no instance where the Department has attempted—through the supervisory authority insisted upon in the old form of standard contract—to obtain information from the tribes or their attorneys for the benefit of the Department of Justice and against the tribal interests.⁴⁴

Myer pointed out that if the attorneys had an argument, it should be with Congress, because the 1872 law mandated secretarial approval. He was just doing his job, he stated, fulfilling his responsibilities to the best of his ability. The laws were passed because the tribes needed federal protection. He argued that the regulations must "be tailored not to the needs of the most advanced and sophisticated tribes but to those least advanced and sophisticated."⁴⁵ He further noted that claims contracts had become big business. Ernest Wilkinson, the attorney for the Ute Indians, had been awarded attorneys' fees of approximately \$2,800,000. (Wilkinson would later note that he had worked on the case for more than fifteen years.) But Myer's role was to protect the tribe and the tribal estate, and "[b]ecause large sums of money are frequently involved, it becomes doubly important for us in our role of trustee and guardian of Indian tribal assets to exercise all possible diligence."⁴⁶ He noted that

⁴⁴*Ibid.*, 7–8.

⁴⁵*Ibid.*, 8.

⁴⁶*Ibid.*, 9.



Commissioner of Indian Affairs Dillon Myer, left, tried to establish new, controversial regulations that gave the BIA more control over contracts between attorneys and Indian tribes. (Photo courtesy of the Topaz Museum, Delta, Utah)

the fees and expenses for tribal attorneys were paid out of tribal funds, most held in trust by the government for the tribe. Thus he had a fiduciary responsibility to the tribes.

Secretary Chapman asked the solicitor of the Interior Department, Mastin G. White, the department's chief attorney, to review the proposed regulations and their legality. Generally, the regulations would have been reviewed by someone in the solicitor's office before they were proposed and released. But the outcry over the regulations was greater than expected, and Chapman and Myer wanted legal support on their side. White's memo, dated June 22, 1951, supported the proposed regulations. With regard to unorganized tribes, the secretary had almost complete discretion in approving any contracts. The only limitation was that he could not act arbitrarily or capriciously in his denial of a contract. The secretary did have limits on his approval of contracts for organized tribes. His discretion could be involved only in the choice of counsel or the fixing of fees. But that still gave him much discretion. "Subject to the traditional limitations against arbitrary or capricious action, I believe that the Secretary may grant approval to or withhold approval from a contract between an organized tribe and legal

counsel for any reason or reasons which he deems to be reasonably related to the choice of counsel or the fixing of fees."⁴⁷

White had reviewed the Joint Efforts Group's memo of law and the letters and comments of lawyers and others who had responded to the proposed regulations. He found none of the arguments persuasive, and found no reason to change or modify his opinion. The secretary had the authority to regulate attorney contracts as set forth in the proposed regulations.

Commissioner Myer called White's opinion "an illuminating document."⁴⁸ Speaking to the National Congress of American Indians, Myer addressed some criticisms of the Indian Bureau, including the attorney contract policy. He recognized that some of the controversy was "an honest difference of opinion" but defended the proposed regulations. He cited White's document giving the secretary the legal authority to approve contracts. And he set forth his own position—which was that he was trying to discharge his responsibility "as conscientiously as possible and to the very best of my ability."⁴⁹ He pointed out that the regulations were designed to protect the interests of all the tribal members, even those who were in the minority of a vote. He was concerned that a tribal council could tie the hands of a tribe in long-term contracts. He was not choosing attorneys or discriminating against attorneys who had openly disagreed with the department. He was doing his duty as a trustee for the Indians:

I have said it before—and I want to repeat—that when any Indian group is ready, willing, and able to take over full management of its own affairs, we shall be prepared to withdraw our supervision over their activities completely. And that definitely includes the authority to enter into contracts with private attorneys. Until such a transfer of responsibilities can be worked out all the way across the boards for any particular Indian group, however, I believe that we should continue our review of attorney contracts as a safeguard against the very real dangers of exploitation.⁵⁰

⁴⁷Memorandum to the Secretary from the Solicitor, p. 8, June 22, 1951, reel 42, III-844, John Collier Papers, pp. 1170–74.

⁴⁸Address by Dillon S. Myer, at the 8th Annual Convention of the National Congress of American Indians, July 25, 1951, St. Paul, Minnesota, reel 43, III-868, John Collier Papers, pp. 827–36.

⁴⁹*Ibid.*, 6.

⁵⁰*Ibid.*, 7.

It is an interesting explanation, and a paternalistic one. The tribes had to be ready to take responsibility for all of their affairs before they could have control over their attorney contracts. This was a plug for the termination policies of the government. But many tribes hired attorneys to assist them in taking over their own affairs and wanted legal advice to be sure they were protected. It was a roundabout system. Myer planned no changes to the proposed regulations.

THE AMERICAN BAR ASSOCIATION

The American Bar Association announced in March 1951 that the Administrative Law Section had appointed a five-attorney panel to review the policies of the Indian Bureau regarding approving contracts with attorneys.⁵¹ Attorney Rufus Poole was the chair of the committee. Poole had previously been an assistant solicitor in the Interior Department under Harold Ickes. The committee met for seven months and issued a report on November 8, 1951. The administrative law attorneys, all of whom had been involved in representing clients before federal or state administrative agencies, were able to use their knowledge and expertise to compare the Indian regulations with those of other administrative agencies.

The members of the committee took their work seriously. In their report, they noted that "[t]he Committee has been guided throughout by the principle that the primary objective in working out a solution of the problem must be the welfare of the Indian tribes. It believes that the proposed regulations should be examined in that light and that the regulations which best serve the interests of the Indian tribes should receive the support of the bar, and other interested persons."⁵²

The committee recommended that the regulations not be issued unless they were modified, and that public hearings be held on the proposed regulations. It agreed with the Joint Efforts Group brief that the secretary's authority over contracts for IRA-organized tribes was limited to the choice of counsel and the fixing of fees. As such, the secretary could not require that the contract include terms on termination, expenses, filing of reports, or limiting employment or association with other attorneys, where the contracting attorney was responsible for all the

⁵¹*New York Times*, March 24, 1951.

⁵²"Report of the Special Committee on Contracts of Lawyers with Indian Tribes," Administrative Law Section, American Bar Association, November 8, 1951, reel 42, III-844, John Collier Papers, pp. 1182-93.

work. These terms would fall outside of the choice of counsel or fixing of fees. The secretary could ask for information about the work to be performed by the attorney, the duration of the contract, whether the attorney would perform the work himself, and the nature and amount of the fee. Poole noted, "Let the Secretary exercise great care in the selection of the attorney. Once he selected him, turn him loose and let him prosecute the claim."⁵³

The committee believed that, although the secretary could review the fixing of fees, he could not require that all fees be contingent in claims contracts, that the contingent fee could not be greater than 10 percent, and that the contingent fee should not be a fixed percentage of recovery. These were matters to be negotiated between the attorney and the tribe. The committee believed that it would be difficult for the tribes to find competent attorneys who would be willing to enter contracts where the secretary had so much power and control over their work product and their compensation. Fees for Indian clients needed to be similar to those for other clients and similar work. "Traditional legal policy has long been against contingent fees in circumstances where the client can afford to pay. Experience has shown that when one can speculate on recovery at no expense, there is a tendency to needless litigation."⁵⁴

The requirement of semiannual reports was also hit hard by the committee. The concern was that the commissioner and the secretary were often in an adversarial position with the tribes. The tribes, in fact, could be hiring the attorney to sue the secretary or the commissioner, or the federal government for whom they were agents. Being able to require the counsel for his adversary to submit reports outlining his work for the tribe gave the secretary an unfair advantage. "The requirement is an unsound and unhealthy arrangement, and so far as the Committee has been able to ascertain, has the added vice of being unnecessary."⁵⁵

As for the unorganized tribes, although the committee realized that the secretary had the authority to require the regulations, it recommended that he apply the same regulations as he would to the organized tribes. The committee noted that the secretary seemed to be doing the opposite: applying the more restrictive regulations for unorganized tribes to the organized tribes. The committee could find no statutory authority for

⁵³Senate Committee on Interior and Insular Affairs, "Statement of Rufus G. Poole before the Committee on Interior and Insular Affairs," Senate Unpublished Hearings Collection, vol. 2, January 23, 1952, CIS-No: 82 SIn-T-9, p. 115.

⁵⁴*Ibid.*, 20.

⁵⁵*Ibid.*, 22.

this and believed it "frustrates the intention of the Congress that that broad discretionary authority of the commissioner of Indian affairs should be curbed."⁵⁶ The committee stated,

Moreover, the Committee has been unable to find evidence of any necessity to turn the clock backward so as to subject the Indian tribes to the minute and detailed controls which are prescribed in the proposed regulations. No instances have been brought to the attention of this Committee indicating that the Indian tribes are unable to regulate their own dealings with attorneys in accordance with the existing regulations which were issued in 1938.⁵⁷

HEARINGS HELD BY THE SECRETARY OF THE INTERIOR

The proposed regulations had not taken effect. They had not yet been published in the *Federal Register*, as required, nor had notice been given for comment. The proposed regulations were finally printed in the *Federal Register* the following August 11, 1951, as a notice of proposed rule making. The notice set forth the regulations, with some changes from the original but still with the same major provisions. Thirty days were given for comments, after which the "regulations will be reconsidered, revised if deemed advisable, and issued in final form."⁵⁸ This thirty-day deadline was extended first to October 9 and then to November 9. The department then issued revised proposed regulations, similar to the originals.

With all the uproar and complaints, Secretary Chapman decided to hold hearings so that he and the department could hear the interested parties. Hearings were held January 3 and 4, 1952. Chapman began the hearings with a prepared opening statement.⁵⁹ In discussing the "public misunderstanding" of the proposed regulations, he provided some background about the confusion. He asked each speaker to be brief, suggesting

⁵⁶*Ibid.*, 14.

⁵⁷*Ibid.*

⁵⁸Memorandum of August 11, 1951, from D.S. Myer, Commissioner, accompanying "Notice of Proposed Rule Making," dated August 1, 1951, from Oscar L. Chapman, Secretary of the Interior, attached as Exhibit B, in Committee on Interior and Insular Affairs, Senate Unpublished Hearings Collection, January 23, 1952, vol. 2, CIS-No: 82 SIni-T.9.

⁵⁹"Statement of the Honorable Oscar L. Chapman, Secretary of the Interior," Hearing on the Proposed Regulations to Govern Indian Tribal Attorney Contracts, January 3, 1952, reel 43, III-846, John Collier Papers, pp. 4-5.

half an hour per speaker. He tried to focus the hearing on the relevant issues, asking speakers to concentrate on the questions of law and administrative policy and not on personalities, individual attorney contracts, or other irrelevant matters.⁶⁰ His underlying hope was to get "the proper balance under the existing statutes to prevent lawyers from taking unfair advantage of inexperienced Indian tribes and yet foster the principle of local self-government among the Indian tribes and encourage them to assume more and more responsibility for the management of their own business affairs."⁶¹

Forty-four people testified, including twenty-five Indians, eight attorneys, and eleven representatives of interested organizations, both Indian related—such as the Indian Rights Association, the Association of American Indian Affairs, and the *Southwest Indian Newsletter*—and others, such as the National Association for the Advancement of Colored People, the American Civil Liberties Union, the American Jewish Committee, and the Women's International League for Peace and Freedom.

Indians testified about the benefits of using outside attorneys who were not controlled by the Indian Bureau. They noted that they were American citizens and wanted to be treated as competent adults, which included being allowed to choose their own attorneys and to enter into contracts with those attorneys. Any restrictions on their attorneys gave the BIA more power over the Indians. The Indians trusted their attorneys, and the attorneys were against the regulations.

This was not the first negative experience the Indians had had with the BIA. The hearings were an opportunity for them to speak directly to the secretary of the interior about their ongoing dissatisfaction with, and lack of trust in, the bureau. The Indians discussed other issues they had with the BIA and explained that their attorneys had helped them reach favorable outcomes. They wanted attorneys who could protect them from the BIA.

Indian-related associations were concerned about the movement away from the New Deal's self-determination policies and toward termination. They argued in favor of self-determination, which included allowing the Indians to decide what attorneys to employ. Other interested associations tended to be concerned about the treatment of Indians by the government. The hearings were being held in 1952, and the civil rights movement was growing. Equal protection and equal treatment

⁶⁰*Ibid.*, 3.

⁶¹*Ibid.*, 4.

under the law were important arguments. The ability to hire an attorney was fundamental in asserting one's rights.

Attorneys testified about the legality of the proposed regulations, arguing about the applicability of 1872 and 1934 laws and their relevance to today's Indians. The attorneys also discussed ethical issues. Many of those testifying had represented or did represent tribes, and they spoke both as advocates for the Indians and as attorneys affected by the regulations. They had multiple interests in the outcome of the hearings.

William V. Creager, who spoke on behalf of Laguna Pueblo, related incidents in which the tribe was dissatisfied with BIA actions.⁶² The local superintendent made decisions about the tribes' leases and contracts; if he did not like the contracts, he did not send them on to the Indian Bureau for approval. This had happened with an attorney contract, an oil and gas lease, and a corporate charter. They had never been approved, and the superintendent had denied ever seeing some of the documents. But the tribe had gone ahead and hired an attorney anyway. The attorney was Felix Cohen, who had worked on their behalf negotiating leases, drafting legislation, and arguing cases related to voting rights and social security benefits.

The tribe wanted an attorney outside of the Indian Bureau, who was responsible only to the tribe. Creager noted that Indians were American citizens and that citizens had the right to handle their own affairs: "We want you to treat us like American citizens and not like savages."⁶³

Thomas Main, representing the Gros Ventre Tribe, Fort Belknap Indian Community, and the Montana Inter-Tribal Policy Board, related similar incidents in Montana, where attorney contracts were not forwarded from the regional office to the BIA, but were twice lost. Because of that, "we Indians did feel that the Bureau doesn't want us to have independent legal advice."⁶⁴ All eight Montana tribes had "a firm and undying opposition to these proposed attorney contracts."⁶⁵ Main noted that the tribes had been making progress until about two years before, when an attitude of paternalism had returned to the bureau. Probably referring to Commissioner Myer, he said the Indians were being treated "like prisoners in a concentration camp."⁶⁶

⁶²Ibid., 19.

⁶³Ibid., 21.

⁶⁴"Statement of Thomas Main," Hearing on Proposed Regulations to Govern Indian Tribal Attorney Contracts, January 2, 1952, in *Congressional Record*, February 14, 1952, p. A820.

⁶⁵Ibid.

⁶⁶Ibid.

Avery Winnemucca, the chairman of the Pyramid Lake Paiute Tribal Council, invoked President Franklin Roosevelt and the New Deal: "We believe that the attempts of Commissioner Dillon Myer to restrict the right of Indians to have attorneys of their own choice on their own terms is an attempt to destroy those fundamental rights of political liberty that Franklin Roosevelt said we should have."⁶⁷

The statement of John Bird, who represented the pueblo of Santo Domingo, complained that the Indian Bureau had not effectively protected the pueblo's rights in the past. The pueblo wanted to select its own attorney to enforce its rights, because the bureau had been unwilling to support the pueblo.⁶⁸

Martha Jay, editor of the *Southwest Indian News Letter*, read a statement from John Collier that focused on the non-legal issues raised by the proposed regulations.⁶⁹ Collier was concerned about the changes in the government's policy that the regulations represented. Over the past twenty years, that policy had been to empower the tribes to become self-governing, responsible, democratic entities. Part of self-government was the right to hire an attorney of one's choice who would be responsive to the needs of the tribal client. According to Collier, the new policy "strikes at the fabric of tribal government, and endangers the survival of Indian corporations and organizations which are vital to the Indians."⁷⁰ The regulations "are an affront to their intelligence, and are in derogation of their rights of tribal self-government."⁷¹

Roger Baldwin testified on behalf of the American Civil Liberties Union. The ACLU was concerned about the right of the Indians to choose their own counsel, "since the selection of attorneys and the right to have an attorney is one of the basic civil rights of American citizens."⁷² Baldwin considered the right to counsel as "the most important single aspect of the rights of American Indians in relation to their government."⁷³ He was concerned that, under the new regulations, the Indian

⁶⁷"Statement of Avery Winnemucca," Hearing on Proposed Regulations to Govern Indian Tribal Attorney Contracts," p. 30, January 3, 1952, reel 42, III-845, John Collier Papers, p. 1256.

⁶⁸"Statement of John Bird," p. 74, reel 42, III-845, John Collier Papers, p. 1268.

⁶⁹*Ibid.*, 63. See also "Statement of the Institute of Ethnic Affairs Concerning the Proposed Regulations of Attorney Contracts with Indian Tribes," p. 1, January 2, 1951[1952?], reel 42, III-844, John Collier Papers, pp. 1200-1201.

⁷⁰*Ibid.*, 2.

⁷¹*Ibid.*, 3.

⁷²*Ibid.*, p. 86, reel 42, John Collier Papers, p. 1270.

⁷³*Ibid.*

Bureau would have the opportunity to judge its opponents' lawyers in advance.

Nicolas Conover English, an attorney representing the Iowa Tribe of Oklahoma, testified that he was concerned about giving the commissioner the right of approval, since the commissioner and the bureau tended to be "interested parties in most, if not all, of the matters to which an Indian tribe may need legal advice and representation." He continued, "It is contrary to every instinct of American fair play that an interested party whose interests are adverse to a client should dictate the choice of the attorney or should have any degree of control over the freedom of action of the lawyer."⁷⁴

Rufus Poole, the chairman of the ABA Committee, testified that choosing your own counsel was one of the most fundamental rights: "I think it has been correctly stated that this right is probably the key to all other rights. If you cannot have your own lawyer, what does it mean that you are entitled to a due process hearing and many of the other rights of the Constitution that confers upon you?"⁷⁵

Poole spoke for all attorneys about the ethics issues. The ABA had become involved because many attorneys had contacted the association when they read the proposed regulations. They "became gravely alarmed at the extent to which the Commissioner proposed to invade or intrude into the relationship of attorney and client."⁷⁶ Poole noted that the bar was "shocked" and "took umbrage at what was being proposed," and that "it was a very disturbing thing."⁷⁷

Poole believed that, under the 1934 statute, the secretary had the authority to determine if the attorney chosen by a tribe was qualified in terms of competence, experience, trustworthiness, and integrity. But his approval was to be given before the attorney's work began, and once it began, the secretary had no more authority over the attorney. This was a crucial point to the ABA, based on attorney ethics and independence. Poole noted,

I don't think there can be any vital and effective advocacy against the government as long as you stay in there with power to constantly reveal what he is doing, and even

⁷⁴"Statement of Nicolas Conover English," Hearing on Proposed Regulations to Govern Indian Tribal Attorney Contracts, January 3, 1952, reel 43, III-846, John Collier Papers, pp. 20-22. See also reel 42, III-845, John Collier Papers, p. 1270.

⁷⁵*Ibid.*, 201.

⁷⁶"Testimony of Rufus Poole," p. 1288 et seq., reel 42, III-845, John Collier Papers, p. 200 et seq.

⁷⁷*Ibid.*, 200-201.

to initiate dismissal proceedings against him. You make him a subservient servant. He can't be anything else, as I see it, and that is the view of the committee, and we feel pretty strongly about that. If you are going to stand over him, and make him answerable to you at every step of the game, why, he can't be a very effective lawyer in representing those interests.⁷⁸

As the general counsel of the Association on American Indian Affairs and representative of the Joint Efforts Group, Felix Cohen testified that the regulations violated the 1872 and 1934 statutes and existing regulations in the department.⁷⁹ He argued that the 1872 law applied only to contracts dealing with claims or lands, and only applied to non-citizen Indians. Since all Indians had been made citizens in 1924, the act should not be followed. The 1938 regulations, which had been approved by Cohen as acting solicitor and signed by Chapman as assistant secretary, should be clarified to represent the practice before the proposed regulations were written.

Cohen then presented his main argument, the constitutional protection of minority rights. He noted that, over the last decade, there had been an increase in constitutional law and the rights of minorities. Minorities were enforcing rights through the courts, and they needed attorneys to do so. "We think that for all practical purposes a man is deprived of all his constitutional rights if he is deprived of the right to be represented by attorneys who can defend and vindicate those rights for him."⁸⁰ Indians had not been treated well by the government over the years. Independent legal counsel was necessary for Indians to exercise their rights of self-government and to challenge the Bureau of Indian Affairs. Cohen commented that "among the hundred or more Indian tribes with which I have personally worked more than 90 per cent of all legal grievances have been grievances against the Office of Indian Affairs."⁸¹ To give the commissioner of that office the responsibility of approving attorney contracts was not proper. The bureau was too interested in the underlying actions to be fair and unbiased.

