

# WESTERN LEGAL HISTORY

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*Cover Photograph:* In this issue, David C. Frederick explains how the Ninth Circuit has been caught up in decisions over the exploitation of the West's natural resources since the early part of the century. (Oregon Historical Society)



The Court of Claims often took years to settle claims, as in the case of the award made in 1908 to Carl Hayden (later a U.S. senator from Arizona), for a claim filed some forty years earlier by his father, Charles Trumbull Hayden, pictured here. (Archives and Manuscripts, University Libraries, Arizona State University)

# "MANY DIFFICULT AND INTERESTING QUESTIONS OF LAW": INDIAN DEPREDATION CASES BEFORE THE UNITED STATES COURT OF CLAIMS, 1891-1920

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LARRY C. SGOGEN

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Only John Marshall, chief justice of the United States Supreme Court, could have condensed such a complex issue into one succinct statement. "The condition of the Indians in relations to the United States," he wrote in 1831, "is perhaps unlike that of any other two people in existence."<sup>1</sup> Although many aspects of that legal and political connection, born with the Commerce Clause of the United States Constitution and sustained by treaties, agreements, laws, and court decisions, have been the subject of rigorous examination, certain areas of federal policy toward Native Americans remain largely unexplored. One of them is the Indian depredation claims system, which lasted from 1796 to 1920.<sup>2</sup> Designed to

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Larry Skogen is a captain in the United States Air Force and assistant professor of history at the United States Air Force Academy. The author thanks Dr. Betsy Muenger, Air Force Academy Command historian, and Drs. Robert A. Trennert, Jr., Peter Iverson, and Albert Hurtado, all of Arizona State University, for their insightful and constructive comments on early versions of this article.

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<sup>1</sup>*Cherokee Nation v. Georgia*, 5 Peters, 15-20 (1831), quoted in *Documents of United States Indian Policy*, ed. Francis Paul Prucha (Lincoln, 1975), 61.

<sup>2</sup>For brief analyses of the claims system, see Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* (Lincoln, 1962), 206-12, and David A. Nichols, *Lincoln and the Indians: Civil War Policy and Politics* (Columbia, 1978), 11-12. Other studies relating to claims have been compilations of chosen sets of depredations without any attempt to analyze the system under which the cases were filed.

prevent retaliations by providing compensation to Indians and whites for property losses both sides caused each other, the system quickly became a tool for Anglos, since Native Americans seldom resorted to such an alien legal apparatus. Nevertheless, once the federal court system became involved in adjudicating claim cases, the justices relied on the whole corpus of Indian law as they tried to maneuver through the shoals of a relationship "unlike that of any other two people in existence."

In 1795 President George Washington asked Congress for a means of ensuring justice to Native Americans in order to prevent retribution against whites living on the new republic's frontier.<sup>3</sup> In response, the lawmakers created an indemnity system patterned on their colonial experiences.<sup>4</sup> Confident in the propitious effects of providing compensation for property losses, members of Congress called the law of 1796 (their third piece of Indian legislation) "An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers [emphasis added]."<sup>5</sup>

Subsequent trade and intercourse laws of 1799, 1802, and 1834 continued the indemnity system, with slight modifications. The War Department administered the claims filed under it until 1849, when the Indian Office was moved into the new Department of the Interior. Another major revision occurred in 1870, when Congress stripped the secretary of the interior of the power to pay claims and instead required special appropriations for all indemnity payments.<sup>6</sup> Despite these efforts, by 1891 everyone associated with the claims realized that none of the revisions or modifications had done anything to make the indemnity system work. Not only did Native Americans rarely use the system, but doubts about the veracity of Anglo claims or insufficient funds to pay them prevented most claimants from receiving compensation for losses. In 1891 an Indian Office official estimated that the promise of indemnity to "citizens and inhabitants [not including Native Americans]

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See, e.g., Lowell H. Harrison, "Damage Suits for Indian Depredations in the Adobe Walls Area, 1874," *Panhandle-Plains Historical Review* 36 (1963), 37-60.

<sup>3</sup>James D. Richardson, comp., *A Compilation of the Messages and Papers of the Presidents* (New York, 1897), 1:177.

<sup>4</sup>For an example of the colonial indemnity provisions, see Maryland's 1652 Articles of Peace signed with the Susquehannocks in *Early American Indian Documents*, ed. Alden T. Vaughan (Washington, D.C., 1979), 6:35.

<sup>5</sup>*United States Statutes at Large*, 1:469.

<sup>6</sup>*United States Statutes at Large*, 16:360.

of the United States" had "been kept in not more than three per cent of the claims" ever filed.<sup>7</sup>

By that year, 7,985 claims had accumulated in Indian Office files with no hope of being judiciously settled.<sup>8</sup> With such a lamentable record on the part of the executive branch and Congress, after a heated debate the lawmakers turned to the third branch of government, the judiciary. On March 3 Congress passed the Jurisdictional Act, sending all depredation suits to the Court of Claims.<sup>9</sup>

The Court of Claims had been created in February 1855 to offer a citizen legal redress against the government in circumstances in which he or she would ordinarily be able to bring suit against another private citizen. However, the court possessed no authority to award any final judgments against the government, but submitted a report of any such adverse rulings to the secretary of the treasury for inclusion in the next appropriations bill. Congress reserved for itself final authority on all such judgments. In reality, therefore, the court's function closely mirrored its title in the enabling act "to establish a Court for the Investigation of Claims against the United States."<sup>10</sup>

The Supreme Court refused to exercise appellate jurisdiction over the new court, and even refused to recognize it as a constitutional court of law, because the claims court could not render a final judgment. However, Congress gradually granted the new tribunal more authority, until in 1887 the Tucker Act finally remedied most of its earlier inadequacies, making it a fully empowered, constitutional court. The following year, Representative Binger Hermann of Oregon proposed turning over the Indian depredation claims to the newly expanded court. Not until the passage of the Jurisdictional Act of 1891, however, did the rest of Congress agree that the Court of Claims was the proper venue for the final adjudication of these suits.<sup>11</sup> Over the

<sup>7</sup>William C. Shelley, chief, Depredation Division, "For the Annual Report of the Commissioner of Indian Affairs," n.d., in "Correspondence Depredation Division," 80:246, Records of the Bureau of Indian Affairs, Record Group 75, National Archives, Washington, D.C. [hereafter cited as Shelley, "Correspondence"].

<sup>8</sup>Ibid. at 243.

<sup>9</sup>*United States Statutes at Large*, 26:851.

<sup>10</sup>*United States Statutes at Large*, 10:612.

<sup>11</sup>John M. Gould and George F. Tucker, *Notes on the Revised Statutes of the United States . . . to July 1, 1889* (Boston, 1889), 351-52; *United States Statutes at Large*, 24:505-08; *Congressional Record*, 50th Cong., 1st sess., 19, pt. 1:227; "Docket," Select Committee on Indian Depredations Claims, File 50A-F44.1, Records of the House of Representatives, RG 233, National Archives, p. 4.

next twenty-nine years clerks in the Court of Claims logged 10,842 depredation cases, seeking roughly \$43.5 million from Indian nations or from the United States, codefendants in all such suits. The justices eventually awarded approximately \$5.5 million to thirty-six hundred claimants.<sup>12</sup>

From a historian's perspective, more important than the awards are the justices' opinions, underscoring the legal status of American Indian nations in their relationship to the United States. As explained by Assistant Attorney General John Thompson in his 1901 annual report,

The belief has been entertained in some quarters that the adjudication of these Indian depredation claims is largely a matter of investigating the facts of the cases and computing the damages suffered by the claimants. This is a very erroneous opinion. On the contrary, the various laws, beginning in 1796, and treaties with Indian tribes, some of them dating even earlier, have given rise in their interpretation and in their application to the changing conditions throughout the period of time covered by the numerous statutes and treaties ending with the act of March 3, 1891, to many difficult and interesting questions of law.<sup>13</sup>

Among the "many difficult and interesting questions" addressed by the court was the role of treaties in determining an Indian nation's liability to pay for claims. Like the colonial powers before it, the United States made treaties with the Indian nations, a practice ended in 1871. Many of these compacts were still in force twenty years later. The justices needed to determine what effect, if any, these documents had on a nation's responsibility to pay claims.