⁷⁸*Ibid.*, 211-12.

⁷⁹"Statement of Felix S. Cohen, General Counsel, Association on American Indian Affairs," Hearing on the Proposed Regulations to Govern Indian Tribal Attorney Contracts, p. 28 et seq., January 3, 1952, reel 43, III-846, John Collier Papers, p. 50.

⁸⁰*Ibid.*, 54.

⁸¹*Ibid.*, 55.

Cohen was also concerned that the policies of the New Deal, which had encouraged Indian self-government and independence, were being turned back to the earlier policies of paternalism and unilateral action by the government. Cohen was making this argument to Chapman, who was a New Dealer himself. He again discussed the 1938 regulations, which had worked well for the Indians and the attorneys. He did not want Indians to be taken advantage of, but he wanted them to be treated as adults and given the responsibilities they had assumed under the IRA.

Harold L. Ickes, former secretary of the interior, had been Chapman's boss during the New Deal. Ickes wanted to appear at the hearing, but he was in the hospital at the time. He sent a letter to Chapman, asking that it be made part of the record.⁸² Chapman agreed and replied to Ickes, addressing him as "Dear Chief" and wishing him a speedy recovery.⁸³ Ickes eventually asked that a letter written by him to Chapman on November 5, 1951, setting forth his thoughts, be included in the record.⁸⁴ Ickes believed that the regulations set back Indian policy from the enlightened period of the IRA to the earlier era of 1872, when Indians were viewed as savages. He saw the bureau as having been taken over by bureaucrats who did not care about providing justice for the Indians:

The proposal of this code is none other than insulting to American citizens, who instead of being brutalized by the inhumane treatment to which they have been subjected by greedy and callous fellow Americans, have made great progress toward their full integration with the whole body of American citizens. Unfortunately, there has been an unhappy infiltration by individuals who have no interest in or concern for the cause of justice for the Indian, of the very Bureau that has been set up by Congress and financed by public funds for the purpose of assuring justice to these first Americans.⁸⁵

Ickes went on to denounce Myer and the people who worked for him, noting that "new people were brought into the Bureau

⁸²Harold L. Ickes to Secretary Oscar L. Chapman, January 4, 1952, reel 42, III-842, John Collier Papers, p. 1207.

⁸³Oscar L. Chapman to Harold L. Ickes, January 8, 1952, reel 42, III-844, John Collier Papers, p. 1208.

⁸⁴Harold L. Ickes to Secretary Oscar L. Chapman, November 5, 1951, reel 42, III-844, John Collier Papers, p. 1179-81.

⁸⁵*Ibid.*, 1.

and they were acceptable to the man at the top in the exact ratio of their lack of interest in the Indians." The Indian Bureau has been "accessory, before or after the fact, to the further despoliation of the Indians."

Ickes had previously written an article for *The New Republic*, excoriating Myer.⁸⁶ Entitled "'Justice' in a Deep Freeze," it was published on May 21, 1951, while the whole attorney contracts issue was simmering. Ickes wrote,

So far as our American Indians are concerned Commissioner Dillon Myer of the Bureau of Indian Affairs is a Hitler and a Mussolini all rolled into one. He is judge, jury, keeper of America's conscience and high executioner. The smaller the pond in which he wields his despotic power, the greater the size to which he attempts to blow himself up. The Bureau presents a strange anomaly because it is in the Department of the Interior of which Oscar L. Chapman is Secretary; and Chapman's prestige is based upon the reputation that, as Assistant Secretary, he built up by his fair and just attitude toward minority groups.⁸⁷

Ickes saw Myer as overturning all the progress made by and for Indians during the New Deal. Ickes' beliefs and work were being marginalized.

Ickes also had no tolerance for the department solicitor and the opinion he drafted about the attorney contracts. He called the solicitor's opinion "a fraud and snare for unwary feet. It is a legalistic booby trap. It is a bald misstatement of the law and it is difficult to believe it was not deliberate."⁸⁸ He accused the solicitor of violating every canon of ethics. Ickes concluded by urging Chapman to reject the regulations.

SENATE HEARINGS

At the same time as the Interior Department hearings, a Senate subcommittee was also holding hearings. The Senate Committee on Interior and Insular Affairs appointed a subcommittee in June 1951 to investigate attorney contracts with the

⁸⁶Harold L. Ickes, "'Justice' in a Deep Freeze," *The New Republic*, reel 43, III-847, John Collier Papers, p. 64.

⁸⁷*Ibid.*

⁸⁸Ickes to Chapman, November 5, 1951, p. 3.



Former secretary of the interior Harold Ickes vehemently opposed Dillon Myer's new regulations, believing that Myer was attempting to overturn the progress made by and for Indians during the New Deal. (Courtesy of NJCHS Archives)

Indians. The subcommittee held hearings on twenty-four days, from January to September 1952, in Washington, New York, and Albuquerque, and made its partial report to the full committee on January 3, 1953.⁸⁹ The committee was concerned

⁸⁹U.S. Senate, "Attorney Contracts with Indian Tribes," 83^d Cong., 1st sess., S. Re. 8, January 3, 1953, reel 42, III-844, John Collier Papers, p. 1234.

because "the Indian legal business has become very lucrative business."⁹⁰ It interviewed attorneys, Indians, and other interested parties, accumulating twenty-six hundred pages of testimony and one thousand pages of documents. According to its report, "the aim of the subcommittee has been to review the administration of the legislation relating to Indian attorney contracts in order to determine the value of existing legislation and the desirability of possible revisions thereof. Through its investigation the paramount purpose of the subcommittee has been to determine the manner in which the welfare of the Indian tribes, for which the Federal Government is responsible, is affected by their relations with attorneys."⁹¹ The subcommittee interviewed many of the same people who appeared before the secretary of the interior.

Testifying at the first hearing, Commissioner Myer commented about the "campaign" being waged against the proposed regulations.⁹² Although he did not name names, the words he quoted were those used in part by Ickes and Collier. This, he claimed, was not just a difference of opinion between misinformed people:

I am talking about a campaign of defamation and distortion which was started by a few individuals who have attempted to becloud the real issues. I believe that I can give you some of its flavor just by mentioning a few of the phrases that have been used to describe me and my actions since our attorney policy statement was issued. I have been called a "blundering and dictatorial tin-Hitler" and a "Hitler and Mussolini rolled into one." Phrases such as "drumhead justice," "despotic power," "arrogant misbehavior," "capricious and tyrannical," and "disdainful disregard of Indian rights" have been hurled at me in national publications. Needless to say, I am not willing to accept these descriptions of me or my actions, but I cite them here to indicate the lengths to which this campaign has proceeded."⁹³

He noted that he was just following the law as interpreted by the department solicitor.

⁹⁰Ibid., 2.

⁹¹Ibid., 4.

⁹²Senate Committee on Interior and Insular Affairs, "Attorney Contracts with Indians," Senate Unpublished Hearings Collection, January 21, 1952, vol. 1, CIS-No: 82 Sini-T.8.

⁹³Ibid., 7.

According to Myer, the bureau had made two basic assumptions in drafting the regulations: "(1) Congress was concerned that disreputable or unscrupulous lawyers, ambulance-chasers, and fomenters of trouble might obtain contracts; (2) Congress wanted to protect the tribal estate against the charging of unreasonable fees for legal services. All provisions of the proposed regulations stem from one or both of these fundamental assumptions."⁹⁴ Myer believed that he had wide discretion in passing judgment on the choice of attorneys. But he urged Congress to review the statutes underlying the regulations to determine if they should be repealed. If the law should still require approval of Indian contracts, "then I strongly urge you to clarify the intent of Congress by spelling out some of the guides that should be followed in administering this responsibility."⁹⁵

Montana Senator Zales Ecton did not understand why the Indians were not being represented by the bureau or department attorneys. Since the government was the guardian of the Indians, the government should provide their own attorneys. He commented, "[Y]ou had lawyers in the Indian Bureau that would be willing to advise them on their rights and privileges. I wonder why the necessity of having additional outside counsel advise them on these rights, when the Superintendent should be able to do so."⁹⁶ Myer responded that the tribes were trying to become more independent and wanted their own counsel. As long as the tribe had funds to pay for an attorney, "we do not question the reason when tribes decide to have counsel."⁹⁷

Rufus Poole testified again on behalf of the American Bar Association.⁹⁸ He argued for the independence of attorneys. The bureau could pass on the competency of attorneys, but that decision should be made without delay. The ABA committee recommended that the decision about competency should be transferred from the commissioner to the solicitor's office, since it was mainly a legal decision. Poole's argument was that the regulations interfered with the independence of the attorneys, which would create a conflict in the attorney-client relationship: "So I say again, for reasons of traditional policy, stay away from this sacred relationship of the attorney and client. Be careful in the attorney that is selected, but once that selection has been made, permit him to work

⁹⁴*Ibid.*, 10.

⁹⁵*Ibid.*, 21.

⁹⁶*Ibid.*, 46.

⁹⁷*Ibid.*, 47.

⁹⁸Senate Committee on Interior and Insular Affairs, "Statement of Rufus G. Poole, Attorney Contracts with Indians," Senate Unpublished Hearings Collection, January 23, 1952, vol. 2, CIS-No: 82 Sini-T.9, p. 90.

in the customary way."⁹⁹ He noted that, in many cases, the tribes were suing the government and needed independent counsel.

Josephine Kelly, the chair of the Standing Rock Sioux Tribal Business Council, was sent to Washington as part of a delegation to represent her tribe. She read a statement from the tribe explaining that the "delegation came to Washington to protest against the action of the commissioner of Indian affairs Dillon Myer in refusing to let us use our own money to hire our own lawyer. We need a lawyer to defend us against the government's attempts to take our lands, and other attacks on our rights."¹⁰⁰ Myer had rejected a contract with their attorney, James Curry, and it was being appealed to Secretary Chapman. "Myer's purpose in turning down our contract with Curry is either to deprive us of legal advice altogether or to force us to take a lawyer that will be a yes man for the Department."¹⁰¹

This was a repeated concern, that the government regulations were designed to disqualify those attorneys who had been critical of the bureau, or who had fought the bureau on the Indians' behalf. The tribes especially were concerned that the approval process would make the attorneys more responsive to the government than to the tribes.

Senator Lehman commented that the purpose of the hearings and the attorney contract approval was to protect the Indians, who are "the wards of the United States."¹⁰² The policy on attorney contracts was part of the guardianship responsibility of the government. But the tribes did not trust the government and often sought to sue the government. They believed that attorneys would protect their rights better than the government did.

The subcommittee's report dealt mainly with the contracts held by attorney James E. Curry, who represented many tribes and served as general counsel of the National Congress of American Indians. Curry had worked with the Interior Department and then had gone into private practice, concentrating on Indian law. He was a friend of Cohen's until a rift occurred between them. The subcommittee spent ten pages of its report commenting on what it considered unethical actions by Curry. It then examined the Joint Efforts Group, based mainly on docu-

⁹⁹*Ibid.*, 119.

¹⁰⁰Senate Committee on Interior and Insular Affairs, "Attorney Contracts with Sioux Indians of the Standing Rock Reservation," Senate Unpublished Hearings Collection, May 11, 1951, CIS-No: 82 SIn-T.7, p. 36.

¹⁰¹*Ibid.*, 38.

¹⁰²Senate Committee on Interior and Insular Affairs, "Attorney Contracts with Indians," Senate Unpublished Hearings Collection, January 28, 1952, vol. 3, CIS-No: 82 SIn-T.10, p. 234.

ments obtained from a lawsuit filed against the Joint Efforts Group by Louis Youpe for breach of contract. The subcommittee based the discussion in its report upon Youpe's claims, although it recognized that they were adversarial statements in a lawsuit and that the other side had not had a chance to respond. The subcommittee recommended that the investigation into the Joint Efforts Group be continued during the next Congress.¹⁰³

The subcommittee's conclusion was that the existing statutes and practices regarding approval of attorney contracts needed to be maintained pending further investigation. The commissioner had a duty to "pass on the fitness of tribal attorneys and fees to be charged. Until the law is changed or repealed he must discharge that responsibility. If Indians are to be entirely free to make their own decisions in the selection and remuneration of counsel there must be new legislation."¹⁰⁴ The subcommittee noted that any attorneys who committed abuses were a minority among those who represented tribes, and "their actions should not be allowed to cast reflection upon the integrity or the professional standards of others who have rendered outstanding service to the Indians."¹⁰⁵

Senator Lehman of New York filed his separate views in a statement dated January 9, 1953.¹⁰⁶ He did not dissent from the report but wanted to give his views a different framework and emphasis. Rather than examining whether the attorneys were following the regulations, he wanted to look at whether the attorneys were properly representing the Indians. Was the service provided to the Indians good? Were the best interests of the Indians being served? These were questions the subcommittee report never addressed.

CHAPMAN'S RESPONSE

Chapman responded on January 24, 1952, with a memo to the commissioner.¹⁰⁷ He had reviewed the proposed regula-

¹⁰³Senate Report 8, p. 24.

¹⁰⁴*Ibid.*, p. 25.

¹⁰⁵Senate Subcommittee on Interior and Insular Affairs, "Interim Report," 82^d Cong., 2^d sess., June 24, 1952, p. 2.

¹⁰⁶"Separate Views by Senator Herbert H. Lehman Concerning Investigation by Subcommittee on Indians Contracts: Attorney Contracts with Indian Tribes," 83^d Cong., 1st sess., Senate Report 8, January 9, 1953, reel 42, III-844, John Collier Papers, p. 1248.

¹⁰⁷Memorandum from Secretary of the Interior to Commissioner, Bureau of Indian Affairs, January 24, 1952, attached as exhibit in Committee on Interior and Insular Affairs, Senate Unpublished Hearings Collection, January 28, 1952. CIS-No: 82 Sini-T.10, p. 214-16.

tions, the comments received, and the testimony from the hearings, and had decided not to issue the regulations. The existing regulations would remain in force. The proposed new regulations were dead.

Chapman decided to appoint a committee of Interior personnel to consider the 1938 regulations and to make any recommendations that were desirable. Additionally, he responded to Myer's argument that the bureau had to follow the statutes until Congress made a change. He asked Myer to prepare letters for his own signature to the president of the Senate and the speaker of the House, asking for "a Congressional review of the obligation that has been placed on the Department to approve Indian tribal attorney contracts and for further clarification or guidance if the present statutes are to remain in force."¹⁰⁸ The department wanted to follow the intent of Congress.

This was everything that Collier, Cohen, and the other tribal attorneys had wanted. They had won. The regulations that they had written during the New Deal were to continue. The *New York Times* reported the decision under the headline "Curb on Lawyers of Indians Lifted."¹⁰⁹ The article explained why the attorneys had fought the regulations: "Underlying the opposition to the abandoned regulations was the conviction of many Indian tribes, lawyers and Indian welfare organizations that the rules would have reduced some of the gains in self rule that Indian tribes have made over a long period of years."¹¹⁰

In July 1952, Congress passed an act that included the Five Civilized Tribes within the secretary's regulations.¹¹¹ Attorney contracts no longer required the approval of the president.

THE DISAGREEMENT CONTINUED

Collier and Cohen still did not like Myer. They truly believed that he was a bureaucrat who did not know anything about the Indians and who surrounded himself with others who knew even less. Collier worked to set up meetings in the fall with representatives of the two presidential candidates, Dwight Eisenhower and Adlai Stevenson, to discuss why neither should reappoint Commissioner Myer. He asked Cohen to draft a memo explaining why Myer should not be reappointed.

¹⁰⁸*Ibid.*, 215.

¹⁰⁹*New York Times*, January 25, 1952.

¹¹⁰*Ibid.*

¹¹¹66 Stat. L. 323, ch. 549 (1952).

At the same time, Cohen was writing to his Indian clients about the record of the Indian Bureau. He made multiple drafts, sending the manuscript out to friends for review and comment before publishing it in the *Yale Law Journal* as "The Erosion of Indian Rights, 1950–1953."¹¹² Cohen noted that the openness that the bureau had demonstrated during the New Deal was gone, and it was difficult to find out exactly what was happening.¹¹³ He recounted the controversy over the proposed regulations about attorney contracts and the resolution when Chapman rejected the regulations. But,

[d]espite this rejection, Commissioner Myer has continued to deny thousands of Indians the right to employ attorneys of their own choice, on the theory that the regulations rejected by his superior, Secretary Chapman, were merely declaratory of existing practice and that he is merely carrying out the prior existing practice. The fact remains, however, that during more than a decade before Mr. Myer took office no Indian tribe had ever been denied the right to retain as its attorney any lawyer in good standing at the bar. Since Mr. Myer took office more than forty Indian tribes have complained of Bureau interference in the exercise of such rights.¹¹⁴

In examining the way the bureau was run, Cohen noted that Myer had no experience with Indians, Indian law, or Indian policy when he came to the bureau. He was an administrator. But rather than learning from the people in the Indian Bureau who had developed expertise during years of working with Indians, Myer dismissed those "who knew most and cared most about Indians," who were the "memory and conscience of the Indian Bureau."¹¹⁵ Many of the people to whom Cohen referred were his friends and former New Dealers from his thirteen years in Interior. They were replaced by people Myer had worked with at the War Relocation Authority, other administrators who had no knowledge of Indian affairs. This bothered Cohen on both a personal and a professional level. He truly believed in the rights of Indians and felt that Myer was setting back the prog-

¹¹²The Indian Bureau Record: 1950–52, confidential copy, October 16, 1952, box 64, file 1017, Felix Cohen Papers. This manuscript was published eventually as "The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy," *Yale Law Journal* 62:3 (February 1953): 348–90.

¹¹³*Ibid.*, 1.

¹¹⁴*Ibid.*, 5.

¹¹⁵*Ibid.*, 31.

ress that the Indians and the Indian Bureau had made. Cohen compared Myer to Stalin:

The Indian who ventures to criticize the Bureau is a natural object of persecution. It is as easy for an Indian to criticize Commissioner Myer without suffering reprisals as it is for a Russian to criticize Stalin without reprisals. For on the Indian reservation, as in the Soviet Union, schools, hospitals, land, jobs, credit, cattle, and police are controlled by one man who is not elected by the people he "administers." The difference between a Commissar and a Commissioner is only four letters and a Russian accent.¹¹⁶

Cohen alleged that, when tribal attorneys reviewed files in the Interior Department to supplement their claims before the ICC, members of the Indian Bureau spied on them. He stated that the bureau would not help the attorneys with the files, but would tell the opposing side what the tribal attorneys were doing.

When Cohen was at Interior, the solicitor's office often would review proposals of the commissioner before they were released and would overrule them if they violated the rights of the Indians. Myer did not allow this and was unhappy with interference by others. "When an Assistant Secretary showed a disposition to correct Commissioner Myer's illegalities," Cohen said, "the Commissioner took vigorous exception and succeeded in having his bureau placed under another assistant secretary who, except on two or three very unusual occasions, refrained from interfering with Indian Bureau decisions. On those occasions when he did overrule a Bureau decision, the Bureau paid little or no attention to the overruling."¹¹⁷ Cohen noted, "The standard response of Commissioner Myer to all criticism is to attack the personal integrity of the person who offers the criticism."¹¹⁸

Cohen himself had been attacked in a number of ways. He was mentioned in a nationally syndicated newspaper column by Drew Pearson.¹¹⁹ Cohen was sure that the Indian Bureau had provided Pearson with the slant of the reporting. Pearson wrote that the Indians are no longer poor, because "increased defense demands for timber, oil, and uranium have quadrupled the value

¹¹⁶*Ibid.*, 27.

¹¹⁷*Ibid.*, 23.

¹¹⁸*Ibid.*, 27.