In addition to the treaties, the justices maneuvered through the language of Section One of the Jurisdictional Act, which relegated to the court all "claims for property of citizens of the United States taken or destroyed by Indians belonging to any

<sup>12</sup>The \$5.5 million estimate comes from my analysis of the awards reported to Congress and contained in sixty-six reports available in the Congressional Serial Set; the \$43.5 million figure is from the Attorney General, *Annual Report for the Year 1894*, ix. Some duplicates in my analysis occurred when a claimant won a suit, the defense won a new trial, and the claimant won again. Both awards were reported to Congress and are included in my figures. The \$43.5 million figure also comprises some duplicate cases, and includes all filed claims before dismissals or consolidations. Nevertheless, I believe the figures serve well as estimates of an economic profile of the claims.

<sup>13</sup>Attorney General of the United States, *Annual Report for the Year 1901*, 55.

band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."<sup>14</sup> From this single, legalistic phrase the justices dealt with three main issues. First, what was a compensable depredation? In other words, what "property of citizens . . . taken or destroyed" fell under their jurisdiction? Secondly, when were Indians "in amity with the United States"? And, finally, what constituted "any band, tribe, or nation"? From 1891 until 1920, the judiciary struggled with these legal issues and the political status of American Indian nations to the federal system.

Certainly only Native Americans can ground their legal rights in the United States to a complete body of treaties executed between their nations and the federal government. The Court of Claims justices viewed these compacts as legally binding and often based their rulings on the presence—or absence, in some cases—of specific treaty stipulations.<sup>15</sup> In *Leighton*, the court ruled:

"A treaty is primarily a compact between independent nations," and our Constitution declares "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." And no distinction is there made between a treaty with a foreign nation and with an Indian tribe. A treaty with an Indian tribe, therefore, is "a law of the land, as an act of Congress is," and where such treaty prescribes a rule by which private rights can be determined, the court will resort to such rule; otherwise the court must look to the legislation of Congress for the enforcement of its provisions.<sup>16</sup>

Consequently, the court held that an Indian nation accrued liability for depredations in two ways. It could accept liability in a treaty, which was often done following a period of hostility. Such a liability, however, had limitations, usually in the total dollar amount the Indian nation agreed to pay to claim-

<sup>14</sup>*United States Statutes at Large*, 26:851-52. The Court of Claims actually had jurisdiction over three classes of claims, but the first class is the only group important to this study.

<sup>15</sup>For a complete discussion on the force of treaties in executing Indian policy, see Felix Cohen, *Handbook of Federal Indian Law* (1942; reprint, Albuquerque, 1971), 33-46 [hereafter cited as Cohen, *Federal Indian Law*].

<sup>16</sup>*Alvin C. Leighton v. United States and the Ogalalla Band et al*, *Court of Claims Reports (CtCl Rpts)*, 29:288, 307 (1894) [hereafter cited as *Leighton*].

ants.<sup>17</sup> On the other hand, Congress could legislate such a liability to them as "dependent domestic nations," as it did with the trade and intercourse laws, the last of which was passed in 1834. The court looked to these two sources to find the liability of an Indian nation to compensate its alleged victims.<sup>18</sup>

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### THE COURT RELIES ON TREATIES AND THEIR CONSTRUCTION

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When interpreting treaties with Indian nations, the justices adhered to the Supreme Court's 1832 decision in *Worcester v. Georgia*, in which a concurring justice wrote, "The language used in treaties with the Indian should never be construed to their prejudice." This ruling affected a great many cases and frequently benefitted the Indian nations.

In 1837 Congress had created a commission to investigate the claims of Anglos in Georgia, Alabama, and Florida against the Creeks and Seminoles for alleged depredations in 1836 and 1837. President Martin Van Buren forwarded the findings of the commission to Congress in 1838. By the 1850s, the lawmakers had still not provided funding for most of these claims, and a vitriolic debate erupted in the House of Representatives, pitting North against South. The claims remained unpaid, and in 1891 the suits transferred to the Court of Claims.

When the descendants of George Garrison sought one thousand dollars for a depredation allegedly committed by the Creeks on June 1, 1836, the government used the opportunity to create a test case, hoping for an adverse ruling against all

<sup>17</sup>For example, in the treaty of September 10, 1853, the Rogue River Indians agreed to pay \$15,000 to white claimants. The court ruled that the treaty created the only liability of the Rogue River Indians and that the \$15,000 was "the exclusive remedy for persons whose property was destroyed." Charles J. Kappler, *Indian Treaties, 1778-1883* (New York, 1904), 603 [hereafter cited as Kappler, *Indian Treaties*]; Elizabeth Ross, *Executrix v. United States and the Rogue River Indians*, *CtCl Rpts*, 29:176 (1894) [hereafter cited as Ross]. The court also ruled that if liability accrued as a result of a treaty, "the right of the claimant to recover will be measured by the terms of the treaty." George M. Love, *Administrator of Harris v. United States, The Rogue River Indians. et al*, *CtCl Rpts*, 29:332, 348 (1894) [hereafter cited as Love].

<sup>18</sup>Two other sources of liability noted by the court were obligations under international law and imposed indemnity as a condition of peace. But, of the many cases I researched, the court always referred to the intercourse law or treaty stipulations as sources of Native American liability for depredation claims. In *Leighton*, the court ruled that Congress did not give it the jurisdiction to "inquire into and enforce the payment of an indemnity" for losses caused in war, so indemnities imposed as a condition of peace did not fall under its authority. See *supra* note 16 at 288, 307. For the four sources of liability, see Love, *supra* note 17 at 332.



such claims. In arguments the assistant attorney general showed that the Creeks and the United States reestablished peaceful relations after the Civil War with a treaty in 1866. Among other things, the treaty granted to the Creeks a "general amnesty of all past offenses against the laws of the United States, committed by any member of the Creek Nation." The government argued that the clause obviated any liability on the part of the Creeks for alleged depredations before 1866. However, the Garrison attorneys argued that the general amnesty applied only to acts committed between 1861, when the Creeks had signed a treaty with the Confederate States, and 1866, when they signed the treaty with the United States.

Ruling in favor of the Creeks, Justice Stanton J. Peelle wrote that "a general amnesty of all past offenses" clearly meant all offenses "prior to the execution of the treaty." To construe the treaty in any other way, he pointed out, would be to interpret that compact to the disadvantage of the Creeks, which the court would not do. Consequently, the 1866 treaty, and a similar one executed with the Seminoles, effectively eliminated all 954 claims against the two nations. Moreover, even if the court had ruled differently regarding the treaties, the justices had earlier invoked the Supreme Court's ruling that "when there is a conflict between the provisions of a treaty and those of a statute the latest in date must govern." Therefore, under that ruling the 1866 treaties ended the Creeks' and Seminoles' liability established by the 1834 trade and intercourse law.<sup>19</sup>

The Court of Claims also used treaties to determine the claim liabilities of Indian nations in the country's newer territories. The Navajo, for example, who lived in the area acquired from Mexico as a result of the 1848 Treaty of Guadalupe Hidalgo, agreed in a treaty on September 9, 1849, that "the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of" the United States would apply to them. However, Congress did not extend the Trade and Intercourse Act over that area until February 27, 1851.