¹¹⁹Drew Pearson, "'Justice' for Indians Comes High," *Washington Merry-Go-Round*, *Washington Post*, August 14, 1952, box 94, file 1503, Felix Cohen Papers.

of Indian land in the past decades and that, as a result, 'lo, the poor Indian' has become very much worth plucking."¹²⁰ Pearson alleged that there was opposition to Myer's proposed regulations on attorney contracts because the contracts were now profitable for attorneys. Pearson wrote, "In the forefront of the attack on the Indian Bureau has been the Association on American Indian Affairs, whose general counsel is Felix Cohen, a former high official of the Interior Department. Cohen is also a partner in a syndicate seeking more than 4 billion dollars in Indian claims against the governments which Cohen once represented."¹²¹

The syndicate to which Pearson referred was the Joint Efforts Group of attorneys. Cohen was employed by them to do research and was paid a salary. He had no financial interest at all in the Indian claims work. He was personally and professionally appalled at the suggestion that he was doing something fraudulent or mercenary or somehow taking advantage of the Indians. Cohen wrote to Pearson himself, noting that if it was merely a personal matter, he would not be writing, but that "when one's client is attacked that is something that no lawyer worthy of his salt can ignore."¹²² He wrote, "I have no interest in any Indian claims judgment. . . . I made a special point, when I recently joined a New York firm that has such interests, of providing that my partnership would be limited so as not to include any share in any such recoveries."¹²³

Myer resigned as commissioner of Indian affairs on March 19, 1953. Dwight Eisenhower had become president, and all top members of the bureau had resigned by request. Some of the resignations were not accepted by Douglas McKay, the new secretary of the interior, but Myer's was. The *New York Times* reported, "The acceptance of Mr. Myer's resignation brings to a close an Indian Bureau administration that has been marked by controversy."¹²⁴ Myer refused to comment on the controversy, noting, "[A]nything I say now might be construed as sour grapes, and I don't want to revive bitternesses that have passed."¹²⁵

Cohen received letters from friends, commenting on Myer's resignation and Cohen's law journal article. Responding to a letter from Arthur Meyer, Cohen wrote, "I was, of course,

¹²⁰*Ibid.*

¹²¹*Ibid.*

¹²²Felix S. Cohen to Drew Pearson, August 21, 1952, box 94, file 1503, Felix Cohen Papers.

¹²³*Ibid.*

¹²⁴"Myer Out as Head of Indian Bureau," *New York Times*, March 20, 1953.

¹²⁵*Ibid.*

much gratified by the acceptance of Commissioner Myer's resignation, but I doubt that there was any direct connection between the article and the resignation. On the other hand, I feel reasonably sure that there was a close connection between the incidents reported in the article and the resignation, which is as it should be."¹²⁶ In a letter to Rufus Poole, Cohen noted, "[B]asically I think that this article outlines the more serious of the problems with which the new administration will have to grapple if it is to make the necessary changes in the handling of Indian affairs which you and I hope it will make."¹²⁷

CONCLUSION

The regulation of attorney contracts with Indian tribes became an issue because of the changing policies of the Indian Bureau. In many ways, it was a fight over the role of the Interior Department. The New Dealers, including Collier, Ickes, and Cohen, wanted the reorganization policies to continue. Their vision of Indian law was to recognize the tribes' powers and rights and to provide ways to enforce those rights. During the 1950s, the government changed to a policy in which tribes would be terminated from federal control but would also lose their political role as independent units. Members of the terminated tribes would have the rights of U.S. citizens but no special relationship with the federal government as sovereign tribes.

The argument over attorney contracts pitted the New Dealers against the termination advocates. It explains, perhaps, the personal nature of the controversy, and why it became such a big issue. But the issues raised were real. What was the balance between the government's function as guardian of the Indians and its role as legal adversary? Could that balance ever really be achieved? How could the government fulfill its special responsibilities to the tribes, arising from treaty obligations, while recognizing the sovereignty of the tribal governments?

Were the Indians really wards who needed protection? When would they be considered smart enough, mature enough, sophisticated enough, to handle their own affairs? Were the policies paternalistic or protective? Could the tribes be protected without being patronized? How did the laws requiring secretarial approval mesh with the tribal self-government and

¹²⁶Felix S. Cohen to Arthur Meyer, March 27, 1953, box 64, file 1024, Felix Cohen Papers.

¹²⁷Felix S. Cohen to Rufus G. Poole, March 4, 1953, box 64, file 1024, Felix Cohen Papers.

self-determination policies of the New Deal, or with the termination policies of the 1950s?

The law was amended in 1958 to remove the Section 81 requirement that contracts be executed before a judge.¹²⁸ It was amended again for some tribes under the Indian Self-Determination and Education Assistance Act of 1993.¹²⁹ But these laws created uncertainty for the tribes, since it was unclear what contracts had to have secretarial approval. Congress addressed the problem in 1999–2000 by recognizing that both laws, the Act of 1872 and the Indian Reorganization Act, were based on the belief that Indians were not competent to handle their own affairs. The Senate Committee on Indian Affairs stated, "There is no justification for such an assumption to provide the basis for federal policy in this era of tribal self-determination."¹³⁰ The committee noted that in 1988 the Interior Department had recommended eliminating the requirement of approval of attorney contracts: "It would be consistent with the goals of Indian self-determination to allow the tribes to choose their own attorneys and set the rate of compensation without the Secretary's oversight."¹³¹ Today Indian tribes can truly hire attorneys of their own choosing.

¹²⁸Pub. L. No. 85-770.

¹²⁹25 U.S.C. 450 et seq., Pub. L. No. 93-638.

¹³⁰Senate Report 106-150, 106th Cong., 1st sess., September 8, 1999, p. 8.

¹³¹*Ibid.*, quoting from letter of Assistant Secretary Ross O. Swimmer to Senator Daniel K. Inouye, Chairman of the Committee on Indian Affairs, September 7, 1988, Senate Report 100-577, 100th Cong., 2^d sess. [1988].

MINING AND POLLUTION IN THE WEST: THE LIMITS OF LAW PROTECTING THE ENVIRONMENT

GORDON MORRIS BAKKEN

This article analyzes the law in action in the context of law in books regarding mining and pollution. Law in action is a term of art referring to how the legal system works in practice. In the late nineteenth and early twentieth centuries, the law in action on the local level suggests that courts did not act as corporate captives that gave business enterprise whatever it wanted at the expense of others.¹ In addition, the practicing bar knew that state supreme court and federal district court rulings set legal limits, and persons transgressing those limits did so at their peril. In creating legal defenses for their clients, mining company lawyers were simply trying to develop the best legal strategy. The unintended consequence of legal strategies for large mining corporations like the Anaconda Copper Mining Company was twentieth-century corporate dissolution. Further, as Jared Diamond observed about Montana and mining pollution, "While denial or minimization of responsibility may be in the short-term financial interests of the mining company, it is bad for society as a whole, and it may also be bad for the long-term interests of the company itself, or the entire mining industry."² In the Gilded Age and the Progressive Era, mining pollution from smelters impacted neighboring farmers and ranchers.

¹My findings are contrary to Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA, 1977) and *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York, 1992).

²Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed* (New York, 2005), 37.

Gordon Morris Bakken is a professor of history at California State University, Fullerton. He received his B.S., M.S., Ph.D., and J.D. from the University of Wisconsin.

These people went to court, and legal strategies evolved that put the industry, in particular, on a trajectory that continued for much of the twentieth century.

PEOPLE'S LAW: THE JENDRESEN DILEMMA

For individuals, particularly the small ranchers/farmers of the West, pollution and the law were personal. The question for the private citizen who had no resources to hire an attorney could be whether the state would assume the burden of bringing suit to abate a nuisance. The law in action in this particular situation involved negotiation in the context of the law of nuisance rather than litigation.

Two situations in Montana illustrate the possible responses. Rasmus E. Jendresen wrote Governor Joseph K. Toole from Warm Springs, Montana, on January 27, 1906, asking for the state's help. Jendresen told Toole that "in the Fall of 1904 my milch cows fell off so wonderfully in their flow of milk" that by February 1905 he could no longer sell milk. He "thought the great decrease all at once was due to the damage done by the Anaconda Smelter Smoke poison, but I was not sure." First, Jendresen consulted an attorney who "advised me to be very sure, before I took any definite action." He did nothing, but eighteen calves, eleven yearlings, two two-year-old cows, and two other cows died; his cows had stillborn calves, and his milk business collapsed by spring 1905. His attorney "went to the A.C.M. Co. Office to find out from Mr. Dunlap (Purchasing Agent for the A.C.M. Co.) what could be done about the matter." Dunlap said he had no authority to settle for any damage done by the smoke. Inertia set in again, but one day, "Mr. Dunlap Genl Purchase Agent for A.C.M. Co. and Mr. Matheson Genl Mangr of same met me on Main St. of Anaconda engaged me in conversation, and asked all manner of information concerning the Smoke agitation, in the alley." They exchanged information on stock losses, and the company men told Jendresen to await an answer.

What Jendresen did was seek compensation informally, ask for legal advice informally, and await a settlement. He was focused on ranching rather than litigation. Two weeks later he visited the company offices looking for a settlement that would enable him to move out of the smoke zone. Dunlap again put him off but noted that the company was preparing for a lawsuit. Jendresen told the governor, "I remarked it was no trouble for them to law as they had the money to back them and could very soon wear us out in court." Jendresen offered to have his remain-

ing cattle slaughtered and analyzed for toxins. Dunlap refused the offer and refused to acknowledge such proof of poisoning.

Then a funny thing happened, Jendresen told the governor. Dr. Cheney, a company man operating as meat and milk inspector, "came down to my Dairy different times after my conversation with Mr. Dunlap, and wanted to test my cattle for Tuberculosis." Jendresen refused to have his cows tested, even in the face of a threatened quarantine. Jendresen probably suspected that the company man was looking for evidence to defend any lawsuit for dead, dying, or down cattle. It was company procedure to gather as much data as possible to prepare for lawsuits for air or water pollution.

Again, inertia set in because Jendresen's cattle improved during the summer, "but as soon as cold weather commenced it was the same, old story," Jendresen wrote. He wanted "the States [sic] protection. I have paid my taxes in this State for ten yrs. now I am facing ruin and I cannot stand for it. I have others dependent on me for support." Finally, he claimed poverty and noted the power and wealth of the company. Only the state could stand up to such an entity.

Attorney General Albert J. Galen responded on February 6, 1906, that "the only relief afforded you by law is a civil action for damages. It is impossible for executive state officers to do anything for you upon the facts presented. . . ."³

Jendresen's dilemma was common in the nineteenth and early twentieth centuries. To file a lawsuit, a plaintiff needed money or land of value to retain the services of an attorney. A retainer and an hourly fee were the norm, and contingency contracts were extraordinary except in debt collection cases.⁴ As Jendresen noted, his potential creditor, Dezourdi, was unable to lend money due to his cash flow requirements in a lawsuit. The limit of law for many people was often the expense to hire an attorney and bring a lawsuit.

THE LAW IN BOOKS

For mining companies, the law had another side. The developing law of nuisance in books in post-bellum America gave western mining interests cause for concern, because courts developed

³Jendresen to Toole, 27 January 1906, and Galen to Jendresen, 6 February 1906, RS 76, box 1, Montana attorney general, general correspondence, Montana Historical Society, Helena, Montana. My typescript of Jendresen's letter attempts to retain his spellings, punctuations, capitalizations, and sentence structures. However, Jendresen's pen was less than perfect, particularly when distinguishing periods and commas. Galen's letter addressing "Jendresen" appears to be a typographical error.

⁴Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln, NE, 1991), 119.

"absolute nuisances," visiting strict liability in damages upon polluters without proof of intent to do harm or negligence.⁵ In terms of common-law nuisance, the lawyers of the nineteenth century knew their *Blackstone*.⁶ Further, with generations of lawyers trained as apprentices in law offices rather than law school, reference to *Blackstone* was common.⁷ Rights in water were limited, and common-law actions were the legal means to protect interests. Regarding the uses of property and pollution, *Blackstone* also provided specific guidance based on English experience with lead smelting polluting the air and dye mills polluting water.⁸ Common-law defenses claimed by polluters were limited.⁹ A concrete example of the limits of prescriptive rights came in Butte in 1891, when a trial judge issued an injunction shutting down the heap roasting of copper ore and the air pollution it caused.¹⁰

⁵William L. Prosser, *Handbook of the Law of Torts*, 3d ed. (St. Paul, MN, 1964), 528. This treatise and its prior and subsequent editions came to be the handbook for generations of law students. Noga Morag-Levine, *Chasing the Wind: Regulating Air Pollution in the Common Law State* (Princeton, NJ, 2003), 44–47, 52–56, 71–77.

⁶James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston, 1950), 257. Also see Joshua Getzler, *A History of Water Rights at Common Law* (New York, 2004), 153–77, 180–92; Richard V. Francaviglia, "Copper Mining and Landscape Evolution: A Century of Change in the Warren Mining District, Arizona," *Journal of Arizona History* 23 (Autumn 1982): 267–98; John E. Lamborn and Charles S. Peterson, "The Substance of the Land: Agriculture v. Industry in the Smelter Cases of 1904 and 1906," *Utah Historical Quarterly* 53 (Fall 1985): 308–25; Morag-Levine, *Chasing the Wind*; John D. Wirth, *Smelter Smoke in North America: The Politics of Transborder Pollution* (Lawrence, KS, 2000); Duane A. Smith, *Mining America: The Industry and the Environment, 1800–1980* (Lawrence, KS, 1987). David Stiller, *Wounding the West: Montana, Mining, and the Environment* (Lincoln, NE, 2000).

⁷Getzler, *History of Water Rights at Common Law*, 154.

⁸William Blackstone, *Commentaries on the Laws of England: Book the Third*, special ed. (Birmingham, AL, 1983), 217–18.

⁹Prosser, *Torts*, 632. Prosser cites *Campbell v. Seaman*, 63 N.Y. 568 (1876) for these basic propositions. He further notes that there is no prescriptive right until the nuisance has done actual damage for the required period, again citing *Campbell*.

¹⁰The injunction issued by Judge McHatton required "stacks or chimneys or stack or chimney whose apex shall not be less than seventy-five feet above the surface of the earth at the base of such stacks, or chimneys or stack or chimney." Injunction, Dec. 31, 1891, Judgment Book D, p. 298, Silver Bow County Clerk of Court, Butte. See Don MacMillan, "Butte's Struggle to Abate Air Pollution, 1885–1891," in Robert Bigart, ed., *Environmental Pollution in Montana* (Missoula, 1972), 1–13; Donald MacMillan, "The Butte 'Smoke Mes-siahs' and Their War Against Air Pollution," *The Speculator* 1 (Summer 1984): 48–53; Duane A. Smith, *Mining America: The Industry and the Environment, 1800–1980* (Lawrence, KS, 1987), 45–46, 75–80, 94–95. Also see Gordon Morris Bakken, "An Inversion Layer in Western Legal History: Air Pollution in Butte, Montana," in Hendirk Hartog and William E. Nelson, eds., *Law as Culture and Culture as Law* (Madison, WI, 2000), 264–91.

The Montana Territorial Supreme Court had decided whether miners could run tailings down streams. In *Nelson v. O'Neal*, Justice Hiram Knowles tersely decided the case without citation after counsel for both sides had relied on California case law. The trespass action asked for damages and an injunction due to the erection of a tailings dam.¹¹ The jury had made special findings, including the fact that erecting a higher dam would interfere with the profitable mining operations of the appellant. Having stated the case in brief, Knowles decided the law issues. He declared that the appellant had "free use" of the water, "but he had no right to fill the channel of the creek with tailings and debris, and let it flow down upon respondent's ground."¹² Knowles decided a common-law trespass case in a traditional manner, but declared against the right to dump mine refuse into the waters of Montana. To do so could subject an offending miner to a private law action for damages or an injunction.

The California Supreme Court looked at a similar situation in *California v. Gold Run Ditch and Mining Company*. The case was a product of hydraulic mining's impact on California river navigation and farmland. The court took judicial notice of the fact that the Sacramento River was a "great public highway." The law provided that "an unauthorized invasion of the rights of the public to navigate the water fouling over the soil is a public nuisance; and an unauthorized encroachment upon the soil itself is known as a purpresture."¹³

The court also dispensed with the defendant's argument regarding identifying the company's debris amid the turbid waters. Why should one hydraulic mining operation be stopped when the pollution is the aggregate product of many hydraulic miners and the forces of nature? The court reminded counsel that it had frequently decided that in equity proceedings

¹¹1 Montana 284 (1871).

¹²1 Montana 284, 285–86. Knowles is considered to be one of Montana's finest territorial jurists. Gordon Morris Bakken, *The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850–1912* (Westport, CT, 1983), 17.

¹³66 Cal. 318 (1884). The synopsis of the case and its holdings is taken from Gordon Bakken, "Destructive Creation: *California v. Gold Run Ditch and Mining Company*," in John W. Johnson, ed., *Historic U.S. Court Cases, 1690–1900* (New York, 1992), 233–34. The debris cases were heard in both federal and state courts. The best book on the subject remains Robert L. Kelley, *Gold vs. Grain: The Hydraulic Mining Controversy in California's Sacramento Valley* (Glendale, CA, 1959). In Utah in 1904, the smelter interests would suffer a similar fate. See Donald MacMillan, *Smoke Wars: Anaconda Copper, Montana Air Pollution, and the Courts, 1890–1924* (Helena, MT, 2000), 106–107. Charles K. Hyde, *Copper for America: The United State Copper Industry from Colonial Times to the 1990s* (Tucson, 1998), 210.

involving an action to abate a public or private nuisance, "all persons engaged in the commission of the wrongful acts that constitute the nuisance may be enjoined, jointly and severally." It was the nuisance that would be enjoined if it were found to be destructive to public or private rights in property.

The mining company also argued that it had gained a right to pollute by custom, by prescription, and by the statute of limitations. The law protected enterprise regardless of the impact of the operations on businesses. It was quite clear that it had been the custom of miners from the earliest days to use water in placer mining and to allow the debris to fall where it may in the process. Based on their customs, many mining corporations had invested heavily in the process of hydraulic mining. They deserved the protection of the law in the pursuit of profit. The *Gold Run* court clearly rejected the implications of the argument and turned the essence of the common law on its claimants. "But a legitimate private business," the court wrote, "founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and when it develops into that condition, the custom upon which it is founded becomes unreasonable, because it was dangerous to public and private rights, and could not be invoked to justify the continuance of the business in an unlawful manner." Thus an enterprise, though creative and positive at its inception, could become destructive of economic development after many years of operation.

Further, the government could not absolve itself of its duty to protect a public trust. Although government could authorize uses of the waters and regulate them, it could not alienate the right of the people in their public waterways. Even more certainly, an enterprise could not gain the same position by prescription. There was no right to continue a public nuisance acquired by prescription. The court ordered a perpetual injunction. The waters were navigable, giving the public the cause of action. Both the state and the federal governments could proceed against damage to navigation, as was the case in California.

CALIFORNIA LAW IN BOOKS IN THE MONTANA MIND

The California case was Montana news. The Butte *Semi-Weekly Miner*, January 9, 1884, edition carried a story entitled "The California Debris Cases," giving the legal developments notice: "The farmers of Sacramento Valley, California, have gained the first victory in their suit with the hydraulic miners of the foot hill counties of that State." The *Miner* noted that

"the suit was instituted for the purpose of determining the right of miners to fill the channels of mountain streams with *debris* from their claims to the detriment of farms lying in the valleys below." The *Miner* opined that "the case will be appealed and will probably go to the Supreme Court of the United States. If the decision of the lower court be sustained the effect will be to lessen materially the gold output of the State. . . ." The *Miner* clearly understood that "Judge Sawyer's decision stops this work and unless miners employ some means by which the *debris* from their claims shall be retained now on their grounds, gold mining in California will be insignificant compared with former years."

Montana Attorney General Albert Galen sued a mining corporation for pollution in 1911 and obtained an injunction. On April 1, 1911, Galen filed *Montana v. Basin Reduction* in Jefferson County to stop the pollution of the Boulder River.¹⁴ The complaint alleged that Montana owned 360 acres in Jefferson County used as a farm in connection with the Montana School for the Deaf, Dumb and Blind, and drew irrigation waters from the river. The state claimed that it had a right to those waters free from "slime, debris, and tailings" that had "polluted and fouled" the waters. The complaint requested an injunction to prevent the deposit of "a great quantity of slime, debris, and tailings in the bed or bottom of said Boulder River and along the sides and in the channel of the stream."