<sup>19</sup>Mary A. Garrison et al v. United States and the Creek Indians, CtCl Rpts, 30:272, 280, 283, 285 (1895); *United States Statutes at Large*, 5:162-63; "Indian Depredations," 25th Cong., 2d sess., January 29, 1838, H. Doc. 127 (ser. 326); Shelley, "Correspondence," supra note 7 at 80:242-43; Kappler, *Indian Treaties*, supra note 17 at 910, 932; James S. Valk, *Survivor, Etc. v. United States and the Rogue River Indians*, CtCl Rpts, 29:62, 67 (1894) [hereafter cited as *Valk*]. There is a minor discrepancy in the official documentation regarding the number of claims against the Creeks and Seminoles that transferred to the Court of Claims. "Letter from the Secretary of Interior," 51st Cong., 1st sess., S. Ex. Doc. 167 [ser. 2688], gives the figure as 961. However, I used the 954 count provided by Shelley, who was closely involved with transferring the claims.

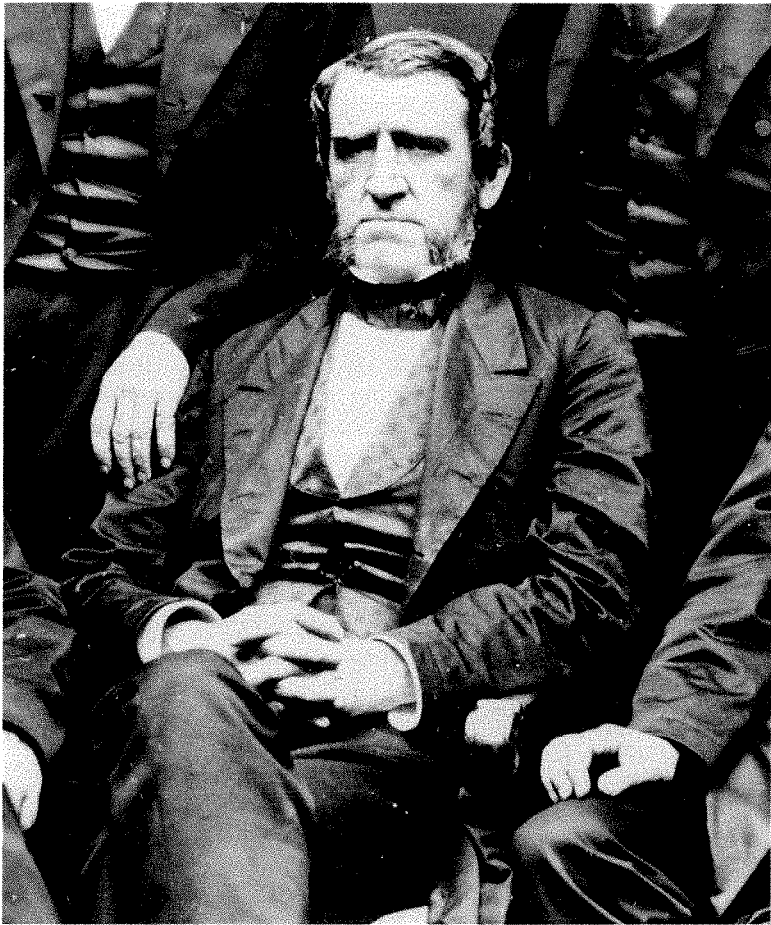
Vincente Pino alleged that between the signing of the treaties of 1849 and 1851, the Navajo stole or destroyed \$2,428 worth of his property, for which he filed a claim under the 1834 intercourse law. The government contended that no liability to indemnify existed until the 1851 act extended the earlier law over the newly acquired territory. But the claimant argued, and the court agreed, that in 1849 the treaty applied the 1834 law to the Navajo, giving Pino the right to file a depredation claim and the Indians the liability for it.<sup>20</sup>

Conversely, the court ruled that with the treaty of April 29, 1868, the Sioux had removed themselves from the operation of the indemnity provisions of the 1834 intercourse law. The 1868 compact gave members of the Lakota Nation the option of surrendering an accused depredator or paying the alleged victim. If they chose to deliver the perpetrator to United States authorities, the victim could not sue them under the intercourse law because they had already met their liability.<sup>21</sup>

The absence of treaties also adversely affected many claimants' cases. The justices ruled that when Native Americans had never signed a treaty or had never been considered in "tribal relations" with the United States, they accrued no liability under the 1834 law. For example, when Lewis Jaeger sought compensation from Yuma Indians for an alleged depredation committed in 1872, the justices ruled that the Yuma had never signed a treaty with the United States and had never been recognized as a tribe capable of signing a treaty; and that they were nothing "more than a race of quiet, inoffensive, self-supporting, industrious persons." Citing the Supreme Court's 1876 *Joseph* decision, the Court of Claims ruled that the intercourse law governed American relations with the "semi-independent tribes whom our Government has always recognized as exempt from our laws." In *Joseph*, the higher court determined that the Pueblo Indians, "if, indeed, they can be called Indians, had nothing in common" with the American Indian nations for whom Congress wrote the 1834 law. In *Jaeger*, the lower court ruled that the Yuma belonged to the same class as the Pueblos and were, therefore, exempt from any liability. A later court decision applied the same criteria to the "Mission Indians" of California. (In 1913 the Supreme Court reversed *Joseph* in *United States v. Sandoval*, but this had little, if any, impact on depredation cases.) Consequently, for suits tried in

<sup>20</sup>Manuel A. Pino, *Administrator v. United States and Navajo Indians*, CtCl Rpts, 38:64, 67 (1903); Kappler, *Indian Treaties*, supra note 17 at 583; "Indian Depredation Claims," 57th Cong., 2d sess, H. Doc. 369 (ser. 4518); *United States Statutes at Large*, 9:587, extended the intercourse law into the new territories.

<sup>21</sup>*Brown v. United States*, *Court of Claims Digest* (CtClD), 4:118 (1897).



William A. Richardson, chief justice of the Court of Claims, presided over the court's early decisions on depredation claims. (National Archives)

the Court of Claims the absence of treaties carried as much weight in determining the liability of Native Americans in depredation claims as did the presence or absence of certain treaty stipulations.<sup>22</sup>

<sup>22</sup>Lewis J. F. Jaeger v. *United States and the Yuma Indians*, CtCl Rpts, 29:172, 173-74 (1894) [hereafter cited as Jaeger]; *United States v. Joseph*, *United States Reports*, 94:614 (1876). *George Bell v. United States and the Dieguenos Indians*, CtCl Rpts, 39:350 (1904). For *Sandoval*, see Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln, 1984), 2:797 [hereafter cited as Prucha, *The Great Father*].

Besides treaties, the justices also interpreted the language Congress used in creating and sustaining an indemnity system, and in transferring the claims to the judiciary. As officials on Indian policy had struggled with terms such as "depredation" and "amity" for the preceding ninety-five years, the judges found it necessary to interpret each of these concepts within the meaning of Congress's original intent, and then to determine the implications of this intent on the claims before the court. Their interpretations touched on such basic concepts as what constituted a depredation as well as the more complex issue of an American Indian government's authority over non-Indians in Indian country.