Judge Lew Callaway issued an order to show cause at a hearing scheduled for April 7, 1911. That hearing was held on May 13, 1911, with the state of Montana represented by Albert J. Galen, Daniel M. Kelly, and M.H. Parker; the defendants were represented by M.S. Gunn, Charles R. Leonard, and the firm of Kremer, Sanders & Kremer. Counsel jointly requested that Judge Callaway inspect the grounds. After receiving testimony and evidence at the hearing, Judge Callaway issued an injunction on May 20, 1911, which "restrained and enjoined" the defendant "from dumping any tailings into Boulder River, whether said tailings be such as are produced by said defendants, or either of them, in the operation of the said concentrator or reduction works at the town of Basin, in Jefferson County, Montana, or such tailings as have heretofore been produced in the operation of said plant and are now on the dump adjoining said plant." Callaway further ordered that

all slimes produced in the treatment of ores at said reduction works or concentrator (except to the extent, and to no greater, that said slimes are now permitted to flow

¹⁴Civil case #1844, Jefferson County Courthouse, Boulder, Montana.

into said river above the railroad bridge across said river west and immediately above the depot of Basin, Montana) shall be conducted into a good, suitable and sufficient slum-dam or settling pond and permitted to settle thoroughly before the same or any of the water therein shall be discharged into said Boulder River.

On April 14, 1911, the attorney general wrote Professor L.E. Milligan at the Montana School for the Deaf and Blind at Boulder to explain the reason for the continuance in the injunction suit detailed above. Galen said that "Gunn & Hall, attorneys for the defendants have made it appear that the defendants are now hauling all of the tailings away in cars and that the damage, if any, which is now being occasioned to State and other lands in the Boulder valley can amount to nothing." Galen told him further that "they say that the only discharge now being made into the Boulder River is a small quantity of slime which amounts to nothing more than a slight discoloration of the water, and that the waters of the Boulder River are not now impregnated to any appreciable extent with either slime or tailings."¹⁵ On May 25, 1911, Galen wrote to the law firm of Kelly & Kelly in Boulder, representing interested parties, observing that "it seems to me that the order in its present form is sufficient to give guaranty against future damage to the property of the State or others resulting from the operation of the Basin Reduction Works."¹⁶ As events would soon prove, Galen's optimism was not well founded.

Emil Starz, an analytical and consulting chemist from Helena, offered scientific analysis of the water, finding a total mineral residue of 10.98 grains per gallon in August 1910 in Merrill's Ditch and 11.66 grains per gallon in First Ditch. Starz found 28.85 grains per gallon in a sample taken one-fourth mile below the settling reservoir at Basin on February 12, 1912, and 30.31 grains per gallon in a sample taken from the overflow of the settling pond below the concentrator at Basin on the same day.

On February 14, 1912, District Judge J.B. Poindexter found the Butte and Superior Copper Company and the LaFrance

¹⁵Galen to Milligan, 14 April 1911, RS 76, box 7, Montana Attorney General Subject Files, Montana Historical Society. Galen sent Judge Lew Callaway a similar letter on the same day. Galen's letter to D.M. Kelly of May 16, 1911, noted that "Mr. Gunn is desirous of having the form of Order modified so that on page two, line 22 after the word 'concentrator' there shall be inserted the words, 'except to the extent that same are now permitted to flow into said river.' I wish you would call Gunn's suggestion to the attention of the Court at the time the Order is presented to the Judge for his signature."

¹⁶Galen to Kelly and Kelly, 25 May 1911, RS 76, box 7, Montana Attorney General Subject Files, Montana Historical Society.



After a hearing in which he found the Butte and Superior Copper Company and the LaFrance Copper Company in contempt of Judge Callaway's injunction, District Judge J.B. Poindexter (above) fined the defendants \$250. (Courtesy of Montana Historical Society Research Center Photograph Archives, Helena, Montana)

Copper Company, and an official of each company, in contempt of the injunction. After the hearing, the judge fined the defendants \$250.

THE LIMITS OF LAW IN BOOKS AT THE OPERATIONAL LEVEL

The Boulder River was not yet free of the law or pollution. On March 6, 1917, Attorney General Sam C. Ford wrote to the Basin Salvage Company, telling them of the injunction and that he was "informed that your company is now, and has been for some time past, dumping debris and tailings from your works into Boulder River, and that by reason thereof the property of the State has been greatly damaged and that the injury to this property will become greater unless prompt action is taken."¹⁷ Ford hoped for "immediate action to prevent further damage."

Maxwell W. Atwater, president of Basin Salvage, responded on March 11, 1917, promising immediate action and narrating the recent history of the company. He "was well aware of the trouble . . . between the Boulder Valley farmers and the old Basin Reduction Company, caused by dumping tailings into Boulder River." He doubted that "any damage would result to the property of the farmers from this small tonnage." If riparian landowners "ever found that the tailings from his mill were causing the least damage to their property that he held himself ready and willing to commence impounding these tailings at the concentrator." After averring that he had received no complaints and that the river was sufficient to carry away the tailings, Atwater argued that "impounding of tailings is an expensive matter and unless the farmers can show a bona fide cause for complaint or unless you order it, we do not believe it the fair thing to compel us to incur this extra expense." Finally, he claimed that the water was fit for cattle to drink.¹⁸

The correspondence continued into the summer of 1917. Attorney General Ford wrote to Atwater on March 20, 1917, requesting "immediate action" to protect state property. Atwater replied on March 23, 1917, assuring Ford that he would "take prompt steps." Ford requested of H.J. Menzener, the

¹⁷Ford to Basin Salvage, 6 March 1917, RS 76, box 17, Montana Attorney General Subject Files, Montana Historical Society.

¹⁸Atwater to S.C. Ford, 11 March 1917, RS 76, box 17, Montana Attorney General Subject Files, Montana Historical Society.

president of the Montana School for the Deaf and the Blind, that he check on Atwater's progress.¹⁹ Menzener reported on May 9, 1917, that he "went to Basin Sunday and found both the Comet and Basin Mills dumping their tailings into the Boulder River. The water is polluted, and we will want to begin irrigating right away, but there evidently has been no move made to change this."²⁰ Ford wrote Atwater nine days later insisting on prompt action to avoid "the necessary proceedings to restrain your Company."²¹ Atwater responded on May 20, 1917, reporting the installation of a bucket elevator to lift tailings back into the old tailings dam, conversations with one valley farmer, a plan to aid farmers financially in the construction of dikes, and plans for a new impoundment dam. On June 6, 1917, he again told the attorney general that the new dam would be constructed when the waters receded. Ford told him six days later that "if the matter is pursued with reasonable diligence there will be no further complaint from this office."²² Rather than impounding the tailings immediately, the corporations played a holdup game that delayed any meaningful enforcement. This was simply part of a litigation strategy practiced most effectively on claimants that had no legal counsel.

The state of the law at the level of the attorney general was strictly focused on the protection of public property. Injunctions were possible and would be enforced to a certain degree. Regarding these particular participants, Lew Callaway went on to become chief justice of the Montana Supreme Court, Galen became an attorney for the Anaconda Copper Mining Company (ACMC) for a short time and later had a long career in public service, and Daniel M. Kelly also worked for ACMC as an attorney and corporate vice president.²³

¹⁹Ford to H.J. Menzener, 3 April 1917, RS 76, box 17, Montana Attorney General Subject Files, Montana Historical Society.

²⁰Menzener to Ford, 9 May 1917, RS 76, box 17, Montana Attorney General Subject Files, Montana Historical Society.

²¹Ford to Atwater, 18 May 1917, RS 76, box 17, Montana Attorney General Subject Files, Montana Historical Society.

²²Ford to Atwater, 12 June 1917; Atwater to Ford, 20 May 1917; Atwater to Ford, 6 June 1917; all in RS 76, box 17, Montana Attorney General Subject Files, Montana Historical Society.

²³See Lew L. Callaway, *Montana Frontier Lawyer: A Memoir*, ed. Vivian A. Paladin (Helena, 1991). While Kelly and Galen were attorneys for the company, they were fined \$500 each for contempt based on misconduct affecting a federal court jury. *In re Kelly et al.*, 243 Federal Reporter 696 (1917). The U.S. district attorney in that case was Burton K. Wheeler, later U.S. senator from Montana. His version of that particular trial may be found in Burton K. Wheeler with Paul F. Healy, *Yankee From the West* (Garden City, NJ, 1962), 110–14.

The actions of the attorney general of Montana mirrored, in part, the developing American law that was driven by an increased awareness of the impact of pollution on health, property values, and human habitation. In particular, the federal government committed resources to the investigation of air and water pollution and the development of law. The federal government was concerned about the destruction of the national forests and the navigability of rivers. Just as various federal agency crews arrived in Butte to look at geology and mine pollution, other federal studies of environmental law found print.

LAW IN BOOKS AT THE NATIONAL LEVEL

In 1904 the United States Government Printing Office (GPO) issued Edwin B. Goodell's *A Review of the Laws Forbidding Pollution of Inland Waters in the United States*.²⁴ Goodell started from the proposition that "no riparian owner . . . may . . . so corrupt or pollute [the water] . . . as to injure the [downstream] owners by diminishing the value of their property in the natural stream."²⁵ Goodell found California cases to be significant in the development of this part of American law, and he found that cases to the contrary in Pennsylvania had been repudiated. Finally, he established a link between pollution and public health.²⁶ This early compilation was not alone on the GPO's list.

In 1917 the GPO issued Public Health Bulletin No. 87 entitled *Stream Pollution: A Digest of Judicial Decisions and a Compilation of Legislation Relating to the Subject*.²⁷ The lawyer-authors arrived at conclusions similar to Goodell's, but had a great deal more to report about statutes and case law. They reported that "discharging waste from a manufacturing plant or mine into a stream is not a natural use of the stream and if done to the material injury of the

²⁴Edwin B. Goodell, *A Review of the Laws Forbidding Pollution of Inland Waters in the United States: Department of the Interior, U.S. Geological Survey, Water Supply and Irrigation Paper No. 103, Series L, Quality of Water* (Washington, DC, 1904).

²⁵*Ibid.*, 8.

²⁶*Ibid.*, 116.

²⁷Stanley D. Montgomery and Earle B. Phelps, *Stream Pollution: A Digest of Judicial Decisions and a Compilation of Legislation Relating to the Subject* (Washington, DC, 1917).

lower riparian proprietor, creates liability for damages."²⁸ Further, "the fact that a manufacturer is engaged in an important industry, the operation of which benefits the public, will not be held to excuse him for polluting the stream to the injury of the lower proprietor."²⁹ The authors also mention the fact that cases to the contrary were a judicial aberration.³⁰ Dealing with post-bellum New York case law, the authors noted that courts had found that "a right to create a public nuisance cannot be acquired even by prescription."³¹ Finally, the authors reprinted Montana's Revised Code of 1907 provisions establishing a state board of health, creating a definition of nuisance, and punishing the willful poisoning of the water supply, the befouling of watersheds, the dumping of coal slack into the streams, the poisoning of fish, and the dumping of sawdust, bark, or chemicals into the water.³²

One reason for this federally sponsored exposition of the law is jurisdictional concepts at the turn of the century.³³ The federal government had limited legal means to deal with pollution unless it involved interstate commerce, navigable waters, federal lands, or the like. On October 14, 1916, W.G. Stimpson, acting surgeon-general of the United States, wrote in a letter to Morris Bien, acting director and chief engineer of the United States Reclamation Service, Department of the Interior, regarding the pollution of the Flathead River: "[I]n cases of injury through pollution from the source mentioned it would appear that the right to redress would have to be

²⁸Ibid., 17.

²⁹Ibid., 23.

³⁰Ibid., 31.

³¹Ibid., 70.

³²Ibid., 264. They also noted that *Miles City v. State Board of Health*, 39 Mont. 405 (1909) had held that no one could gain a prescriptive right to pollute as against the state. Ibid., 100–101. The U.S. Government Printing Office published another reprint from the Public Health Reports of January 26, 1917, as Earle B. Phelps, *Control of Pollution of Streams* (Washington, DC, 1917).

³³See Samuel Charles Wiel, *Water Rights in the Western States* (San Francisco, 1905, 1908, 1911). This was the most substantial treatise on prior appropriation law and included some materials on pollution in state law. State law applied in cases of water rights as well as nuisance.

based on the principles of the common law or the statutes of the States in which the offense occurs."³⁴

WHY LAW IN BOOKS AT THE STATE LEVEL WAS SIGNIFICANT

Events taking place in the state courts in the years before World War I turned nuisance law against the pecuniary interests of businesses. Christine Rosen's 1993 study of nuisance law in the courts of New York, New Jersey, and Pennsylvania demonstrates that a dramatic change of position was taking place. Rosen found, "It is quite clear from the language that judges used to overturn balancing that they were beginning to weigh the harm and discomfort people suffered as a result of industrial pollution more heavily in the balance." Further, looking at the language judges used, "they believed it was unconscionable that homeowners and farmers, no matter how poor, be forced to suffer the environmental degradation of a neighboring business when it was technologically possible for the business to alleviate the problem." Rosen saw that "in the judges' minds, the value of protecting people from unrestricted pollution not only had to take precedence over the values of promoting economic growth, but also over making injunction decisions contingent on an assessment of the costs as well as the benefits of pollution abatement." To these judges, "the right of people to be protected from unnecessary pollution was so important that they could safely and fairly ignore the costs of forcing businesses to abate their pollution." In the environmental age, "that the cost to the polluter of installing pollution abatement technologies might be far greater than the benefit to the plaintiff was irrelevant."

Rosen argues that "economics was not the issue. Rights were." She focused on the New York State Court of Appeals case, *Whalen v. Union Bag & Paper Co.*, the case in which it

³⁴Stimpson to Bien, 14 October 1916, RG 90, Records of the Public Health Service, box 303, National Archives, Washington, DC. The federal investigations of smelters in the West did turn up potential public health threats early in the century. J.K. Haywood's *Injury to Vegetation by Smelter Fumes* (Washington, DC, 1905), p. 22, noted in the Mountain Copper investigation in California that "an analysis of the water from a creek which runs alongside the smelter and empties into the Sacramento River was made, and it was found that the water was not only very acid, but contained a trace of arsenic and 1 milligram of dissolved copper per liter. It can easily be seen that these constituents might have an extremely injurious action upon the fish, upon crops irrigated by the Sacramento, and upon persons who might drink the water."

overturned balancing: "Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich." It was wrong, the court went on to say, to put "the hardship on the party in whose favor the legal right exists instead of on the wrongdoer."³⁵ Rosen cites several reasons for this shift, but it is clear that, with some exceptions, judges were favoring plaintiffs, with injunctions and damages putting the burden of pollution abatement on the offending facility.

The Anaconda Copper Mining Company was very aware of the trend and adopted a strategy of buying interests in or the lands of potential plaintiffs. One example of the disturbing trend was the quest for the opinion in *Anderson v. American Smelting*. This judicial development was only one element in risk management for the company.

WHY FEDERAL LEGISLATION WAS A CROUCHING TIGER

At the turn of the twentieth century, Congress legislated for American waters. In 1899, Congress passed and the president signed the Rivers and Harbors Act of 1899. Ransom Cooper, a Great Falls, Montana, attorney, wrote a letter dated January 23, 1909, that made the significance of the act for smelting interests abundantly clear to Charles W. Goodale, the manager of the Great Falls reduction works. Cooper reminded Goodale of "Senator Powers' letter of the 18th inst. to you, containing the statement that navigation on the Missouri river will be resumed next season, and that a small steamboat is to be put on the river to run between Bismark [sic] and Fort Benton." The letter made him "again call your attention to the matter which has been frequently discussed of speedily making arrangements to stop dumping in the river." Like any good lawyer, Cooper set out the language of "Federal statute applicable (30 Stat. L. 1152)."

Cooper then reminded Goodale that times had changed:

In these days in which the delinquencies of corporations are being looked up with so much diligence it is not

³⁵Christine Rosen, "Differing Perceptions of the Value of Pollution Abatement across Time and Place: Balancing Doctrine in Pollution Nuisance Law, 1840-1906," *Law & History Review* 11 (Fall 1993): 303-81, 374.



Charles W. Goodale, above, manager of a Great Falls reduction works, was advised by attorney Ransom Cooper that, to avoid a federal indictment or lawsuit, the company should stop dumping smelting refuse in the Missouri River. Photograph by Dusseau & Thomson, Butte, Montana. [Courtesy of Montana Historical Society Research Center Photograph Archives, Helena, Montana]

impossible that we might be indicted under this statute, or at least that the Department of Justice might seek to restrain such dumping.

Further, it was not

beyond the realm of possibility that the Federal authorities might take it upon themselves to sue us for damages for obstructing the river, and while the danger of an action for damages is more or less remote, in view of the fact that navigation to some extent is to be resumed on the river, it ought not to be taken for granted that matters will be permitted to continue as they are very long.

Finally, if the steamboats were to run aground and slag were to be found in the sand bars, the company could face a federal lawsuit. Cooper had a plan to avoid liability: "Accordingly, it seems to be that plans looking to the early abandonment of the river as a sluice-way for smelter refuse should be adopted at as early a date as practicable."³⁶ Although the Missouri River was clearly navigable and subject to federal law, the Clark Fork River at the Silver Bow Creek in Anaconda was not considered navigable until 1985.

The rule of law for navigability was navigability in fact. The Montana Supreme Court, in *Gibson v. Kelly*, declared, "The common law was therefore modified, and the rule is now established by the overwhelming weight of American authority that a stream navigable in fact is navigable in law."³⁷

The federal rule of a floating sawed log being sufficient to establish navigability in law was adopted in Montana.³⁸ In 1910, in a letter from James M. Self to Montana Senator Joseph M. Dixon, the question of whether the Clark Fork River was navigable was an issue. The admission that a portion of the river was non-navigable gave "absolutely under the law the bed of the river to the defendants by virtue of their ownership of both banks of the river."³⁹ The issue of navigability had consequences in terms

³⁶Goodale was the manager of the Boston and Montana Consolidated Copper and Silver Mining Company housed in Butte. The reduction works in question was in Great Falls. See Gordon Morris Bakken and J. Elwood Bakken, "The Gold Fish Died: Great Falls, Fort Benton, and the Great Flood of 1908," *Montana: The Magazine of Western History* 51 (Winter 2001): 38–51.

³⁷15 Mont. 421 (1895).

³⁸*Montana Coalition for Stream Access, Inc., et al. v. Dennis Michael Curran*, 210 Mont. 38 (1984). *James E. Edwards v. Roy E. Severin*, 241 Mont. 168 (1990).

³⁹Self to Dixon, 11 June 1910. mss., Joseph M. Dixon Collection, box 11, University of Montana Archives, Mansfield Library.

of streambed ownership issues, but it was also a jurisdictional question when the federal government was involved.

For the federal government to sue, navigability had to be established to enforce the Rivers and Harbors Act of 1899. Ligon Johnson, the federal government's expert in mining cases, explained the situation to the United States attorney general in 1909. "The chief objection to selecting the Anaconda suit for the leading case," Johnson wrote, "was the difficulty of establishing injury to navigable streams, which could easily be done at Kennett [the water courses from Anaconda flowing through a chain of lakes before reaching any navigable body of water]." Politics was another problem. Johnson noted "that the U.S. District Attorney of Montana was closely identified with the copper company faction and owed his appointment to the two U.S. Senators from that state, who were making a most strenuous opposition towards the institution of any legal proceedings."

Beyond politics, Johnson doubted the judgment of the federal district judge in Montana. He cited the Deer Lodge Valley farmers' suit against Anaconda.⁴⁰ For Johnson, working on smelter pollution cases throughout the West, the issue of navigability on the Clark Fork was, among others, a significant one. Yet federal law proved to be a paper tiger.⁴¹

HOW COUNTY TRIAL COURT RECORDS REVEAL THE OPERATIONAL LEVEL OF LAW

The law in books had a great deal to do with the law in action, but the law in action in the county trial courts of Montana was not much more favorable to plaintiffs than appellate opinions were. Although seldom mined by legal historians, trial court records reveal a course of conduct leading to a corporate general policy regarding potential plaintiffs.⁴²

In 1897, two cases filed in the Deer Lodge County District Court, *Ephraim Staffanson v. Anaconda Copper Mining Corporation* (case #1305) and *Mary Holby v. Anaconda Copper Mining*

⁴⁰Johnson to Attorney General, 5 June 1909, mss., box 514, RG 60, Department of Justice Central Files, Straight Numerical Files (Folded), National Archives.

⁴¹See Bakken and Bakken, "The Gold Fish Died," 38–51.

⁴²This observation is certainly not solely mine. Compare Peter King, *Crime and Law in England, 1750–1840: Remaking Justice from the Margins* (Cambridge, UK, 2006); John R. Wunder, *Inferior Courts, Superior Justice: A History of the Justices of the Peace on the Northwest Frontier, 1853–1889* (Westport, CT, 1979). Specifically on litigation strategy on property litigation, see Bakken, *Practicing Law in Frontier California*, 51–98.