A depredation, the justices decided, included any theft or destruction of property committed with malicious intent and often attended by violence. Justice Lawrence Weldon explained:

The term "depredation" is defined to be "the act of plundering, a robbing, a pillaging," and the depredator to be "one who plunders or pillages, a spoiler, a waster." . . . The term depredation, as defined and used in common parlance, implies one or more of the following conditions: Force, trespass, violence, a physical taking by force from the actual or constructive possession of the owner or person authorized to hold the possession, or a destruction of something valuable.<sup>23</sup>

The court's decision on William McKinzie's claim, however, illustrated that the justices were willing to look beyond force and physical violence in determining whether a depredation had been committed. In 1866 the United States Army established Fort C.F. Smith at the point where the Bozeman Trail, leading to the Virginia City mining district, crossed the Big Horn River in Montana. This post was one of three army forts designed to counter efforts by the Lakota, led by Red Cloud, to close the trail, which the Lakota contended violated previous treaties. Over the next two years, the persistence and military ability of Red Cloud, aided by the young Crazy Horse, forced the government to abandon the posts, after which Red Cloud promised to sign the 1868 Treaty of Fort Laramie. Toward the end of July, under the watchful eye of the Lakota, the troops marched out of Fort C.F. Smith.

Taking advantage of the soldiers' exodus, two entrepreneurs, John Richard, Jr., and William McKinzie, purchased a large

<sup>23</sup>*Sheldon Ayres v. United States and the Snohomish Indians*, CtCl Rpts, 35:26, 27 (1899) [hereafter cited as *Ayres*]. See also *Davidson v. United States*, CtCl D, 4:126-127 (1899).

amount of merchandise from the fort and the surrounding area, undoubtedly at fire-sale prices. They planned to transport the goods to settlements in the Gallatin Valley, closer to Virginia City's mining district. On August 2 Red Cloud's forces victoriously entered the abandoned fort and set it afire. Soon the celebrants turned their attention to the Richard and McKinzie wagon train, still in the vicinity of the post, and began running off their livestock and destroying or taking their merchandise. When Red Cloud arrived on the scene, he recognized Richard, whose mother and wife were Lakota, and ordered an end to the assault on his property. Red Cloud then demanded from the traders tobacco, sugar, coffee, and other supplies he said he needed for the women, children, and young men of his group. Richard and McKinzie "promptly handed over" the merchandise, which they later claimed amounted to \$3,923.50. In *McKinzie*, Justice Charles Howry wrote that, despite the absence of any actual threats or violence, "duress is sufficiently shown to make the transaction an involuntary surrender on the part of the owners to the defendant band of such property as was actually delivered to them." On February 20, 1899, the court awarded McKinzie, the surviving partner, \$1,556 in compensation for the merchandise given to Red Cloud.<sup>24</sup> Thus, while the court generally looked for violence or threats against claimants before judging an act a compensable depredation, it also recognized that victims could be coerced into giving up property.

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### THE COURT EMPHASIZES NATIVE AMERICANS' RIGHT TO WAGE WAR

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More indicative of the court's philosophy toward claims is what it determined did not constitute a depredation. Foremost among the property losses in this category were the spoiliations occurring in war. Repeatedly the justices defended what they called "the exercise of a belligerent right" to wage war, or, in international law, the sovereign power of American Indian nations to make war, despite their "domestic dependent nation" status. In defining "their rights as belligerents," the court

<sup>24</sup>Robert M. Utley, *The Indian Frontier of the American West, 1846-1890* (Albuquerque, 1984), 99-125; David Lavender, *The Great West* (New York, 1985), 386-90; James C. Olson, *Red Cloud and the Sioux Problem* (Lincoln, 1965), 74-76 [hereafter cited as Olson, *Red Cloud*]; *William S. McKinzie v. United States and The Ogallala Tribe*, CtCl Rpts, 34:278, 282, 283 (1899); "Indian Depredation Claims," 49th Cong., 1st sess., March 16, 1886, H. Ex. Doc. 125 (ser. 2399), 74-75; "Indian Depredation Claims," 55th Cong., 3d sess., S. Doc. 143 (ser. 3735), 4.

noted, "When war comes, it becomes lawful to kill, capture, and destroy." Any ensuing losses, the judges argued, must be suffered by the victims. Furthermore, indemnifying property lost in Indian wars would be counter to the "long-established and statutory recognition of the policy of the United States against the payment of claims arising by acts of war."<sup>25</sup>

Of all the court's decisions, recognition of the Indian nations' "rights as belligerents" symbolized the relationship of Native Americans to the United States. While the court accepted their "domestic dependent nation" status and acknowledged their "duty to submit to the constituted authorities," the justices nevertheless argued that "by reason of their recognized tribal relations by the political departments of the Government and the favorable rules of interpretation to which they are entitled their rights as belligerents will be respected." It was a well-established fact, Justice Charles Nott wrote in *Love*, that an Indian warrior could not be tried for murder or robbery for acts of war committed within a state. For the Court of Claims, American Indian nations indisputably possessed the right to wage war, and property losses resulting from the exercise of that right were not compensable.<sup>26</sup>

The court also refused to award indemnity if the alleged victim provoked an attack or was clearly in the wrong at the time of the depredation. For example, the justices determined that the "aggressions of the settlers and misconduct of the [United States] troops" caused attacks by the Hualapais in 1866 and 1867 against Charles Luke's mining camp in Mojave County, Arizona. "[I]t would be adding injury to injury," they wrote, "to hold that, notwithstanding their just indignation and hostility, they are responsible in damages, and not protected" by the law.<sup>27</sup> Likewise, when Louis McCoy attempted to recover losses he had sustained while illegally hunting buffalo in Indian Territory, the justices proclaimed his vocation the "most inimical to the normal and natural rights of the Indians." While the Kiowa who attacked him were also intruders, not being on their own reservation at the time, the court ruled that before claimants could demand anything from Indians, they had first to "be free from wrong" themselves. McCoy was clearly in the

<sup>25</sup>*Love*, supra note 17 at 332, 346, 348; *Leighton*, supra note 16 at 288, 306, 325. The Supreme Court affirmed *Leighton* in 161 U.S. 291 (1896). Cohen, *Federal Indian Law*, supra note 15 at 274. See also *Valk*, supra note 19 at 62, 68, and *Ross*, supra note 17 at 176, 178.

<sup>26</sup>*Leighton*, supra note 16 at 325; *Love*, supra note 17 at 346.

<sup>27</sup>*Charles A. Luke v. United States and the Hualapai Indians*, CtCl Rpts, 35:15, 24-25 (1899). See also *Milton C. Conners v. United States and the Cheyenne Indians*, CtCl Rpts, 33:317, 318, 325 (1898).

wrong and, therefore, was not entitled to compensation for the Kiowa attack on his hunting party.<sup>28</sup>

The justices also agreed that at times Native Americans possessed civil liability for a claimant's loss, but that their actions did not necessarily constitute a depredation. For example, in 1894 when high water grounded 360 logs floating on the river through the Snohomish reservation in Washington State, the logs' owner, Sheldon Ayres, made a verbal contract with the Indians. He agreed to pay a salvage fee to the Snohomish, who promised to keep the logs until he could regain possession of them. Fifteen days later, Ayres returned to the reservation and found that the Snohomish had cut many of the logs into cord wood and given the remaining timber to "other parties." For the loss of his logs, Ayres filed a claim for \$1,881.60. The court, however, ruled, "It is not every wrong that amounts to a depredation." While the justices agreed that Ayres had an "unquestionable" right to redress, they also pointed out that, in creating the Indian depredation claims system, Congress intended to offer protection for "property which under the law would either amount to a theft or a trespass."<sup>29</sup> The violation of Ayres's contractual agreement with the Snohomish did not constitute a depredation.