Corporation (case #1310) alleged water pollution.⁴³ Holby's complaint alleged, "tailings, sand and debris . . . have almost entirely filled the channel of said Dutchman Creek." These waters polluted by the defendant were "unwholesome and unfit" for irrigation and had "filled up and destroyed the ditches built by plaintiff." The company answered with blanket denials. In the *Staffanson* case, the company denied

that defendant uses any deleterious or poisonous chemicals in or about the reduction of its ores, although it admits that quantities of arsenic and possibly deleterious chemicals or substances are found in the ores and are extracted therefrom in the process of reduction, and denies that all of the waters used by the defendant become charged with poisonous chemicals or copper.

The company handling individual claimants evolved its litigation strategy. Denying the pollution put the plaintiff in the position of proving injurious pollution by a particular company at a specific place and time. That required time and money for experts, but mining companies had one more legal defense up the sluice.

Abraham Beckstead filed suit against Anaconda Copper Mining Company on June 14, 1900, similarly alleging pollution of the Deer Lodge River via the Silver Bow Creek, dating back to 1895.⁴⁴ Cornelius F. Kelley was one of the company attorneys handling the case, and after demurrers and stipulations giving the company time to answer, the company attorneys filed an answer on March 11, 1901. The answer included a denial of the specific pollution. Other denials were general, but on April 8, 1901, in an amended answer, the company changed its position and its defense strategy. The company admitted that "in the month of June, 1895, this defendant became, ever since has been and now is the owner of said smelting and reduction works, and that it has ever since becoming such owner engaged in and is now operating and conducting the same." Further, the company admitted "that since the said last named date this defendant has diverted the whole of the waters of Warm Springs

⁴³*Ephraim Staffanson v. Anaconda Copper Mining Corporation*, case #1305; *Mary Holby v. Anaconda Copper Mining Corporation*, case #1310, Deer Lodge County District Court (1897).

⁴⁴*Abraham Beckstead v. Anaconda Copper Mining Company*, case #1855, Deer Lodge County District Court (1900). Please note that the quotations for this case and those that immediately follow are from the manuscript trial court record of the case. Quotations in the text after the footnote to the case file are from the manuscript record in the case file in the respective county courthouse.



Cornelius F. Kelley was one of the company attorneys who defended Anaconda Copper Mining Company against lawsuits related to pollution of nearby waters. (Courtesy of Montana Historical Society Research Center Photograph Archives, Helena, Montana)

Creek therefrom and has used the same in and about such smelting and reduction works in the conduct of such business." Finally, the company admitted that it used "water and so conducted its business that the waters aforesaid have been impregnated with and have carried away tailings and other substances and refuse matter produced in and resulting from such

smelting and reduction operations." The company then denied that this did the plaintiff any damage "in any sum whatever."

Having changed from a denial to an admission of tailings and refuse pollution of the waters, the company then alleged facts needed to establish a prescriptive easement defense. The company argued that since 1884, a smelting and mining company now absorbed into the Anaconda Copper Mining Company had been using these waters and polluting them with tailings and other refuse matter. This use was open, notorious, continuous, and peaceable. In so admitting pollution of the waters, the company was attempting to establish the common-law defense of prescription, but that was not the only change of defense tactic.

The company also set up a defense under the balancing test as well as a claim of technological impossibility. Further, if an injunction were issued, the company would be forced to shut down, resulting in a parade of horrors. First, the company employed more than 2,000 men at the smelter and reduction works. Second, in Butte more than 4,000 men were employed in mining and handling ores headed for the Anaconda facility. Third, the city of Anaconda was totally dependent on the company and was home to 9,453 people, according to the 1900 census. Finally, more than 25,000 people were economically dependent on the continuation of the smelting and reduction operations. This language was aimed at setting up facts needed for a balancing test holding of the court.

The company attorneys, led by A.J. Shores and W.W. Dixon, signed the amended answer, but the case did not proceed to judgment, settling on August 29, 1903. What is significant about the legal documents is their admissions of pollution and their asserted defenses. A litigation strategy taking advantage of common-law defenses had emerged.

Suits against the Anaconda Copper Mining Company were not the only mining pollution cases in the Deer Lodge County District Court. J. and Henry Watson filed a series of cases on September 16, 1901, against the Colorado Smelting and Mining Company, alleging that the company had dumped poisons in Silver Bow Creek.⁴⁵ In *Watson and Watson v. Colusa Parrot Mining and Smelting Company*, the defendant also set up the prescriptive easement defense with Butte facts in a November 23, 1901, answer.⁴⁶ Colusa admitted pollution dating back to 1887

⁴⁵J. *Watson and Henry Watson v. Colorado Smelting and Mining Company*, case #2001, Deer Lodge County District Court (1901). Also see case #2002 against the Parrott Silver and Copper Co. and case #2003 against the Butte and Boston Consolidated Mining Co.

⁴⁶J. *W. Watson and Henry Watson v. Colusa-Parrot Mining and Smelting Company*, case #2005, Deer Lodge County District Court (1901).

but then denied "that any of its acts in fouling or polluting or corrupting the waters of Silver Bow creek and Deer Lodge river have been unlawful or wrongful." Colusa argued that all of these acts were lawful. The answer went on to claim credit for its predecessors in interest dating back to 1887. They had impregnated the same [Black Tail Deer Creek, a tributary of Silver Bow Creek] with "quantities of tailings and other substances." Further, they had "a prescriptive right as against the plaintiffs . . . to continue . . . to use and pollute the waters. . . ." The litigation strategy was clear.

The case went to trial on February 18, 1902. After hearing the evidence, hearing arguments, and receiving instructions from the judge, the jury awarded the plaintiffs \$3,000 at 8 percent per year until paid and \$433.90 costs. Judgment was entered February 25, 1902. With this turn of events and an appeal, the cases settled on November 10, 1903. The appeal resulted in a new trial at which the plaintiffs refused to introduce new evidence and the court dismissed the action. The settlement of 1902 had made the formality of dismissal on the record necessary.

The developing law of nuisance and defenses thereto were very much a part of the living law in the trial court of Deer Lodge County sitting in Anaconda. The company had shifted from denials to admissions of pollution, but to no avail, as the *Watson* case demonstrated.

The company also ran afoul of ranchers in Powell County and found them to be of a different breed. Rather than small ranchers with limited means such as Rasmus Jendresen, men such as Peter Valiton, N.J. Bielenberg, and Conrad Kohrs were claimants against the company who had attorneys skilled in litigation and the resources to stay the contest. Further, these were men of substantial influence. Kohrs, for example, had been a member of the 1889 Montana Constitutional Convention, and his ranches spread from the Deer Lodge Valley to Canada.⁴⁷ Regardless of the reputation and wealth of the plaintiffs, their lawsuits and claims did not look much different from those filed in Deer Lodge County. The place of trial in Deer Lodge County was Anaconda, and in Powell County the place of trial was Deer Lodge, home of the territorial penitentiary.

⁴⁷Gordon Morris Bakken, *Rocky Mountain Constitution Making* (Westport, CT, 1987), 16. Conrad Kohrs, "Autobiography of Conrad Kohrs," mss., Montana Historical Society, Helena. Peter Valiton was born in France and emigrated to the United States in 1856, moving to Deer Lodge in 1867 to establish a general merchandising business in Deer Lodge and Butte. Valiton's Brewery was a fixture in Deer Lodge and produced the second-largest revenue returns of any brewery in the territory, producing nearly one thousand gallons per month. Valiton sold the brewery and turned to ranching about 1878. Dorene Courchene, ed., *Powell County: Where It All Began* (Deer Lodge, MT, 1989), 119-20.



Peter Valiton was an influential rancher who filed a complaint against the Anaconda Copper Mining Company regarding pollution of the Deer Lodge River, from which he had drawn water for irrigation and domestic purposes for more than thirty years. (Courtesy of Montana Historical Society Research Center Photograph Archives, Helena, Montana)

Peter Valiton filed his complaint against the Anaconda Copper Mining Company on June 19, 1902. Edward Scharnikow of Deer Lodge, an attorney of legal and political ability, represented Valiton.⁴⁸ The complaint Scharnikow crafted alleged that Valiton owned a 60,000-acre ranch, that he had been in possession of the ranch for more than thirty years, and had taken water from the Deer Lodge River for irrigation and domestic purposes during the period of his possession. Further, Valiton asserted a prior appropriation right in this water. With these waters on these lands, Valiton had a stock-raising and dairy business that had been, for the years 1897 to 1901, made "sterile, fruitless and unproductive" due to the "acids, poison, chemicals, debris and other deleterious substances" that "polluted, fouled and corrupted" the Deer Lodge River. One of the allegations was that these polluting materials were carried "through a ditch or race-way constructed and owned by the said defendants into the Deer Lodge River, thereby polluting and corrupting the waters of the said Deer Lodge River. . . ." Valiton demanded \$2,000 for domestic water supply, \$15,000 for lost crops, \$5,000 for ruined irrigation ditches, and \$25,000 for tailings damages to land.⁴⁹ Scharnikow had taken away the coming to the nuisance argument as well as the prior right to water use defenses that the company asserted in other litigation. The plaintiff's bar also was learning a strategy.

After the usual motions and an amended complaint filed July 14, 1906, the company answered on April 12, 1907. Included in the answer to the amended complaint was an admission that the company had sluiced tailings and debris into Warm Springs Creek. But the company denied the alleged purpose of the ditch and claimed "that its purpose was merely to convey the same away from the premises of the defendant, and to so distribute the same as to cause the least possible injury." This admission and denial were linked to the company's affirmative defense.

The defense again was prescription. The company admitted that it had polluted since 1884, but no more than was necessary for reasonable business purposes. The company asserted that the Anaconda Mining Company gained a prescriptive right and easement, that the Anaconda Copper Mining Company succeeded to that interest by purchase, and had continued "impregnating the waters of said stream and fouling the same with tailings and other refuse matter,"

⁴⁸*Anaconda Standard*, October 13, 1912.

⁴⁹*Valiton v. Anaconda Copper Mining Company*, case #48, Powell County District Court [1902].

thereby retaining "the prescriptive right to continue perpetually to so use such waters. . . ."

The company also argued the balancing test and asserted impossibility regarding moving the smelter site. First, the company argued technology, declaring that in "process of concentrating, small quantities of tailings and other debris, both in suspension and solution, have been and are necessarily permitted to escape and flow away with the waters of said Warm Springs Creek and into the Deer Lodge River." Further, the company took "every precaution and step . . . to prevent any needless or unnecessary pollution." Finally, there was no place for the company to carry on its business except where it had built the reduction facility. So the company lawyers asserted. The case was dismissed as settled on November 10, 1910. The legal process bought the company time, but not an established legal defense. Peter Valiton, in the end, took cash, and the company an easement in the settlement.

N.J. Bielenberg and William T. Elliott filed their lawsuit against the company on May 17, 1905.⁵⁰ They alleged that the smelter belched harmful "sulphur dioxide, sulphuric acid, sulphurous acid, arsenic, copper and other noxious and poisonous substances" that killed "crops growing on said premises" and poisoned "livestock in that portion of said Deer Lodge Valley, causing large numbers of horses, sheep, cattle and swine so poisoned to sicken, and a great many to die." Their attorney, Robert L. Clinton, had alleged facts to fend off the coming to the nuisance defense.

Next, Clinton anticipated motions regarding joinder—the uniting of two or more persons as co-plaintiffs—and parties alleging that "it requires several thousand dollars expense to prepare a suit for trial on the part of said farmers or anyone of them. . . ." Further, "no one farmer alone can prepare his case for trial without such expense, and that as several suits must be instituted from year to year to recover damages for loss of crops and livestock" and the farmers were unable to farm profitably because of the smoke, they, of necessity, were in court together rather than singly in separate suits.

Clinton also alleged facts in the pleadings to explain why the farmers had waited until 1905 to sue in an effort to attack the laches defense (waiting too long to file a lawsuit). The complaint stated that "such precipitations of said poisonous and noxious substances from said smelter fumes and smoke are insidious and cumulative and great damage has been done from time to time before the farmer is aware of the presence of said poisonous and noxious substances. . . ."

⁵⁰*N.J. Bielenberg and William T. Elliott v. Anaconda Copper Mining Company*, case #142, Powell County District Court (1905).

He also anticipated the balancing test in another allegation in the complaint. Clinton claimed that more than two million dollars of real property in the smoke zone had been damaged. Further, more than one hundred homes would be destroyed and their residents rendered homeless by the fumes.

Clinton alleged facts going to issues of whether damages at law or an injunction in equity was proper. The farmers wanted an injunction, and Clinton alleged that without an injunction "relief [was] impracticable if not futile." He went on to note that closing the smelter would allow the rains to wash away the poisons and restore the valley.

The company, through its attorneys A.J. Shores, Cornelius F. Kelley, and D. Gay Stivers, answered on June 7, 1905. After a series of general admissions and denials, including one denial that any farmers resided in the valley before 1884, the company admitted that there was arsenic, sulfur, and copper released into the air in the smelting process, but denied that it caused any damage. After this general denial of causation of any damage, the company went on to allege facts necessary to a prescriptive easement defense. The answer regarding air pollution was little different from the water pollution prescriptive defense. The legal conclusion the answer suggested was that the Anaconda Mining Company possessed a "prescriptive right as against the plaintiffs and all others similarly situated" and that the company succeeded to that right and maintained it. But that was not the only defense.

The company also averred facts to fit a balancing test defense. The answer alleged that the lack of notice of maintaining a nuisance led the company to expend millions of dollars in improvements and the building of the Washoe Smelter. The Anaconda site was the only one suitable for the smelter, and, if it were closed, the county of Silver Bow would lose about "forty per cent" of its tax revenues.

The legal conclusion from all of this in the company's eyes was simple: an injunction was not warranted, and the plaintiff's remedy at law was "plain, speedy and adequate." But the plaintiffs were guilty of laches by company lights and should take nothing from the suit except the defendant's "costs and disbursements." So said the company.

CONCLUSION: ENVIRONMENTAL LAW PRACTICED ON THE LOCAL LEVEL REVEALED THE LIMITS OF LAW

The developing law on the ground in the courts of Butte, Anaconda, and Deer Lodge was the common law of nuisance

and the norms of civil procedure. What is important about this developing law is that it did not favor the interests of the company, necessitating the development of a litigation strategy. First, the common law to which every schooled lawyer in nineteenth-century America referred was from *Blackstone*. It taught the practicing bar a simple lesson. Smelters that polluted the air and water violated the common law of nuisance. Second, state courts of the East generally favored plaintiffs. With the exceptions of Pennsylvania and Indiana cases, most appellate opinion favored trial court judges granting injunctions, levying damages, or fashioning equitable remedies.

Montana's appellate court found that there was no right to dump tailings into streams. The federal government forbade dumping in navigable streams, and California's supreme court had declared clearly against dumping in navigable streams. In Butte, a judge had exercised his equitable authority to enjoin heap-roasting operations on common-law grounds. Without a great deal of scientific knowledge, judges believed that arsenic and sulfur dioxide killed. They only had to look out a window in Butte and see the stumps of dead trees to find relevant evidence of the destructive power of smoke laced with poisons. In Anaconda, Rasmus E. Jendresen saw the good and the bad, the cows of a rainy spring and summer prospering, and those of dry seasons failing. He believed that the smelter fumes had something to do with health. But lay observation and scientific knowledge would clash when the litigation strategy culminating in the *Bliss* case dominated the time of the company's legal staff.

For lawyers advising a smelter client, the law favored plaintiffs from the time of *Blackstone*, but there were defenses. As noted above, most of these defenses were falling before late nineteenth-century judicial scrutiny. Further, cities like Butte were legislating to limit reduction activities. In this legal environment, the industrial company had limited options. It could mitigate, abate, or litigate. Failing these three, it could buy up the interests of potential plaintiffs and continue business as usual, knowing that continued pollution further depreciated downstream and downwind plaintiffs' property values. In addition, delay favored the company that had sufficient resources to stay the course of long legal battles.

Taking the long view of western mining, and the Anaconda Copper Mining Company in particular, Jared Diamond observed, "The mining industry evolved in the U.S. with an inflated sense of entitlement, a belief that it is above the rules, and a view of itself as the West's salvation—thereby illustrating

the problem of values that have outlived their usefulness."⁵¹ Winning nuisance cases or buying out complaining farmers only strengthen this industry attitude.

Although Diamond's conclusions are not based on the period studied here, it is nonetheless clear that the industry attitudes evolved from their successful litigation strategy. Few lawyers thought beyond the jurisprudence of the Gilded Age and the Progressive Era to envision Earth Day. Why would they? They had devised successful strategies. Mining companies prospered with world market prices for their products, and claimants usually settled their suits without trial. These legal history conclusions resonate with Jared Diamond's observation. The limits of common-law remedies clearly articulated in law and politics in the late twentieth century spawned state and federal statutes and case law to bring the industry to account for its Gilded Age behavior in the Age of Aquarius.

⁵¹Diamond, *Collapse*, 461–62.

BOOK REVIEWS

American Sovereigns: The People and America's Constitutional Tradition Before the Civil War, by Christian G. Fritz. New York: Cambridge University Press, 2008; 427 pp.; notes, index; \$80.00 cloth.

Traditionally, constitutional history has traced a path from the 1787 Constitutional Convention through a panoply of Supreme Court decisions and formal amendments to arrive at our modern regime. The antebellum era is, more often than not, marked by heroic monuments: *Marbury v. Madison* (1803); *McCulloch v. Maryland* (1817); *Gibbins v. Ogden* (1824); and—somewhat less heroically—*Dred Scott v. Sandford* (1857). This court-centered history enjoys a wide popular following from a generation raised on the belief that constitutional law is, after all, law. It belongs to the courts and, in the last resort, to the Supreme Court. Any proper constitutional history, or so the belief goes, ought principally to tell the Court's story.

So it might surprise some that Christian Fritz's marvelous new book, *American Sovereigns*, deals seriously with only one court case—*Luther v. Borden* (1849)—and even that one fails to make an impression. In Fritz's formulation, the contours of American constitutionalism were worked out by the people-at-large in a variety of settings, both formal and informal. The primary constitutional question of the antebellum era, Fritz contends, was how the people could act as a collective sovereign.

Practically, this could manifest itself in several ways. The people might revise or amend their constitutions. They might bypass established amendment procedures and call constitutional conventions, effectively nullifying old arrangements. Or they might express their sovereign will by more benign means—for example, by sending instructions to legislators to redress specific grievances or to repeal obnoxious laws. Precisely how the sovereign will could be expressed appropriately was a matter of serious debate in antebellum America. Fritz's choice of constitutional landmarks to plot his narrative demonstrates his sensitivity to this fact. Beginning with Shays' Rebellion (1786), he moves through the Constitutional Convention to a detailed history of the Whiskey Rebellion (1791–94), to the Virginia and Kentucky Resolutions (1798–99), to the Hartford Convention (1814), to the Nullification Crisis (1833), and finally closes with the Dorr Rebellion (1841–42) in Rhode Island.

These disputes, Fritz contends, are appropriate sites for exploration because contending parties were forced to articulate precisely how the people could act in their sovereign capacity. A fundamental belief in the people as sovereign undergirded all parties in these conflicts, but the proper role of the people almost never occasioned agreement. Revolutionary lights (and federal framers) like Alexander Hamilton and George Washington argued strenuously against people coming together in "certain self-created societies" to discuss political matters, and they denounced as illegal the citizens' assemblies in western Pennsylvania that had called for the repeal of the whiskey excise tax. Thomas Jefferson and James Madison, on the other hand, sympathized with such dissent and encouraged the robust exercise of the sovereign will of the people.

Jefferson's victory in the election of 1800 vindicated the people as active participants in democracy, but it did not end the debate. In the 1830s it resurfaced as South Carolina contemplated nullification of a federal statute. Committed Jeffersonians (like President Andrew Jackson) now found themselves arguing that the Union was sacred and perpetual, thus prohibiting certain actions by the people acting as collective sovereigns (such as, for instance, South Carolinians nullifying a congressional tariff). However, the belief in the right of the people to act as sovereigns persisted, and by mid-century something of a constitutional middle-ground had been staked out. Between the poles of strict obedience to established procedure and outright revolution, the people retained the right to alter or abolish unjust governments and to watch vigilantly over their operations. This, Fritz argues convincingly, rather than reverence for procedural amendments, dominated the American constitutional tradition.