Neither did the burning of Lewis Jaeger's ferryboat in 1872. Jaeger ran a lucrative ferry operation on the Colorado River west of what is now Yuma, Arizona. In August one of his boats broke from its mooring and floated down the river, coming to rest against the bank near a Yuma Indian community. Jaeger tied up his boat and hired two men to guard it. Later the river receded, leaving the ferry marooned on the dry bank. The Yuma then built fires near the boat, accidentally setting it on fire and destroying it, for which Jaeger sought three thousand dollars in compensation. Aside from the court's opinion that the intercourse law did not apply to the Yuma, the justices also ruled that the absence of "malicious intent" made the loss uncompensable even if the Indians possessed a liability for depredations.<sup>30</sup>

The court also adhered tenaciously to the government's established policy not to compensate for personal injuries. On July 8, 1884, Manuelita Swope had filed a twenty-five-thousand-dollar claim against the Kiowa and Comanche. She said

<sup>28</sup>*Louis McCoy v. United States and the Kiowa Indians*, CtCl Rpts, 38:163, 164 (1903). See also *Roy v. United States*, CtCl D, 4:132 (1910).

<sup>29</sup>Ayres, *supra* note 23 at 26, 27, 28, 29 (1899).

<sup>30</sup>Jaeger, *supra* note 22 at 172; "Indian Depredation Claims," 49th Cong., 1st sess., March 16, 1886, H. Ex. Doc. 125 (Serial 2399), 102-3; Janet L. Hargett, "Pioneering at Yuma Crossing: The Business Career of L. J. F. Jaeger, 1850-1887," *Arizona and the West* 25 (1983), 346.

that on June 11, 1872, they attacked her home on Ute Creek, San Miguel County, New Mexico Territory, where she, a twenty-year-old bride, was living with her forty-year-old husband, Charles Hopkins. The attackers, she claimed, killed her husband and their foreman, mutilated her husband's body, took her captive, and stole property worth \$816. She managed to escape her capturers on the first night after the attack, but not before they had already "treated her in a most cruel and inhuman manner, cutting off her hair, inflicting a severe wound upon her head, and otherwise maltreating her person." On January 30, 1885, Indian Agent P. B. Hunt presented her claim to the tribal council of the Kiowa and Comanche at their agency in Indian Territory. Although the Indians denied any knowledge of the attack, the Indian Office recommended an allowance of \$816 to cover the cost of Swope's property. The acting secretary of the interior concurred with the Indian Office's findings and sent the claim to Congress, recommending that the lawmakers could, if they chose, provide further compensation for Swope's suffering. The legislators had not acted on her case when it was transferred to the Court of Claims.<sup>31</sup>

Before the court, Swope's attorneys argued that she was entitled to the full twenty-five thousand dollars because of the physical and mental injuries suffered as a result of the attack and abduction. On her behalf they introduced her physician's statement, attesting

that she was an *imbecile for one or two years* after the assault upon her by the Indians, and that whereas before she had been more than an ordinarily bright young woman of a naturally cheerful disposition, she became listless and dreamy in her manners, and would sit around for hours together without saying a word; that she seemed to have received a profound mental shock from which she was years in recovering; that, in his opinion, *she has not yet wholly recovered her mental faculties* (said twenty years after the assault), and that to-day (September 20, 1892) she is nowhere near as bright as she was before the injury.

<sup>31</sup> *Manuelita Swope v. United States and the Comanche and Kiowa Indians*, CtCl Rpts, 33:223, 224, 227 (1898); "Indian Depredation Claims," 49th Cong., 1st sess., March 16, 1886, H. Ex. Doc. 125 [ser. 2399], 210-11; "Objections by Pettis & Agnew to the Allowance of either of the Motions made or filed in this case by B. F. Dowell," 3; Muldrow to Commissioner of Indian Affairs, December 27, 1886, 3-4; "Claimant's Request for Additional Finding of Fact, with Supplementary Brief," 4; all in Indian Depredation Case 927, Records of the Court of Claims, RG 123, National Archives; "Indian Depredation Claims," 55th Cong., 2d sess., S. Doc. 301 [ser. 3615], 2.



However, to the Court of Claims, Congress's intent could not have been clearer: "Under the Indian Depredation Act," the justices ruled on Swope's claim, "the court has no jurisdiction of claims growing out of personal injuries, but is limited to such as arise from depredations upon property." Echoing the long-held position of the government, on February 28, 1898, Justice Weldon wrote for the court, "Grievous though her suffering was and is, it comes within the domain of an injustice and wrong without a remedy." The judges then awarded her \$816.<sup>32</sup> Personal suffering, the court affirmed, did not constitute a compensable depredation.

Illustrating the complexity of the issues confronting the Court of Claims is the decision on James Hamilton's case in 1907. As the surviving partner of Samuel Humes, Hamilton filed a suit against the Chickasaw Nation for confiscating and selling the partnership's properties on Indian lands in 1867, and depositing the proceeds of the sale into its national treasury. In 1871 Hamilton sought \$3,050 in compensation under the Indemnity Act. The court's opinion on the case reiterated that the term "depredation" implied the use of force in the destruction or taking of a victim's property. The term "inherently excludes the idea of a peaceful taking of property in pursuance of law," wrote Justice Fenton Booth. The court defended the right of the Chickasaw government to pass laws within the boundaries of its nation. The court held that when, between 1858 and 1861, Humes and Hamilton purchased property and secured trading licenses to conduct business within the Chickasaw Nation, the partners had voluntarily subjected themselves to the jurisdiction of that government. The court then pointed out that the United States secretary of the interior chose not to exercise his right, as granted in an 1866 treaty, to suspend the confiscation act of the Chickasaw legislature. Therefore, the Chickasaw governor had legally taken the Humes and Hamilton property, and the partnership had not suffered a depredation.<sup>33</sup>

<sup>32</sup>For more information on the court's refusal to make awards for personal suffering, see *John S. Friend v. United States and the Comanche Indians*, CtCl Rpts, 29:425, 429 (1894); and Attorney General, *Annual Report for the Year 1894*, 18.

<sup>33</sup>*James H. Hamilton, Surviving Partner, Etc. v. United States and the Chickasaw Nation*, CtCl Rpts, 42:282, 286 (1907); "Indian Depredation Claims," 49th Cong., 1st sess., March 16, 1886, H. Ex. Doc. 125 (ser. 2399), 170-71. The latter document shows that in Hamilton's original claim he alleged, or the Indian Office interpreted it as, the destruction of his buildings. For the secretary of the interior's power to suspend Chickasaw legislation, see Kappler, *Indian Treaties*, supra note 17 at 922.

The phrase "in amity," included in every depredation claims-related act since 1796, presented another constructional problem for the justices. The Indian Office had always held that a tribe and the United States were in amity if they had signed a treaty of friendship. However, Congress always maintained that two political entities could not be in amity if a state of war existed, regardless of any documents to the contrary.

The Court of Claims settled on an amalgam of the two interpretations, but leaned more heavily toward the congressional construction. The justices first looked at the definition of the word "amity" and decided that it meant "friendliness," or, in the international arena, "peace." Why, they asked, must they interpret a word with such a clear meaning? They then tried to divine the original intent of the lawmakers who had first used the term a century earlier in the Trade and Intercourse Act of 1796. At that time, few tribes were in actual treaty relations with the United States. The judges doubted whether Congress meant to exclude from indemnity provisions all the non-treaty nations then on the United States' frontier. Between 1796 and 1871, however, the government negotiated treaties with many American Indian groups. The justices contended they could not simply disregard these documents in determining amity. Moreover, the court ruled that a treaty could imply a state of friendship and, in the absence of any evidence to the contrary, it would rule that Indian nations in treaty relations with the United States were "in amity" for the purposes of indemnity claims. But the question of amity was a question of fact, and a treaty alone did not necessarily prove that actual peace existed. If hostilities between the United States and an Indian nation occurred, regardless of any prior treaty, the justices believed that war, not amity, existed.<sup>34</sup> The problem lay in determining when an act of theft or destruction represented an isolated depredation or an act of war. Thus, the court's own construction of "in amity," and its recognition of the Indian nations' right to wage war, required that for each claim, or test case, before the court, the justices needed to determine if the alleged loss had occurred as a result of a depredation in peace or hostilities in war.<sup>35</sup>

<sup>34</sup>*Samuel Marks et al v. United States*, CtCl Rpts, 28:147, 167-73 (1893) [hereafter cited as *Marks*], *aff'd Marks v. United States*, 161 U.S. 297 (1896); *Valk*, *supra* note 19 at 62, 67-68; *Leighton*, *supra* note 16 at 288, 301-3, 325; *Love*, *supra* note 17 at 332, 340-42.

<sup>35</sup>Attorney General, *Annual Report for the Year 1896*, xx, 11. For references to all Court of Claims printed opinions on "amity" and on the state of amity for specific Native American political entities, see *Digest of Decisions of the United States Court of Claims*, comp. Harry N. Stull (Chicago, 1929), 479-81; *CtCl D*, 8:113-17, and 4:121-26.

This interpretation roused the ire of claimants. If the court decided that a state of war existed, an Indian nation could not be charged with an indemnity unless specifically allowed by a treaty subsequent to the hostilities. The federal government found itself in the position of defending claims against its "domestic dependent nations," at the expense of its own citizens, by proving that a state of war existed between itself and its "wards." "It is absurd," claimant attorney John W. Clark proclaimed, "to maintain that an Indian tribe, which is a more dependent subject as such than any individual citizen of the United States, can not be held liable because it has become contumacious and unruly."<sup>36</sup>

But what Clark called "contumacious and unruly," the justices believed, in many cases, constituted belligerence. The absence of a formal declaration of war or abrogation of a treaty by Congress or an Indian nation did not bother the judges. We treat our domestic nations differently from foreign nations, they wrote.<sup>37</sup> The justices said they could determine an Indian war by the level of hostility between the Native Americans and United States citizens, and the government's response to those activities. For example,

If a party of bad white men or a party of bad Indians engaged in rapine and murder and the remainder of the white community and of the Indian tribe did not take up arms, it was crime, but not war. If, on the contrary, the condition of affairs was such that every man on the one side stood ready to kill any man on the other side and military operations took the place of peaceful intercourse, hostility so far existed that amity ceased to exist and the purpose of the statute in allowing indemnities was at an end.<sup>38</sup>

The Supreme Court supported this position. It also took the more practical stand that if all claimant petitions received favorable awards, the cost of the indemnities would quickly deplete "every dollar of annuity, if not every dollar of fund" set aside for the Indian nations. This had not been Congress's intention in creating the indemnity system. Rather, lawmakers had wanted a system whereby a victim could receive compensation, if the violation had been committed by an individual,

<sup>36</sup>*William Cox v. United States and the Bannock Indians*, CtCl Rpts, 29:349, 360 (1894).

<sup>37</sup>*Marks*, supra note 34 at 28:147, 169-70.

<sup>38</sup>*Elijah W. Dobbs v. United States and the Apache Indians*, CtCl Rpts, 33:308, 313 (1898) [hereafter cited as *Dobbs*].

or individuals, from an Indian nation "in the relation of actual peace with the United States." Therefore, the higher court agreed, in every case the Court of Claims needed to determine the international conditions existing between the United States and an Indian nation at the time of the alleged depredation, before it could decide whether a claim warranted compensation.<sup>39</sup>

The task was certainly formidable. One secretary of war estimated that to compile data "respecting Indian hostilities from the records of the War Department alone would require the services of 100 men for a year or more of time." Undaunted, however, the assistant attorney general in charge of Indian depredation cases, aided by "one clerk and two poorly paid assistants" in the Justice Department and five examiners to take testimony in the field, gathered information to convince the Court of Claims that depredations occurred during wars. The non-amity status of the defendants, after all, was the best, and in some cases the only, defense the government could muster.

By 1896 the court had ruled on enough of the cases for the Justice Department to compile a list of the dates of non-amity between the United States and the various Indian nations. On March 31 this list was mailed in a circular to all claimants and their attorneys, asking them to withdraw cases if their claims fell within the times already adjudged as periods of hostility. The government hoped to trim the docket, enabling the rest of the cases to move up more quickly on the court's calendar, but few of the claimants complied, preferring to wait for possible changes to the law.<sup>40</sup>

While recognition that a condition of war could exist between the United States and an Indian nation generally worked in favor of the defendants, a related construction adversely affected the government. The 1891 law made the accused Native Americans and the United States codefendants in all depredation cases. In the event of awards to claimants, the liability to pay the indemnity fell to the Indian nation, if it possessed the necessary funds, or to the United States if it did not. In making awards, therefore, the court needed to identify which Indian nation was responsible for providing the funds. But occasionally a claimant did not, or could not, identify specific Native Americans responsible for a depredation, saying only that "Indians" committed it. The Court of Claims decided that in such cases the United States assumed the full liability to indemnify

<sup>39</sup>*Marks v. United States*, 161 U.S. 297, 304-5 (1896).

<sup>40</sup>Attorney General, *Annual Report for the Year 1896*, 13-14, 19, 21.

the claimant.<sup>41</sup> This interpretation, the assistant attorney general complained,

puts a premium upon the testimony of the wary and the designing to avoid identification of Indians not only for the reason that the United States are thereby prevented from relying upon the defense of the want of amity of the Indians, but for the further reason that judgment can in such case be had for the acts of unknown persons possibly not Indians at all, thereby making the United States liable for the depredations of white men masquerading as Indians.<sup>42</sup>

This construction, as the Justice Department pointed out and a sympathetic court agreed, made it impossible for the United States to defend against a claim by proving that the loss occurred during a state of war.<sup>43</sup> How many "wary and . . . designing" claimants, or their attorneys, took advantage of this loophole is impossible to ascertain.

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#### THE COURT RULES ON BANDS AT WAR AND TRIBES AT PEACE

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Further complicating the issue of amity, the justices divided American Indian nations into political subgroups and determined that a depredation committed by a smaller group at war with the United States could not be charged against the rest of the Indian nation that remained in amity with the government.<sup>44</sup> This construction grew out of the phrase "band, tribe, or nation" in the 1891 Jurisdictional Act. The justices ruled that if a band of a tribe committed an offense while in a state of war, the tribe that remained friendly and peaceful was not liable for the band's activities. To determine whether a band existed, the court used, in descending order, three criteria: Had the United States ever negotiated a treaty recognizing the band as a distinct political entity from the larger tribe or nation? Did

<sup>41</sup>*Joshua Gorham v. United States and the Comanche and Kiowa Indians*, CtCl Rpts, 29:97 (1894) [hereafter cited as *Gorham*]; *W. W. Woolverton, Administrator v. United States and Nez Perce Indians*, CtCl Rpts, 29:107 (1894) [hereafter cited as *Woolverton*].