Somewhat troubling is the absence in Fritz's book of any mention of slavery. Slavery was central to the antebellum constitutional order, as scholars of the last generation have labored tirelessly to prove. Slavery's absence in *American Sovereigns* disappoints most because its inclusion might well have strengthened Fritz's argument. The territorial disputes over slavery in Missouri (1819–20) and Kansas (1854–60) raised constitutional issues about the people's role as collective sovereign. State authorities in Wisconsin, Ohio, and Massachusetts justified interposition to obstruct the Fugitive Slave Act of 1850 on the grounds that they were expressing the sovereign will of the people.

Such criticism serves only to highlight the richness of the history Fritz seeks to illuminate. This book succeeds in its task of bringing to light a central constitutional issue too often neglected today. It does so in lively style, peppered with compel-

ling stories and incisive analysis. It should be read and enjoyed by academics, judges, lawyers, and anyone else interested in our constitutional history.

H. Robert Baker
Georgia State University

Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory, by Christian W. McMillen. New Haven and London: Yale University Press, 2007; 284 pp.; maps, notes, index; \$38.00 cloth.

In 1941, when the Supreme Court issued its fifteen-page opinion on *United States v. Santa Fe Pacific Railroad Company*, it not only set the stage for the massive cases presented to the Indian Claims Commission, but it helped mold the discipline of ethnohistory. Felix Cohen and Nathan Margold spent two days in November 1941 arguing the case for the United States, in behalf of the Hualapai Indian Tribe. Just three weeks later Justice William O. Douglas, writing for a unanimous court, included a short statement that would have a far-reaching impact on tribal litigation in the twentieth century. He said the court had concluded that "occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." That opinion not only made the Indian Claims Commission possible; it probably made it necessary. The determination of tribal exclusive use and occupancy of aboriginal territory led directly to the development of ethnohistory as a new discipline, combining elements of ethnographic fieldwork and historical research.

The history of this very complicated case has been laid out excellently by historian Christian W. McMillen. In 1866 Congress passed an act granting lands to the Atlantic and Pacific Railroad Company to encourage the construction of a rail line. The railroad was granted alternate sections within forty miles on either side of the railroad's tracks. When the tracks were finally laid through western Arizona by the Santa Fe Pacific Railroad Company, successor to the Atlantic and Pacific, they passed near the southern boundary of the recently established Hualapai Indian Reservation. The Hualapai Reservation had been made permanent by a presidential executive order, issued in 1883, and the Santa Fe Pacific Railroad Company claimed ownership of alternate sections within the forty-mile limit and inside the Hualapai Reservation.

The battle over ownership of those tens of thousands of acres went on for decades, until it was finally settled in the

Hualapai's favor in the 1940s. McMillen ably demonstrates how Hualapai leaders, in particular Fred Mahone, vehemently and consistently argued that the reservation land was their land since time immemorial. It had been Hualapai land, they said, prior to the establishment of their reservation. How could it be that the small portion of their aboriginal territory preserved for their benefit by the United States could be cut apart so that the railroad could take a great swath of the little they had left?

The Hualapai were fortunate to have able leaders who argued their case energetically to government officials. They were also fortunate to have the support of knowledgeable attorneys from the Justice and Interior Departments. First R.H. Hanna and then Margold and Cohen argued in their behalf. Cohen, who possessed one of the most brilliant minds on federal Indian law in the twentieth century, had just published his *Handbook of Federal Indian Law* before he made his arguments before the Supreme Court in 1941.

The Hualapai were desperately poor, with few resources, fighting against a well-funded corporate railroad, which had powerful allies in government, including Senator Carl Hayden. McMillen not only provides the necessary detail to understand the complexity of the litigation, the interdepartmental government conflicts, and tribal participation in the legal battle; he also provides a narrative with tension and eventual climactic drama that draws the reader through the history of events leading to the final settlement.

In the end, the Hualapai were able to demonstrate aboriginal title, both in the Santa Fe Railroad case and in their later Docket 90 before the Indian Claims Commission. Their reservation remained intact. Interestingly, after title to the reservation lands was quieted, the Justice Department continued an action to obtain title to checkerboarded lands in a ten-mile strip outside and to the west of the reservation. This claim was based on the belief that the original reservation boundary was further to the west than the surveyed boundary.

McMillen puts the case in a national perspective and also demonstrates that it was an important precedent for other countries dealing with aboriginal rights. The work is very well documented, with extensive citations and a good index. A bibliography might have been helpful. Two maps place Hualapai aboriginal territory, the Hualapai Reservation, and the applicable stretch of the Santa Fe Pacific rail line. The book explicates a pivotal decision in Indian law, provides an excellent history of the Hualapai through the pertinent years, and adds considerable insight concerning the work of Felix Cohen, who called the Santa Fe Railroad case "the most complicated case I have

ever handled." The book is a valuable addition to the body of knowledge about federal Indian law and tribal history.

E. Richard Hart
Winthrop, Washington

Blood Passion: The Ludlow Massacre and Class War in the American West, by Scott Martelle. New Brunswick: Rutgers University Press, 2007; 266 pp.; illustrations, appendices, notes, bibliography, index; \$25.95 cloth.

Scott Martelle's account of the 1914 Ludlow Massacre and the surrounding events is perhaps the most gripping and readable account of these times, although the field devoted to the subject is relatively crowded. This detailed and compelling narrative chronicles the nine months of conflict and strike by the United Mine Workers against the Rockefeller-controlled Colorado Fuel and Iron Company. Although the book is not particularly analytical, Martelle carefully lays out the facts that can provide readers with a more profound understanding of labor's struggles.

Ultimately, the most salient achievement of this retelling is to remind us that the United States once knew active class warfare. Instead of witnessing brutal events in faraway places such as Baghdad or My Lai, we are ushered into our own world where innocent bystanders could not be distinguished and where neutrality was neither allowed nor respected.

This is the classic labor story in which workers' rights are pitted against those of the capitalists. Insisting upon its right to negotiate its members' wages, the UMW falls headlong into conflict with the Colorado Fuel and Iron Company officials' belief that they are entitled to negotiate the terms of labor without collective bargaining. Although today's laws require states to recognize the right to organize, this conflict occurred at a moment in history when workers increasingly concluded that they would gain this right only if they enforced it themselves.

The history of mining is replete with violence, dynamite, and guns, and this episode was no exception. These Colorado coal battles between 1913 and 1914 followed earlier tensions in that state and elsewhere and descended, seemingly inevitably, into further bloodshed as company guards and union men armed themselves. Complicating matters was the blurred line between state and private force, which was made more unclear when company guards participated in and cooperated with the state militia. If law—and not morality—had been the only factor, then labor, which stockpiled weapons and never

shied away from a fight, must be at least as culpable as the company. However, labor was pressing a moral issue that was highly unlikely to change without forceful confrontations. One imperfect outcome of the strike was Rockefeller's initiative to improve relations by encouraging company unions—a halfway measure that ultimately was outlawed when the National Labor Relations Act was passed in 1935.

Martelle attempts to be objective, taking neither the union's nor capital's side. He is painstaking in his attempts to document the party that instigated the beatings, killings, and other atrocities that took place. He cites contradictory evidence but never abrogates his responsibility to declare accounts farfetched when they seem so. And, indeed, both sides participated in behaviors that are hard to justify.

Martelle builds reader trust in his veracity in interesting ways. For example, bullets seldom simply hit people. Instead, they rip into specific parts of the body, severing flesh or bone, and then exit from another precisely located position, exactly as a coroner would report. But in addition to such clinical details, readers are also frequently treated to convincing portraits of the victims' lives that give poignancy to the shocking suddenness with which many of the seventy-five documented unionists, guards, strikebreakers, family members, and bystanders died.

Although one senses a greater sympathy for labor than for capital, Martelle does not appear to want to declare who was right and who was wrong. Instead, he would have us witness the brutal path of history in order to draw our own conclusions. This is an important story, particularly for readers who may have lost sight of the conditions that engendered the modern labor movement or who fail to see its connections to those in the rising global economy.

Dan Jacoby
University of Washington, Bothell

Goodbye, Judge Lynch: The End of a Lawless Era in Wyoming's Big Horn Basin, by John W. Davis. Norman: University of Oklahoma Press, 2005; 252 pp.; illustrations, notes, bibliography, index; \$32.95 cloth.

On July 20, 1903, a group of thirty to forty armed men made their way to the Big Horn courthouse in the town of Basin, Wyoming. At about 1 a.m., intent on lynching two inmates who were both convicted of murder and whose cases were on appeal to the Wyoming Supreme Court, they gained entrance to the jail inside the courthouse. But the vigilantes were unable

to make headway against the steel of the cell doors; instead, according to one account, the mob fired into the locked cell and killed the two appellants, Jim Gorman and Joseph Walters, as well as "accidentally" killing a young court clerk, Earl Price, who was present in the cellblock area. A Big Horn County deputy sheriff was wounded in the attack; another inmate was uninjured during the killing spree.

According to newspaper accounts cited in John W. Davis' book *Goodbye, Judge Lynch*, a good portion of the Wyoming citizenry "deplored the murder of the young court clerk." One headline from a small Big Horn Basin area newspaper sums up what was believed to be the prevailing attitude: "Earl Price falls a victim of a mob at Basin, who also take the worthless lives of Gorman and Walters." As Davis points out, "among the 'better people of Wyoming' there was a favorable attitude toward lynching. . . . [I]t seems never to have occurred to any of these people that the dignity and majesty of the law in Wyoming might have been offended when a mob slaughtered two prisoners in the care of the state."

Davis uses the trials of Gorman and Walters as examples of justice in Wyoming in the late nineteenth and very early twentieth centuries. Justice, or "law and order," as it is often depicted in the old West, arrived in the mountainous areas of north-central Wyoming in "fits and spurts." Reflecting the remoteness and expansiveness of this large state (ninth largest in the United States), John Davis' book provides the reader with a fascinating glimpse into several incidents that highlight both the cultural and economic development of the area known as the Big Horn Basin of northern Wyoming.

Created as a territory in 1868 and admitted to the union as a state in 1890, Wyoming contained distances between population centers that caused problems for the effective administration of justice. In his treatment of justice in the Big Horn Basin, Davis draws on an array of historical works, newspaper accounts, and personal recollections in both published and unpublished works of "people who were there."

"Judge Lynch" is, of course, a euphemism for the extralegal seizure of a person or persons for the purpose of summary and fatal judgment. Most frequently, lynching is carried out by a mob, and the "judgment" results in hanging the aforementioned person by the neck until dead. In short, mob rule involved the unauthorized pursuit of what the mob perceived to be justice. The author recounts the Big Horn Basin's "progression from raw frontier to what could fairly be called a mature society" over a thirty-year period.

Wyoming has always been sparsely populated, at first attracting prospectors and fur traders but later cattlemen, and

then shepherds and farmers. Animosities arose among these groups, leading to conflicts, particularly between shepherds and ranchers. In recounting this "end of a lawless era" in Wyoming's Big Horn Basin, the author gives us a sense of the geography and climate of the area, as well as its economic development and population changes, and he describes how, eventually, the rule of law gradually emerged in this vast territory.

Utilizing the above-referenced incident and several others that took place in the Big Horn Basin from 1884 to 1903, Davis provides a lively rendition of what small-town Wyoming was like. Certainly government existed, as well as law courts and lawmen, but there were also large distances between population centers and the constables. Sheriffs and justices of the peace, who were largely self-reliant, did in some small measure attempt to bring a semblance of law and order to this rough country.

And so it was when, in April 1902 in Big Horn County, Jim Gorman and his sister-in-law, Maggie Gorman, were accused of the homicide of Tom Gorman—Jim's brother and Maggie's husband. Although this would have been a routine homicide in most of the U.S., it was seen as a test of the "political maturity of the citizenry of Big Horn County." The author covers the arrest, appointment of counsel, and testimony of witnesses at trial in detail. The eventual fate (after a second trial) of Jim Gorman appeared to meet the test of "political maturity" . . . until July 20, 1903. So too with the luckless Joseph Walters, who shared Gorman's fate on that day. Walters, accused and convicted of murder in the first degree, had a case similar to that of Gorman. Both cases were on appeal, and both contained significant legal issues. Davis outlines these issues in detail, indicating that both men would likely have prevailed on appeal—that is, until certain Big Horn citizenry appealed to "Judge Lynch" and mooted the legal process. "Political maturity" seems to have had to wait a bit in northern Wyoming.

As might be expected, the attack on the jail caused concern in the state capital, Cheyenne. Subsequently, a grand jury of Big Horn County citizens was impaneled and delivered eight indictments of local area residents. Speculation that the raiders would not be held accountable for their actions was correct: all charges were dismissed against all defendants on the motion of the prosecution, "owing to its inability to get witnesses to testify." Davis writes, "The lynching and the complete inability to punish those responsible were terribly distressing events for those who wanted conflict within the Big Horn Basin to be resolved in a peaceful way, with the rule of law as the dominant force in the society."

Six years later, another incident occurred in the county, in which a number of attackers—all cattlemen or cowboys employed by local cattle ranchers—killed three shepherds whom they accused of violating an unwritten agreement not to bring their flocks onto “cattle ranges.” This time the outcome was different. The Spring Creek Raid, as the incident came to be known, garnered widespread attention in the state’s newspapers, and political support for the prosecution of the attackers gained momentum. Davis has written extensively about this incident (see *A Vast Amount of Trouble: A History of the Spring Creek Raid*, University of Colorado Press, 1993). Through a diligent investigation of the March 28, 1909, killings, the county prosecutor obtained indictments against seven local men for first-degree murder and arson; significantly, one of the arrestees had also been charged in the murders at the Big Horn County Courthouse in 1903.

Much of the public supported the accused, and certain cattlemen were spending huge amounts on lawyers for the defendants. But, in large measure, these sums were matched by the shepherds’ association. Emotions ran high, and, as Davis recounts, the state’s militia had to send a contingent to protect the courthouse. Eventually, convictions were obtained (in varying degrees and charges against the several defendants) for first-degree murder or through plea bargain for the other six defendants.

These convictions marked “the end of the tradition of violence in the Big Horn Basin and indeed, throughout Wyoming.” Davis contends that “a number of factors contributed to that result, not least a growing disapproval of lynching in the society at large, coupled with increased efficiency of law enforcement authorities.” Concluding his book with the words of one of the prosecutors in the Spring Creek Raid, Davis writes, “Wyoming has passed the border stage of her history. It has been a hard, bitter growth but we have arrived and the world will know that the law is held in regard by the majority of our people.”

Davis has written an interesting and well-researched treatise on early Wyoming legal history. His epilogue, which follows up on many of the central personages, witnesses, defendants, lawyers, judges, and law enforcement agents, is informative. The same can be said of the numerous notes that are, in their own way, as interesting as the text they support, which is a story of how justice trumped lawlessness in the Big Horn Basin of Wyoming.

James P. Spellman
Long Beach, California

ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

Anderson, Robert T. "Alaska Native Rights, Statehood, and Unfinished Business." *Tulsa Law Review* 43 (Fall 2007).

Andrews, Gregg. "Black Working-Class Political Activism and Biracial Unionism: Galveston Longshoremen in Jim Crow Texas, 1919–1921." *Journal of Southern History* 74 (August 2008).

Barnes, John. "The Struggle to Control the Past: Commemoration, Memory, and the Bear River Massacre of 1863." *Public Historian* 30 (February 2008).

Bridges, Amy. "Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States." *Studies in American Political Development* 22 (March 2008).

Brock, Ralph H. "William R. Scurry and the Withdrawal of the Texas Boundary Commission." *Panhandle-Plains Historical Review* 79 (2006–2007).

Bruscino, Thomas A., Jr. "A Troubled Past: The Army and Security on the Mexican Border, 1915–1917." *Military Review* 88 (July–Aug. 2008).

Burden, David K. "Reform Before *La Reforma*: Liberals, Conservatives and the Debate over Immigration, 1846–1855." *Mexican Studies/Estudios Mexicanos* 23 (Summer 2007).

Byrum, Scott R. "Colonial Power and Indigenous Justice." *Oregon Historical Quarterly* 109 (Fall 2008).

Chang, Kornel. "Enforcing Transnational White Solidarity: Asian Migration and the Formation of the U.S.-Canadian Boundary." *American Quarterly* 60 (September 2008).

Chen, Anthony S., Robert W. Mickey, and Robert P. Van Houweling. "Explaining the Contemporary Alignment of Race and Party: Evidence from California's 1946 Ballot Initiative on Fair Employment." *Studies in American Political Development* 22 (September 2008).

Correia, David. "'Rousers of the Rabble' in the New Mexico Land Grant War: *La Alianza Federal De Mercedes* and the Violence of the State." *Antipode* 40 (September 2008).

Creel, Von Russell. "Challenge and Opportunity: The First Year of the United States Court for the Indian Territory." *Oklahoma City University Law Review* 30 (Summer 2005).

Darcy, R. "Constructing Segregation: Race Politics in the Territorial Legislature, 1890–1907." *Chronicles of Oklahoma* 86 (Fall 2008).

Denning, Robert. "A Fragile Machine: California Senator John Conness." *California History* 85:4 (2008).

Duchesne, Matthew. "Tribal Trustees and the Use of Recovered Natural Resource Damages Under CERCLA." *Natural Resources Journal* 48 (Spring 2008).

DuWors, Richard. "Documents from the Indian Fishing Rights Controversy in the Pacific Northwest." *Pacific Northwest Quarterly* 99 (Spring 2008).

Edmunds, R. David. "Chief Joseph: The Nez Perce Flight for Justice." *American Heritage* 58 (Fall 2008).

Finger, Thomas, and Barbara Morehouse. "River of Change: An Environmental History of Climate and Water Management in the Upper Little Colorado Watershed." *Journal of the Southwest* 49 (Winter 2007).

Heyman, Josian M. "Constructing a Virtual Wall: Race and Citizenship in U.S.-Mexico Border Policing." *Journal of the Southwest* 50 (Autumn 2008).

Kashay, Jennifer Fish. "Competing Imperialisms and Hawaiian Authority: The Cannonading of Lahaina in 1827." *Pacific Historical Review* 77 (August 2008).

Knack, Martha C. "The Saga of Tim Hooper's Homestead: Non-Reservation Shoshone Indian Land Title in Nevada." *Western Historical Quarterly* 39 (Summer 2008).

Kotlowski, Dean J. "From Backlash to Bingo: Ronald Reagan and Federal Indian Policy." *Pacific Historical Review* 77 (November 2008).

Lee, Sharon S. "The De-minoritization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California." *Asian American Law Journal* 15 (May 2008).

Martínez, Oscar J. "Border Conflict, Border Fences, and the 'Tortilla Curtain' Incident of 1978–1979." *Journal of the Southwest* 50 (Autumn 2008).

Mihesuah, Devon Abbott. "Unfinished Choctaw Justice: The Murder of Charles Wilson and the Execution of Jackson Crow." *Chronicles of Oklahoma* 86 (Fall 2008).

O'Neill, Michael. "The Removal of Chief Justice Maginnis: Politics and the Judiciary in Wyoming Territory." *Annals of Wyoming* 79 (Summer–Autumn 2007).

Pacheco, Jaime, and LeRoy Anthony Reaza. "The Municipal Origins of La Villa de San Felipe el Real de Chihuahua, 1718–1725: The Cabildo's Struggle for Jurisdictional Autonomy." *New Mexico Historical Review* 80 (Winter 2005).

Power, Jeanne M., and Lirio Patton. "Between Mendez and Brown: *Gonzales v. Sheely* (1951) and the Legal Campaign against Segregation." *Law & Social Inquiry* 33 (Winter 2008).

Ranco, Darren, and Dean Suagee. "Tribal Sovereignty and the Problem of Difference in Environmental Regulation: Observations on 'Measured Separatism' in Indian Country." *Antipode* 39 (September 2007).

Sadowski-Smith, Claudia. "Unskilled Labor Migration and the Illegality Spiral: Chinese, European, and Mexican Indocumentados in the United States, 1882–2007." *American Quarterly* 60 (September 2008).

Savitt, Todd L. "Abortion in the Old West: The Trials of Dr. Edwin S. Kellogg of Helena, Montana." *Montana* 57 (Autumn 2007).

Sekaquaptewa, Pat. "Key Concepts in the Finding, Definition, and Consideration of Custom Law in Tribal Lawmaking." *American Indian Law Review* 32:2 (2007–2008).

Self, Robert O. "Sex in the City: The Politics of Sexual Liberalism in Los Angeles, 1963–79." *Gender & History* 20 (August 2008).