<sup>42</sup>Attorney General, *Annual Report for the Year 1896*, 16. See also Attorney General, *Annual Report for the Year 1894*, 17.

<sup>43</sup>For the Court of Claims' concurrence on the logic to the objection to this ruling, see *Gorham*, *supra* note 41 at 29:97, 101.

<sup>44</sup>*Jeremiah Graham v. United States and the Sioux Tribe of Indians*, CtCl Rpts, 30:318, 338 (1895).

the government's officers deal with the band as being separate from the larger political group? And did the Indians recognize the band as being distinct from the tribe? If a band met one of these criteria, the activities of that group needed to be separated from the larger political entity.<sup>45</sup>

For example, the judges ruled that Chief Joseph and his Nez Perce were a non-treaty Indian band distinct from the larger Nez Perce nation. In its flight toward Canada in 1877, any destruction or theft committed by Chief Joseph's band was an act of war. Moreover, the Nez Perce tribe that remained in amity, and even assisted the United States military in capturing fleeing kindred, was not liable for any of the losses attributed to Chief Joseph's band.<sup>46</sup> The court made similar determinations regarding the activities of other well-known bands, including Victorio and his Chiricahua and Mescalero Apache band as opposed to the amity of the Apaches at the Mescalero Reservation, and Geronimo and his followers versus the larger Chiricahua Apache tribe remaining at peace.<sup>47</sup>

In 1901 the Supreme Court concurred with this interpretation, and tried to clarify the distinction between a tribe and a band. In *Montoya v. United States*, it stated:

By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a "band" within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership and concert of action.<sup>48</sup>

<sup>45</sup>Elijah W. Dobbs, *supra* note 38 at 308, 309, 315-16.

<sup>46</sup>Woolverton, *supra* note 41 at 107; Attorney General, *Annual Report for the Year 1894*, 1.

<sup>47</sup>Eutimio Montoya v. *United States and the Mescalero Apaches*, CtCl Rpts, 32:349 (1897); Moeller W. Scott v. *United States and the Apache Indians*, CtCl Rpts, 33:486 (1898); Attorney General, *Annual Report for the Year 1901*, 56.

<sup>48</sup>180 U.S. 261 (1901), quoted in Cohen, *Federal Indian Law*, *supra* note 15 at 270.

Usually, this construction helped the defendant Native Americans because those who remained at peace with the United States did not need to pay for the destructions of war caused by members of their nation over whom they exercised no control.

But the ruling also benefitted a few claimants. In 1875, for example, the Oglala Sioux split into two distinct groups. Red Cloud and his followers remained on the reservation, abiding by their 1868 promise never to fight the Anglos again. Crazy Horse, however, led a large portion of the Oglala into Yellowstone country. Eventually they joined forces with the growing community of Lakota and Northern Cheyenne under the intellectual and spiritual leadership of Sitting Bull, and helped defeat the Seventh Cavalry at the Little Big Horn. To Crazy Horse's group "fell the retribution of war," while Red Cloud's people continued under the "obligations of peace." The court ordered the payment of a claim against Red Cloud's people, dismissing the government's defense that all the Oglalas were at war in 1876. The court reasoned that when Crazy Horse and his people left the reservation, the United States military pursued them as an enemy and waged war against them, entitling them to recognition as a distinct political entity in a state of war. By remaining on the reservation and not participating in the hostilities, however, Red Cloud and his people demonstrated that they had remained in amity with the United States and were liable for the depredations they committed.<sup>49</sup>

The Court of Claims decided many other issues affecting claims, but none of the rulings underscored the status of American Indians in the United States as much as the interpretations of treaties, the language of the laws, and Native American political units. In 1920 the court heard its last five depredation cases, handing down two awards. At the same time a last-ditch effort was made before the Supreme Court to reverse the lower court's discrimination between bands at war and tribes at peace. In 1915 an amendment to the original Jurisdictional Act dropped the phrase "bands, tribes, or nations" and simply identified "any tribe in amity" with the United States. Mary Rex,

<sup>49</sup>The Northern Cheyenne also split, some remaining on the reservation and some eventually joining Sitting Bull. Because the victim of the alleged depredation did not know whether to accuse the Northern Cheyenne or the Sioux, the court could not decide which group it should charge with the depredation, and ordered the United States to provide compensation. *Francis Salois v. United States, the Northern Cheyenne and the Sioux Indians*, *CtCl Rpts*, 33:326, 335 (1898). James Olson explains that the division between Red Cloud and the Oglalas with Sitting Bull was not nearly so neat as the court envisioned. Olson argues that Red Cloud may have strongly supported Sitting Bull's forces, and, if nothing else, at least offered "parental approval" for his son Jack, who participated in the Battle of the Little Big Horn (*idem*, *Red Cloud*, *supra* note 24 at 214-22).

administrator of James Ivie's suit against the Utes, contended that the language of the amendment held a tribe responsible for the actions of a band (in this case led by Black Hawk) belonging to that tribe, despite the fact that the court had previously dismissed the case because the band was at war with the United States. In 1918 the Court of Claims disagreed with her and dismissed the case. She appealed the decision to the Supreme Court, and no doubt the Justice Department breathed a sigh of relief when, on January 26, 1920, the highest tribunal upheld the judgment of the lower court. Had the Supreme Court reversed this construction, as many as three hundred cases, amounting to more than one million dollars, would have returned to the docket at the Court of Claims. Despite the efforts of a few undaunted claimants over the next years, for all practical purposes, 1920 marked the end of the Indian depredation claims system, even though the provision for filing claims remains federal law today.<sup>50</sup>

In 1891 the Court of Claims had entered the murky legal waters of Native American-Anglo relations. To the justices' credit, their decisions emphasized the legal status of American Indian nations in the United States. Time and again the court affirmed rights of Indian nations as "domestic dependent" political units within the American federal system. The justices did not view Indians as simply subject people obliged to submit to an arbitrary higher authority. It is true that they saw the Indians as "wards" of the federal government, but that status often required more of the guardian than the dependent. Thousands of claimants watched helplessly as their government defended the right of federal wards to steal or destroy their property. Despite the seeming incongruence of that situation, the Court of Claims' justices did not shirk their responsibility to decide each case upon its merits and within the constraints of constituted law. Their opinions are instructive to today's student grappling with federal law regarding Native Americans.