Sellars, Richard West. "A Very Large Array: Early Federal Historic Preservation—The Antiquities Act, Mesa Verde, and the National Park Service Act." *Natural Resources Journal* 47 (Spring 2007).

Skibine, Alex Tallchief. "Formalism and Judicial Supremacy in Federal Indian Law." *American Indian Law Review* 32:2 (2007–2008).

Sonenshein, Raphael J. "The Role of the Jewish Community in Los Angeles Politics: From Bradley to Villaraigosa." *Southern California Quarterly* 90 (Summer 2008).

Stalls, Clay. "*Damna Absque Injuria*: Reparations in the Owens Valley Water Wars." *Southern California Quarterly* 90 (Summer 2008).

Strub, Whitney. "The Clearly Obscene and the Queerly Obscene: Heteronormativity and Obscenity in Cold War Los Angeles." *American Quarterly* 60 (June 2008).

Walston, Roderick E. "California Water Law: Historical Origins to the Present." *Whittier Law Review* 29 (Summer 2008).

Weisiger, Marsha. "Gendered Injustice: Navajo Livestock Reduction in the New Deal Era." *Western Historical Quarterly* 38 (Winter 2007).

Wood, James M., and Thomas A. Wood. "To Win, Hold, and Lose the Land: The Families of Santa Cruz and the San Rafael de la Zanja Land Grant." *Journal of Arizona History* 49 (Summer 2008).

Zesch, Scott. "Prelude to a Massacre: Chinese Los Angeles in 1870–1871." *Southern California Quarterly* 90 (Summer 2008).

MEMBERSHIPS, CONTRIBUTIONS, AND GRANTS

AS OF JANUARY 1, 2009

FOUNDER

\$3000 or more

Christine W.S. Byrd, Los Angeles
Farella Braun & Martel LLP, San Francisco
Morrison & Foerster Foundation, San Francisco
Susman Godfrey LLP, Los Angeles & Seattle

PATRON

\$1000-\$2999

Akin, Gump, Strauss, Hauer & Feld, Los Angeles
Hon. George T. Anagnost, Peoria
Bingham McCutchen LLP, Santa Monica
Elizabeth Cabraser, Esq., San Francisco
Coughlin, Stoia, Geller, Rudman & Robbins, LLP, San Diego
Gareth T. Evans, Esq., Los Angeles
Jeffrey M. Fisher, Esq., San Francisco
Gibson, Dunn & Crutcher LLP, Los Angeles
Girardi & Keese, Los Angeles
Gold, Bennett, Cera & Sidener, San Francisco
Leonard L. Gumpport & Wendy Munger, South Pasadena
Hughes, Hubbard & Reed, Los Angeles
Edward Vincent King, Jr., Esq., San Francisco
Klee, Tuchin, Bogdanoff & Stern LLP, Los Angeles
Jan N. Little, Esq., San Francisco
Munger, Tolles & Olson LLP, Los Angeles
O'Melveny & Myers LLP, Los Angeles
Pachulski, Stang, Ziehl et al., Los Angeles
Per Ramfjord, Esq., Portland
Rus, Miliband & Smith, Irvine
Sidley Austin Foundation, Chicago
Stoel Rives LLP, Portland
Wilson Sonsini Goodrich & Rosati, Palo Alto
Ziffren, Brittenham, Branca, Fischer et al., Los Angeles

STEWARD

\$750-\$999

J. Bruce Alverson, Esq., Las Vegas
Leroy J. Barker, Esq., Anchorage
Crowley Fleck PLLP, Billings
Donald Gaffney, Esq., Phoenix
Hon. Procter Hug, Jr., Reno
Marshal A. Oldman, Esq., Encino
Hon. Christina Ann Snyder, Los Angeles

SPONSOR

\$500-\$749

Blecher & Collins, Los Angeles
Boies, Schiller & Flexner LLP, Oakland
Jerome I. Braun, Esq., San Francisco
William I. Edlund, Esq., San Francisco
Paul T. Friedman, Esq., Oakland
Frederick P. Furth, Esq., Healdsburg
D. Wayne Gittinger, Esq., Seattle
Patricia Glaser, Esq., Los Angeles
Gersham Goldstein, Esq., Portland
Greenberg Glusker, Los Angeles
Greines, Martin, Stein & Richland, Los Angeles
Rita M. Haeusler, Esq., Los Angeles
Horvitz & Levy, Encino
Jennings, Haug & Cunningham LLP, Phoenix
Mark A. Kadzielski, Esq., Los Angeles
Mary E. Kelly, Esq., Los Angeles
Theodore Latty, Esq., Los Angeles
Lewis & Roca LLP, Phoenix
Lewis, Brisbois, Bisgaard & Smith, Los Angeles
Hon. Thomas Nelson, Boise
Albert Pagni, Esq., Reno
Cornell Price, Esq., Los Angeles
Gerald K. Smith, Esq., Phoenix
Sullivan & Cromwell, Los Angeles
Steven L. Swig, Esq., San Francisco
Taylor & Company Law Offices, San Francisco
Paul Westberg, Esq., Boise
Jeff Westerman, Esq., Los Angeles
Douglas R. Young, Esq., San Francisco

GRANTOR

\$250-\$499

Mitchell E. Abbott, Esq., Los Angeles
Wylie A. Aitken, Esq., Santa Ana
Lorraine Akiba, Esq., Honolulu
Edward Angel, Washington
Seth Aronson, Esq., Los Angeles
Prof. Gordon Morris Bakken, Santa Ana
Charles A. Bird, Esq., San Diego
Kevin Boyle, Esq., Los Angeles
Andrew P. Bridges, Esq., San Francisco
James H. Broderick, Jr., Esq., Los Angeles
Richard Brophy, Esq., Oakland
Timothy F. Cahill, Esq., Sacramento
Hon. Earl H. Carroll, Phoenix
John Francis Carroll, Esq., San Pedro
Hon. David O. Carter, Santa Ana
Steven Chidester, Esq., Irvine
Hon. Richard R. Clifton, Honolulu
William A. Cohan, Esq., Rancho Santa Fe
Cynthia M. Cohen, Esq., Los Angeles
Ezekiel Cortez, Esq., San Diego

Cosgrave Vergeer Kester LLP, Portland
Crowell Moring LLP, Los Angeles
Keely E. Duke, Esq., Boise
Scott H. Dunham, Esq., Los Angeles
Equal Justice Society, San Francisco
Robert H. Fairbank, Esq., Los Angeles
Hon. Valerie Baker Fairbank, Los Angeles
Hon. Ferdinand F. Fernandez, Pasadena
Bertram Fields, Esq., Los Angeles
Eric M. George, Esq., Los Angeles
Hon. Alfred T. Goodwin, Pasadena
Hon. Ronald M. Gould, Seattle
Philip L. Gregory, Esq., Burlingame
Hanna & Brophy, LLP, Oakland
Edwin A. Harnden, Esq., Portland
Robert Henigson, Deer Harbor
Earl M. Hill, Esq., Reno
John C. Hueston, Esq., Los Angeles
John Jaqua, Esq., Eugene
Hon. Robert Johnston, Las Vegas
Daniel R. Kaleba, Esq., San Jose
Michael C. Kelley, Esq., Los Angeles
Terri D. Keville, Esq., Los Angeles
Daniel M. Kolkey, Esq., San Francisco
Kunz, Plit, Hyland, Demlong & Kleifield, Phoenix
Ruth J. Lavine, Esq., Los Angeles
Robert D. Lowry, Esq., Eugene
Gregory P. Lynch, Esq., Bend
Timothy Lynch, Esq., Anchorage
Ron Maroko, Esq., Los Angeles
Steven R. Mather, Esq., Beverly Hills
Daniel J. McAuliffe, Esq., Phoenix
Mrs. David McDaniel, San Francisco
Thomas J. McDermott, Jr., Esq., Indian Wells
Prof. Claire McKanna, San Diego
Hon. M. Margaret McKeown, San Diego
Mitchell, Silberberg & Knupp, Los Angeles
Ann Moorman, Esq., Ukiah
Morgan Angel & Associates, Washington
Hon. John F. Moulds, Sacramento
Hon. Geraldine Mund, Woodland Hills
Terry Nafisi, Los Angeles
George W. Nowell, Esq., San Francisco
Hon. Ben O'Brien, Carmichael
Lori Ploeger, Esq., San Francisco
M. Laurence Popofsky, Esq., San Francisco
Hon. Harry Pregerson, Woodland Hills
Hon. James A. Redden, Beaverton
Remcho, Johansen & Purcell, San Leandro
James Rigos, Esq., San Francisco
Hon. Paul G. Rosenblatt, Phoenix
William J. Rush, Esq., Tacoma
Hon. Pamela Rymer, Pasadena
Kelli Sager, Esq., Los Angeles
Francis O. Scarpulla, Esq., San Francisco
Quinton Seamons, Esq., Scottsdale
Segal & Kirby, Sacramento

Calvin Siemer, Esq., San Francisco
Hon. Milan D. Smith, Jr., El Segundo
Dean Steven R. Smith, San Diego
Snell & Wilmer, Phoenix
Dean Kenneth W. Starr, Malibu
Gregory P. Stone, Esq., Los Angeles
Eleanor Swent, Palo Alto
Ragesh Tangri, Esq., San Francisco
Hon. James Teilborg, Phoenix
Jeffrey I. Tilden, Esq., Seattle
Gail M. Title, Esq., Los Angeles
D. Burr Udall, Esq., Tucson
Hon. Vaughn Walker, San Francisco
Robert S. Warren, Esq., San Marino
Michael A. White, Esq., Saipan
White & Case, Los Angeles
Wilke, Fleury, Hoffelt, Gould & Birney, Sacramento
Meryl L. Young, Esq., Irvine
John Youngquist, Esq., San Francisco
Kelly A. Zusman, Esq., Portland

SUSTAINING
\$100-\$249

Barry Abrams, Esq., Houston
Alex Aghajanian, Esq., Pasadena
Mark Asdourian, Esq., Newport Beach
Laurel Beeler, Esq., San Francisco
Timothy Berg, Esq., Phoenix
Charles Berwanger, Esq., San Diego
Hon. Marsha Berzon, San Francisco
Hon. Robert Boochever, Pasadena
John Briscoe, Esq., San Francisco
Hon. Robert Bryan, Tacoma
Albie Burke, Ph.D., Long Beach
Kathleen Butterfield, Esq., San Francisco
Dominic Campisi, Esq., San Francisco
Hon. William Canby, Phoenix
John Carson, Esq., Los Angeles
Matthew Carvalho, Esq., Seattle
Hon. Avern Cohn, Detroit
Wilson Condon, Esq., Anchorage
Jason Crotty, Esq., San Francisco
Hon. Frank Damrell, Sacramento
Gary Dance, Esq., Pocatello
Richard De Luce, Esq., Palos Verdes Estates
Roy Dwyer, Esq., Bend
Prof. John Eastman, Orange
Robert Ebner, Esq., West Covina
Hon. Morrison England, Jr., Sacramento
Donald Falk, Esq., Palo Alto
Hon. Robert Faris, Honolulu
Hon. Dale Fischer, Los Angeles
Dennis Fischer, Esq., Santa Monica
Hon. Raymond Fisher, Sherman Oaks
Ruth Fisher, Esq., Los Angeles

Hon. James Fitzgerald, Anchorage
Hon. Betty Fletcher, Seattle
Hon. William Fletcher, San Francisco
Hon. Selim Franklin, Costa Mesa
John Fredenburg, Esq., Sacramento
Lawrence Friedman, Stanford
Hon. Helen Frye, New York
Hon. Dolly M. Gee, Los Angeles
Hon. Lloyd George, Las Vegas
Brian Getz, Esq., San Francisco
E. Johanna Gibbon, Esq., Irvine
Prof. Dale Goble, Moscow
Christopher Goelz, Esq., Mercer Island
Hon. Mitchel Goldberg, Yorba Linda
Thomas Greenan, Esq., Seattle
Hon. Arthur Greenwald, Encino
Hon. Philip Gutierrez, Los Angeles
Michael Haglund, Esq., Portland
E. Richard Hart, Winthrop
John Hasko, Moscow
Thomas Haven, Esq., Atherton
Arthur Hellman, Pittsburgh
Brian Hennigan, Esq., Los Angeles
Bruce Heurlin, Esq., Tucson
Hon. H. Russel Holland, Anchorage
James Homola, Esq., Fresno
Michael Hubbard, Esq., Waitsburg
Shirley Hufstedler, Esq., Flintridge
Peter Hughes, Esq., San Diego
Hon. Sandra Segal Ikuta, Pasadena
Hon. Susan Illston, San Francisco
Daniel Jamison, Esq., Fresno
Hon. D. Lowell Jensen, Castro Valley
Bernard Jolles, Esq., Portland
Hon. Cindy Jorgenson, Tucson
Hon. Meredith Jury, Riverside
Hon. Lawrence Karlton, Sacramento
Steven Kazan, Esq., Oakland
Patrick Kelly, Esq., Los Angeles
Thomas Kidde, Esq., Los Angeles
Michael King, Esq., Seattle
Hon. Sam King, Honolulu
Hon. Andrew Kleinfeld, Fairbanks
Thomas Koegel, Esq., San Francisco
Theodore Kolb, Esq., San Francisco
Stephen Kolodny, Esq., Beverly Hills
Gordon Krischer, Esq., Los Angeles
Hon. Robert Kwan, Santa Ana
Hon. Peggy Leen, Las Vegas
Hon. Ronald Leighton, Tacoma
Hon. Ronald Lew, Los Angeles
Samuel Lionel, Esq., Las Vegas
David Lira, Esq., Los Angeles
Hon. M. James Lorenz, San Diego
Hon. Elwood Lui, Los Angeles
Hon. Eugene Lynch, Ross
Thomas Mackey, Ph.D., Louisville

J. Richard Manning, Esq., Seattle
Hon. Malcolm Marsh, Portland
Daniel Mason, Esq., San Francisco
Kirk McAllister, Esq., Modesto
Tracy McGovern, Esq., Medford
Hon. Howard McKibben, Verdi
Mary McNamara, Esq., San Francisco
Kurt Melchior, Esq., San Francisco
Frederick Merkin, Esq., Los Angeles
Grover Merritt, Esq., Alta Loma
Hon. Susan Mollway, Honolulu
Bernard Moore, Esq., Medford
Hon. Kimberly Mueller, Sacramento
Hon. Alex Munson, Saipan
Smithmoore Myers, Esq., Spokane
Hon. Dorothy Nelson, Pasadena
David Nolan, Esq., Orinda
Hon. William Norris, Los Angeles
Royal Oakes, Esq., Los Angeles
Richard Odgers, Esq., San Francisco
Leslie O'Leary, Esq., Portland
Hon. John Peterson, Butte
Thomas Peterson, Esq., San Francisco
Paula Petrik, South Riding
Hon. Mariana Pfaelzer, Los Angeles
Hon. Virginia Phillips, Riverside
Jeffrey Portnoy, Esq., Honolulu
John Poucher, Esq., Santa Barbara
Hon. Albert Radcliffe, Eugene
John Rawls, Esq., Houston
Hon. Manuel Real, Los Angeles
Scott Reed, Esq., Coeur d' Alene
Michelle Reinglass, Esq., Laguna Hills
Hon. Stephen Reinhardt, Los Angeles
Hon. Robin Riblet, Santa Barbara
Kent Richards, Ph.D., Ellensburg
Hon. James Robart, Seattle
Cara Robertson, Esq., Santa Monica
David Robinson, Esq., Pasadena
James Roethe, Esq., Orinda
Lawrence Rohlffing, Esq., Santa Fe Springs
Robert Rosenfeld, Esq., San Francisco
Hon. Herbert Ross, Anchorage
Lowell Rothschild, Esq., Tucson
Hon. Janis Sammartino, San Diego
Robert Sanger, Esq., Santa Barbara
Martin Schainbaum, Esq., San Francisco
Hon. Mary Schroeder, Phoenix
Jeremiah Scott, Jr., Esq., Eureka
Hon. Edward Shea, Richland
Timothy Sheehan, Esq., Albuquerque
Hon. Otto Skopil, Jr., Lake Oswego
Hon. N. Randy Smith, Pocatello
James Spellman, Esq., Long Beach
Michael Steponovich, Esq., Orange
David Steuer, Esq., Palo Alto
Hon. Alicemarie Stotler, Santa Ana

Lynn Stutz, Esq., Campbell
Hon. Lonny Suko, Yakima
Wilma Sur, Esq., Honolulu
Hon. A. Wallace Tashima, Pasadena
John Taylor, Esq., Pasadena
Hon. Leslie Tchaikovsky, Oakland
Hon. Sidney Thomas, Billings
Hon. Gordon Thompson, Jr., San Diego
Roderick Thompson, Esq., San Francisco
John Thorndal, Esq., Las Vegas
Terry Thurbon, Esq., Juneau
Hon. Robert Timlin, Carpinteria
Gary Torre, Esq., Oakland
Paul Ulrich, Esq., Phoenix
Riley Walter, Esq., Fresno
Hon. Kim Wardlaw, Pasadena
Leslie Weatherhead, Esq., Spokane
Hon. John Weinberg, Seattle
Hon. Claudia Wilken & Hon. John M. True III, Berkeley
Hon. Stephen Wilson, Los Angeles
Joseph Woods, Jr., Esq., Oakland
Edward Wynne, Jr., Esq., Ross
Hon. Frank Zapata, Tucson
Hon. Thomas Zilly, Seattle

ADVOCATE**\$50-\$99**

Robert Aitken, Esq., Palos Verdes Estates
Cheryl Alcorn, Temple City
Honey Amado, Esq., Beverly Hills
Jean-Claude Andre, Esq., Los Angeles
Sarah Andre, Los Angeles
C. Murphy Archibald, Esq., Charlotte
Ronald Atwood, Esq., Portland
Frederick Baker, Esq., San Francisco
Hon. Dennis Beck, Fresno
David Bederman, Atlanta
Hon. William Beverly, Jr., Rolling Hills Estates
Hon. Robert Block, Santa Ana
Ernest Bonyhadi, Esq., Portland
Stanley Boone, Esq., Fresno
Margaret Branick-Abilla, Esq., Palo Alto
Hon. Rudi Brewster, San Diego
Hon. Melvin Brunetti, Reno
Donald Burrill, Esq., South Pasadena
Martha Byrnes, Esq., Los Angeles
Robert Calo, Esq., Portland
Hon. Peter Carroll, Riverside
Annetta Casey, Esq., Berkeley
Cathy Catterson, San Francisco
Hon. Maxine Chesney, San Francisco
Dana Christensen, Esq., Kalispell
Nanci Clarence, Esq., San Francisco
Richard Clements, Esq., Long Beach
Charles Cleveland, Esq., Spokane

Hon. Audrey Collins, Los Angeles
Jack Collins, Esq., Portland
Theodore Collins, Esq., Seattle
John Colwell, Esq., Bonita
Anne Crotty, Esq., Pasadena
Ronald Dean, Esq., Pacific Palisades
Eileen Decker, Esq., Los Angeles
Janmarie Dielschneider, Esq., McMinnville
Hon. David Duncan, Phoenix
Paul Eaglin, Esq., Fairbanks
James Ellis, Esq., Seattle
Hon. William Enright, San Diego
Bruce Ericson, Esq., San Francisco
Thomas Fallgatter, Esq., Bakersfield
James Finberg, Esq., San Francisco
Hon. George Foley, Jr., Las Vegas
Hon. Richard Ford, Nipomo
Stanley Friedman, Esq., Los Angeles
Christian Fritz, Ph.D., Albuquerque
Paul J. Georgeson, Esq., Reno
Michael Gisser, Esq., Los Angeles
Hon. Marc Goldman, Santa Ana
Barry Goode, Esq., Richmond
John Gordan III, Esq., New York
William Gorenfeld, Esq., Novato
Jeffrey Graubart, Esq., Pasadena
Paul Gray, Esq., Claremont
Eugene Gregor, Esq., New York
Michael Griffith, Oakland
Dr. Vanessa Gunther, Fullerton
Hon. Randolph Haines, Phoenix
Hon. Cynthia Hall, Pasadena
John Hanft, Esq., San Francisco
Richard Harrington, Esq., San Francisco
Hon. Terry Hatter, Jr., Los Angeles
John Havelock, Esq., Anchorage
Hon. William Hayes, San Diego
Alan Hensher, Esq., Merced
Preston Hiefield, Jr., Esq., Redmond
Ernest Hoidal, Esq., Boise
Hon. Eileen Hollowell, Tucson
Hon. John Houston, San Diego
Hon. Patrick Irvine, Phoenix
Hon. Anthony Ishii, Fresno
L.M. Jacobs IV, Esq., Tucson
Hon. Edward Johnson, Stagecoach
Dr. Lisa Johnson, Hayward
Garry Kahn, Esq., Portland
Hon. Harold Kahn, San Francisco
Jacquelyn Kasper, Tucson
Hon. Victor Kenton, Los Angeles
Matthew Kirby, Esq., Los Angeles
Hon. Christopher Klein, Sacramento
Hon. James Kleinberg, San Jose
Hon. Leslie Kobayashi, Honolulu
Mark Koop, Esq., Berkeley
Hon. Marlene Kristovich, Los Angeles

Donald Kunz, Esq., Phoenix
Jerrold Ladar, Esq., San Francisco
Louise LaMothe, Esq., Santa Barbara
John Lapinski, Esq., Los Angeles
James Lassart, Esq., San Francisco
Bartholomew Lee, Esq., San Francisco
H. Clifford Looney, Esq., Vale
James Lund, Esq., Los Angeles
Jordan Luttrell, San Francisco
Michael Magliari, Chico
Hon. James Mahan, Las Vegas
Hon. Bruce Markell, Las Vegas
Robert Markman, Joplin
James Martin, Esq., Los Angeles
Jill Martin, Hamden
Hon. A. Howard Matz, Los Angeles
Jerry McNaul, Esq., Seattle
Howard McPherson, Esq., Honolulu
Philip Merkel, Esq., Huntington Beach
Mark Andrew Merva, Esq., Washington
Hon. Jeffrey Miller, San Diego
Thomas Mitchell, Esq., San Francisco
Hon. Donald Molloy, Missoula
Prof. R. James Mooney, Eugene
Alexander Moore, Esq., Walnut Creek
Prof. Leopold Musiyán, Papeete
Claus-M. Naske, Ph.D., Fairbanks
Hon. William Nielsen, Spokane
Hon. Fernando Olguin, Los Angeles
David Oppenheimer, San Francisco
Chet Orloff, Portland
Hon. Diarmuid O'Scannlain, Portland
Hon. Carolyn Ostby, Billings
Hon. Karen Overstreet, Seattle
Stephen Pahl, Esq., San Jose
John Palache, Jr., Esq., Greenwich
Hon. Owen Panner, Medford
Robert Parham, Anchorage
Forrest Plant, Esq., Sacramento
Hon. Stephen Pogson, Phoenix
John Porter, Esq., Los Angeles
Bertram Potter, Esq., Pasadena
Sara Purcell, Esq., Mill Valley
Hon. Charles Pyle, Tucson
Hon. Justin Quackenbush, Spokane
Judith Ramseyer, Esq., Seattle
Hon. Karsten Rasmussen, Eugene
Ann Miller Ravel, Esq., San Jose
Hon. Edward Reed, Jr., Reno
Michael Reiss, Esq., Seattle
Kenneth Robbins, Esq., Honolulu
Philip Roberts, Laramie
Ralston Roberts, Esq., Hillsborough
Hon. Ernest Robles, Los Angeles
Hon. John Rossmeissl, Yakima
J. David Sackman, Esq., Los Angeles
Stefano Sarnicola, Glendale

Edmund Schaffer, Esq., Los Angeles
Edwin Schander, Pasadena
Robert Schwantes, Burlingame
Jack Schwartz, Esq., Portland
Hon. William Schwarzer, San Francisco
Hon. J. Michael Seabright, Honolulu
Hon. Richard Seeborg, San Jose
Hon. James Selna, Santa Ana
Molly Selvin, Ph.D., Los Angeles
Peter Sherwood, San Francisco
J. Shotwell, Bay Center
Hon. William Shubb, Sacramento
John Cary Sims, Sacramento
Gail Smith, Esq., Mt. Vernon
Neil Smith, Esq., San Francisco
Rayman Solomon, Camden
Graydon Staring, Esq., San Francisco
H. Dean Steward, Esq., San Clemente
Hon. Karen Strombom, Tacoma
Sanford Svetcov, Esq., San Francisco
Hon. Venetta Tassopulos, Glendale
James Towery, Esq., San Jose
Hon. Howard Turrentine, San Diego
Hon. Nandor Vadas, Eureka
Hon. Neil Wake, Phoenix
George Walker, Esq., Monterey
Hon. J. Clifford Wallace, San Diego
Timothy Weaver, Esq., Yakima
Harold Weiss, Jr., Leander
Robert Welden, Esq., Seattle
Hon. Thomas Whelan, San Diego
Rebecca Wiess, Esq., Seattle
Robert Wolfe Esq., Manhattan Beach
John Wunder, Ph.D., J.D., Lincoln
Hon. Bernard Zimmerman, San Francisco

SUBSCRIBING

\$25-\$49

Alabama Supreme Court, Montgomery
Alaska State Court Law Library, Anchorage
Albany Law School, Albany
American Antiquarian Society, Worcester
American University, Washington
Clayton Anderson, Esq., La Mesa
Appalachian School of Law, Grundy
Archives Library Information Center, College Park
Arizona State Law Library, Phoenix
Arizona State University, Tempe
Ronald Aronovsky, Esq., Glendale
Adam Attwood, Spokane
Judith Austin, Boise
Ave Maria School of Law, Naples
Gregory Baka, Esq., Saipan
Brian Baker, Esq., Pasadena
Bancroft Library, Berkeley
Barry University, Orlando

Beverly Bastian, Carmichael
Terry Bird, Esq., Los Angeles
Jonathan Blavin, Esq., San Francisco
Dean Bochner, Esq., Los Angeles
Boston College, Newton Center
Boston Public Library, Boston
Boston University, Boston
George Brewster, Jr., Esq., San Diego
Hon. Charles Breyer, San Francisco
Brigham Young University, Provo
Hon. Robert Broomfield, Phoenix
Wayne Bruno, Browning
Hon. Samuel Bufford, Los Angeles
Robert Bulkley, Jr., Esq., Beaverton
Carl Burnham, Jr., Esq., Ontario
Kenneth Burt, Carmichael
California Court of Appeals, Sacramento
California History Center, DeAnza College, Cupertino
California Judicial Center, San Francisco
California State Library, Sacramento
California State University, Fullerton
California Western Law School, San Diego
Case Western Reserve University, Cleveland
Robert Castro, Chino Hills
Catholic University of America, Washington
Chapman University, Orange
Chase College of Law Library, Highland Heights
Hon. Edward Chen, San Francisco
Chicago Kent College, Chicago
Hillel Chodos, Esq., Los Angeles
A. Marisa Chun, Esq., Washington
Jerry Clark, Great Falls
College of William & Mary, Williamsburg
Colorado Supreme Court, Denver
Columbia University Law School, New York
Constitutional Rights Foundation, Los Angeles
John Cormode, Mountain View
Cornell University, Ithaca
Creighton University, Omaha
Dalhousie University, Halifax
Dale Danneman, Esq., Paradise Valley
Dorothy DeCoster, Seattle
Dr. Patrick Del Duca, Esq., Los Angeles
DePaul University, Chicago
Charles Diegel, Nora Springs
M. Allyn Dingel, Jr., Esq., Boise
Charles Donegan, Esq., Washington
Drake University, Des Moines
Duke University, Durham
Duquesne University, Pittsburgh
Noel Dyer, Esq., San Francisco
Elon University School of Law, Greensboro
Emory University, Atlanta
Iris Engstrand, San Diego
W. Manning Evans, Washington
Federal Judicial Center, Washington
John Feeney, Esq., Flagstaff

Alfred Ferris, Esq., San Diego
Florida Coastal School of Law, Jacksonville
Florida State University, Tallahassee
Fordham University, New York
Merrill Francis, Esq., Los Angeles
Richard Frank, Esq., San Francisco
Holly Fujie, Esq., Los Angeles
Gale Group, Serials Department, Detroit
George Washington University, Washington
Georgetown University Law Center, Washington
Georgia State University, Atlanta
Hon. Helen Gillmor, Honolulu
Charlotte Goldberg, Los Angeles
Golden Gate University, San Francisco
Gonzaga University, Spokane
Mary Grafflin, San Francisco
William Grauer, Esq., San Diego
Stephen Griffith, Esq., Portland
Robert Grimes, Esq., San Diego
Hon. David Hagen, Reno
Roger Haines, Jr., Esq., Del Mar
Forrest Hainline III, Esq., San Francisco
Hamline University, St. Paul
Mark Harrison, Esq., Phoenix
Harvard Law School, Cambridge
Hastings College of Law, San Francisco
Robert Henry, Esq., Seattle
Paul Hietter, Gilbert
Historical Research Associates, Missoula
Fred Hjelmeset, Mountain View
Hofstra University, Hempstead
Douglas Houser, Esq., Portland
Lembhard Howell, Esq., Seattle
Prof. James Huffman, Portland
Hon. Roger Hunt, Las Vegas
Huntington Library & Art Gallery, San Marino
Idaho State Historical Society, Boise
Hon. Cynthia Imbrogno, Spokane
Indiana University, Bloomington
Indiana University School of Law, Indianapolis
JRP Historical Consulting Services, Davis
Kristen Jackson, Esq., Los Angeles
Kathleen Jolly, Esq., Monrovia
Judiciary History Center, Honolulu
Elissa Kagan, Esq., Laguna Woods
Dennis Karnopp, Esq., Bend
Hon. Robert Kelleher, Los Angeles
Paul Kens, Austin
Merri Ketterer, Livingston
Hon. Garr King, Portland
Chris Kitchel, Esq., Portland
Warren Kujawa, Esq., Henderson
Douglas Kupel, Esq., Phoenix
David Langum, Birmingham
Ronald Lansing, Portland
James Larsen, Spokane
Beatrice Laws, San Francisco

Peter Levinson, Bethesda
Henry Lewek, Novato
Kenneth Leyton-Brown, Ph.D., Regina
Liberty University Law Library, Lynchburg
Douglas Littlefield, Oakland
Allan Littman, Esq., Tiburon
Tracy Livingston, Huntley
Long Beach City Attorney's Office, Long Beach
Hon. Robert Longstreth, El Cajon
Los Angeles County Law Library, Los Angeles
Los Angeles Public Library, Los Angeles
Louisiana State University, Paul M. Herbert Law Center, Baton Rouge
James Loveder, Esq., Santa Ana
Hon. Charles Lovell, Helena
Loyola Law School, Los Angeles
Loyola University, New Orleans
Weyman Lundquist, Esq., Hanover
Jay Luther, Esq., San Anselmo
MacQuarie University, Sydney
Brian Malloy, San Francisco
Robert Maloney, Jr., Esq., Portland
Charles Markley, Esq., Portland
Marquette University, Milwaukee
James Mason, Starbuck
H.L. McCormick, Esq., Santa Ana
Joe McCray, Esq., Portland
Prof. Charles McCurdy, Charlottesville
Trish McCurdy, Novato
McGeorge School of Law, Sacramento
Hon. Robert McQuaid, Jr., Reno
Mercer University, Macon
Michigan State University, East Lansing
Mississippi College, Jackson
Montana State Law Library, Helena
Jeffrey Morris, Douglaston
Multnomah Law Library, Portland
Inga Nelson, Portland
David Nemer, Jr., Esq., San Francisco
Nevada Historical Society, Reno
Nevada Supreme Court, Carson City
New York Public Library, New York
New York University, New York
James Nielsen, Esq., San Rafael
Willard Norberg, Esq., San Francisco
Diane North, Brookeville
North Carolina Central University, Durham
Northern Illinois University, DeKalb
Northwestern School of Law, Portland
Northwestern University School of Law, Chicago
Doyce Nunis, Jr., Ph.D., Los Angeles
Peter O'Driscoll, South San Francisco
Ohio Northern University, Ada
Ohio State University, Columbus
Oklahoma City University, Oklahoma City
Orange County Public Law Library, Santa Ana
Rachel Osborn, Esq., Spokane
Pace University, White Plains

Anne Padgett, Esq., Henderson
Pennsylvania State University, Carlisle
Pepperdine University, Malibu
Hon. Lawrence Piersol, Sioux Falls
Barry Portman, Esq., San Francisco
Paul Potter, Esq., Sierra Madre
Graham Price, Q.C., Calgary
Princeton University, Princeton
Hon. Philip Pro, Las Vegas
Karl Quackenbush, Esq., Seattle
James Reavis, Missoula
LeRoy Reaza, San Gabriel
Prof. R.A. Reese, Irvine
Regent University, Virginia Beach
David Reichard, San Francisco
Evelyn Ricci, Santa Barbara
Virginia Ricketts, Twin Falls
Riverside County Law Library, Riverside
S. Roger Rombro, Esq., Manhattan Beach
John Rosholt, Esq., Twin Falls
Rutgers Law Library, Newark
Samford University, Birmingham
San Diego County Law Library, San Diego
San Francisco Law Library, San Francisco
San Francisco Public Library, San Francisco
San Jose Public Library, San Jose
Santa Clara University, Santa Clara
Evelyn Schlatter, Salida
Owen Schmidt, Esq., Portland
David Schoeggl, Esq., Seattle
Seattle University Law Library, Seattle
Seton Hall University, Newark
Hon. Miriam Shearing, Incline Village
Rupa Singh, Esq., San Diego
Alan Smith, Esq., Seattle
Hon. Paul Snyder, Gig Harbor
Social Law Library, Boston
South Texas College of Law, Houston
Southern Methodist University, Dallas
Southern Methodist University School of Law, Dallas
Southern New Hampshire University, Manchester
Southwestern University, Los Angeles
Russell Speidel, Esq., Wenatchee
Stanford University, Stanford
State University of New York, Buffalo
Stetson University, St. Petersburg
Stevenson University, Stevenson
St. John's University, Jamaica
St. Louis University, St. Louis
St. Mary's University, San Antonio
Hon. Roger Strand, Phoenix
St. Thomas University, Miami Gardens
Melanie Sturgeon, Ph.D., Mesa
Mark Suagee, Esq., Benson
Superior Court Law Library, Phoenix
Swets Information Services, Rummel
Syracuse University, Syracuse

Nancy Taniguchi, Ph.D, Merced
Temple University, Philadelphia
Texas Tech University, Lubbock
Texas Wesleyan University, Ft. Worth
Hon. Mary Theiler, Seattle
Thomas Jefferson School of Law, San Diego
Thomas M. Cooley Law Library, Lansing
Thomas Tongue, Esq., Portland
Susan Torkelson, Stayton
Touro Law School, Central Islip
Michael Traynor, Esq., Berkeley
Tulane University, New Orleans
Hon. Carolyn Turchin, Los Angeles
Chris Tweeten, Esq., Helena
Prof. Gerald Uelmen, Santa Clara
Universidad de Malaga, Malaga
Universite Laval, Quebec
University of Alabama, Tuscaloosa
University of Alberta, Edmonton
University of Arizona, Tucson
University of British Columbia, Vancouver
University of California, Berkeley
University of California, Davis
University of California, Los Angeles
University of California, Santa Barbara
University of Chicago, Chicago
University of Colorado, Boulder
University of Connecticut, Hartford
University of Denver, Denver
University of Detroit, Detroit
University of Florida, Gainesville
University of Georgia, Athens
University of Hawaii, Honolulu
University of Hawaii Law School, Honolulu
University of Idaho, Moscow
University of Illinois, Champaign
University of Iowa, Iowa City
University of Kansas, Lawrence
University of La Verne, Ontario
University of Louisville, Louisville
University of Maine, Portland
University of Miami, Coral Gables
University of Michigan, Ann Arbor
University of Minnesota, Minneapolis
University of Mississippi, University
University of Missouri, Columbia
University of Missouri, Kansas City
University of Montana, Missoula
University of Nebraska, Kearney
University of Nebraska, Lincoln
University of Nevada, Las Vegas
University of Nevada, Reno
University of Nevada School of Law, Las Vegas
University of New Mexico, Albuquerque
University of New South Wales, Sydney
University of Notre Dame, Notre Dame
University of Oklahoma, Norman

University of Oregon, Eugene
University of Pennsylvania, Philadelphia
University of Pittsburgh, Pittsburgh
University of San Diego, San Diego
University of San Francisco, San Francisco
University of South Carolina, Columbia
University of Southern California, Los Angeles
University of St. Thomas, Minneapolis
University of Texas, Austin
University of Tulsa, Tulsa
University of Utah, Salt Lake City
University of Utah Law School, Salt Lake City
University of Virginia, Charlottesville
University of Washington School of Law, Seattle
University of Wisconsin, Madison
University of Wyoming, Laramie
U.S. Court of Appeals for the Eleventh Circuit, Atlanta
U.S. Courts for the Eighth Circuit, Kansas City
U.S. Courts for the Seventh Circuit, Chicago
U.S. Courts for the Sixth Circuit, Cincinnati
U.S. Department of Justice, Washington
U.S. Supreme Court, Washington
Valparaiso University, Valparaiso
Vanderbilt University, Nashville
Villanova University, Villanova
Wake Forest University, Winston-Salem
Nicholas Wallwork, Esq., Phoenix
Stephen Wasby, Eastham
Washburn University, Topeka
Washington State Law Library, Olympia
Washington University, St. Louis
Roy Weatherup, Esq., Northridge
Edgar Weber, Esq., Daly City
David Weinstein, Esq., Los Angeles
Deborah Weiss, Esq., Topanga
Wells Fargo Historical Services, San Francisco
West Virginia University, Morgantown
Western New England College, Springfield
Western State University, Fullerton
Western Wyoming College, Rock Springs
Whitman College, Walla Walla
Whittier Law School, Costa Mesa
Widener University, Harrisburg
Widener University, Wilmington
Norman Wiener, Esq., Portland
Willamette University, Salem
William Mitchell College of Law, St. Paul
H.W. Wilson Company, Bronx
Wisconsin Historical Society, Madison
W. Mark Wood, Esq., Los Angeles
Paul Wormser, Mission Viejo
Yale Law Library, New Haven
Yeshiva University, New York
York University Law Library, North York
Rosalyn Zakheim, Esq., Culver City
Laurence Zakson, Esq., Los Angeles
J.S. Zil, M.D., J.D., Sacramento

GRANTS, HONORARY, AND MEMORIAL CONTRIBUTIONS

10 PERCENT FOR HISTORY CAMPAIGN

U.S. Court of Appeals, Ninth Circuit
U.S. District Court, Central District of California
U.S. District Court, District of Alaska
U.S. District Court, District of Arizona
U.S. District Court, District of Idaho
U.S. District Court, District of Montana
U.S. District Court, District of Nevada
U.S. District Court, District of Northern Mariana Islands
U.S. District Court, Northern District of California

NEVADA LEGAL ORAL HISTORY PROJECT

John Ben Snow Memorial Trust
State Bar of Nevada
U.S. District Court, District of Nevada
Washoe County Courthouse Preservation Society

HONORARY AND MEMORIAL CONTRIBUTIONS

On the occasion of 55 years in the practice of law
Forrest A. Plant, Esq.

In honor of Judge James R. Browning
Cara W. Robertson, Esq.

Judge Herbert A. Ross

In honor of Jeffrey M. Fisher, Esq.

Roderick M. Thompson, Esq.

In honor of Judge Alfred T. Goodwin

Law Offices of Robert D. Lowry, Esq.

In honor of Judge Thelton Henderson, Esq.

James M. Finberg, Esq.

In honor of Donald Kunz on his 50th anniversary practicing law

William M. Demlong, Esq.

In honor of Judge Virginia A. Phillips and Deputy Court Clerk Marva Dillard

Cornell J. Price, Esq.

In honor of Judge Mary M. Schroeder

Martha C. Byrnes, Esq.

In memory of Judge Stanley N. Barnes

Edmund S. Schaffer, Esq.

In memory of Gary Byrd

Christine W.S. Byrd, Esq.

In memory of Jane Kuebler Colwell

John C. Colwell, Esq.

In memory of Doc & Alma

Hon. James A. Redden

In memory of Ian Fan

Thomas S. Kidde, Esq.

In memory of Abraham Gorenfeld

William R. Gorenfeld, Esq.

In memory of Jerry Ladar

James A. Lassert, Esq.

In memory of Judge William H. Orrick
Brian H. Getz, Esq.
In memory of Charm Robinson
David K. Robinson, Esq.
In memory of Judge Joseph Sneed
Jerome I. Braun Philanthropic Fund
In memory of Judge Bruce R. Thompson
Earl M. Hill, Esq.