Unfortunately, the court's efforts coincided with the national movement to destroy the sovereignty of the American Indian

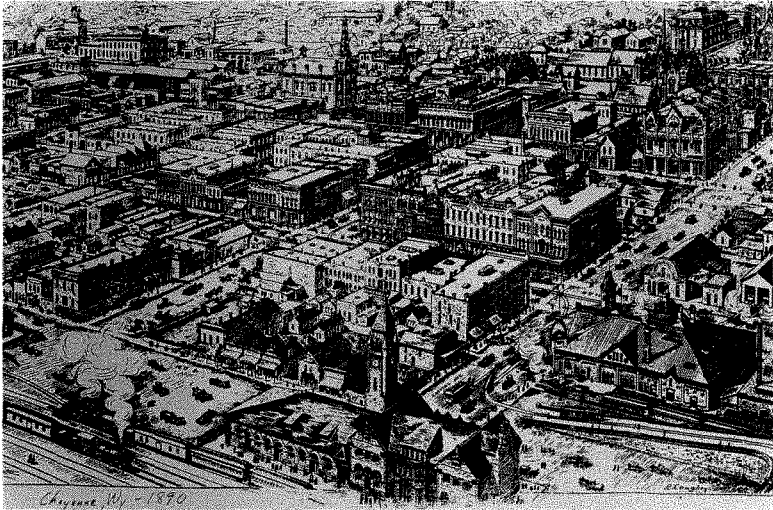
<sup>50</sup>Attorney General, *Annual Report for the Year 1920*, 98; *CtCl Rpts*, 55:544; *Mary E. Rex, Administratrix, James A. Ivy, deceased v. United States and the Indians*, Indian Depredation Case 10842, Records of the Court of Claims, RG 123, National Archives; *Rex, Administratrix of Ivie [sic] v. United States and Ute Indians*, 251 U.S. 382 (1920). As late as the 1930s, the Interior Department received inquiries about claims filed to it and later transferred to the Court of Claims. See Box 1431, File 5-6, Part 3, "Claims-Depredations, General, Jan 19, 1931-Apr 21, 1934," Central Classified File, 1907-1936, Records of the Office of the Secretary, Department of Interior, RG 48, National Archives. Title 25 *United States Code* 229 still allows a "citizen or inhabitant" to file for property stolen or destroyed by "any Indian, belonging to any tribe in amity with the United States."



nations. Assaults in the form of the 1887 Dawes Act, designed to break up tribal lands, and the 1903 *Lone Wolf* decision, giving Congress the right to abrogate Indian treaties unilaterally, were not softened by any of the Court of Claims' decisions.<sup>51</sup> Moreover, when Congress created the Indian Claims Commission in 1946 "to give the Indians their day in court," lawmakers set the stage for the termination of "federal supervision and control over" Native Americans. The government hoped to destroy Indian sovereignty completely by allowing Native Americans, in the words of President Harry Truman, to "take their place without special handicaps or special advantages in the economic life of our nation and share fully in its progress."<sup>52</sup> Consequently, the Court of Claims' decisions recognizing the relationship of American Indians within the federal system had no ameliorating effects on the assaults on their sovereignty. The court had simply ended decades of haggling over an ineffective indemnity system that had done nothing to "preserve Peace on the Frontiers."

<sup>51</sup>See C. Blue Clark, "*Lone Wolf v. Hitchcock*: Implication for Federal Indian Law at the Start of the Twentieth Century," *Western Legal History* 5 (1992), 1.

<sup>52</sup>Many studies have been made of the Indian Claims Commission. For a brief synopsis, see Prucha, *The Great Father*, *supra* note 22 at 2:1017-1023. These quotations are found on pages 1019, 1022-23.



Cheyenne, like other western communities, took pains to portray itself as law-abiding and respectable, so it is not surprising that buildings housing activities considered improper—like saloons and brothels—were carefully omitted from promotional depictions like this bird's-eye view from 1890. (Wyoming State Museum)

# SEND THE BIRD AND CAGE: THE DEVELOPMENT OF DIVORCE LAW IN WYOMING, 1868-1900

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PAULA PETRIK

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On September 14, 1876, Ruthina deMars wrote to her husband that she was enjoying herself "first class" and hoped "to continue to do the same without [his] assistance. I am very much obliged to you for past favors," she added, "but should much rather our intercourse should cease from this time. Please send me my bird and cage and wax flowers" by express.<sup>1</sup> Whether the bird and cage arrived via the Union Pacific in Evanston, Wyoming, is unclear; it was clear to the court, however, that Ruthina deMars, like many others in Wyoming between 1868 and 1900, had sundered the bond between husband and wife by deserting her spouse. In consequence, the Albany County court awarded her husband, a town soda-water manufacturer, a divorce.

Only one of several hundred divorce suits in Albany County, the deMars case serves as the simplest example of desertion, but, as in the adjacent Laramie County, the interpretation of divorce law, especially desertion, was much more complex and masked more serious causes for marital breakup. Later, the use

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<sup>1</sup>Civil Case No. 864, Albany County, Wyoming State Archives, Cheyenne, Wyoming. Data analysis is based on 237/245 completed divorce cases from Albany County, Wyoming, and 258/275 *available* completed divorce suits from Laramie County, Wyoming, by computer. In Albany County, few files were absent from the archive, but in Laramie County the clerk of the court did not index divorce cases among the civil suits between 1881 and 1885. The entries simply record the granting of a divorce but not the particulars of the case. Defective and missing cases also complicated analysis of the Laramie County material. Nonetheless, it is reasonable to assume that the absence of some fifty cases from 1881 to 1885 and approximately twenty missing files would not substantially alter the results of the statistical research for Laramie County. Spelling and punctuation have been regularized throughout.

of mental cruelty as a reason for divorce proved even more problematic. The ideal of the companionate marriage, mutually affectionate, cooperative, and reciprocal, in short, was slow to arrive in Wyoming, and was in part the result of rising expectations as working-class people aspired to the middle ranks.

Recognizably similar circumstances, although they differed in degree, contributed to the two counties' understanding of divorce laws. The largest city in Laramie County was Cheyenne. By virtue of its role as the territorial capital (and, after 1890, the state capital) and the division point for the Union Pacific Railroad, it harbored a variety of social groups: skilled, unskilled, and professional rail employees; state and federal bureaucrats; several bands of merchants and artisans; and a bevy of western capitalists. Despite the sizable population of single males within its precincts, soldiers posted nearby to Fort D.A. Russell, and single men from cattle ranches in the area, Cheyenne was predominantly a city of families. Laramie, the main population center of Albany County, was smaller, and was also a product of the Union Pacific, which designated the town as its section point. Whereas middling business people dominated Cheyenne's social structure, Laramie was a working-class town, populated by Union Pacific rail and shop workers, rolling mill laborers, and roustabouts from the cattle operations. Like Cheyenne, Laramie was the home of a number of single men, but determined middle- and working-class families set the tone for the town.<sup>2</sup>

Although Ruthina deMars took the easiest route out of her marriage, Wyoming law provided a number of grounds for divorce: desertion for one year, adultery, cruelty, indignities rendering a spouse's condition intolerable, a husband's neglect or failure to provide for one year, intemperance, a husband's vagrancy, physical incompetency, prenuptial pregnancy of the wife by another man, and conviction of felony before the marriage.<sup>3</sup> While Wyoming's canon was a lengthy one, Albany and Laramie County courts initially reduced the list to desertion, cruelty, adultery, and intemperance; only after 1885 did the courts regularly recognize a husband's willful neglect and indignities rendering a spouse's condition intolerable, and even then plaintiffs and their lawyers seldom availed themselves of these

<sup>2</sup>Beginning with 1,450 residents in 1870, Cheyenne experienced sustained growth, reaching a population of 14,087 by 1900. In 1870 Laramie's population numbered 854, increasing to over 8,000 by 1900 with the growth of area ranching and the addition of the university.

<sup>3</sup>Carroll D. Wright, *A Report on Marriage and Divorce in the United States* (Washington, D.C., 1891), 112-13; Special Reports, *Marriage and Divorce 1867-1906, Part 1* (Washington, D.C., 1909), 327. Later, the canon allowed divorce for conviction of a felony after a marriage.

provisions. "Indignities" (often interpreted as forms of mental harassment or meanness) were, moreover, subsumed under the general heading of "cruelty" (usually defined as physical violence) and, again, only after 1885 did the courts allow cruelty specified as "indignities" to be sufficient for a divorce. This informal concatenation of the divorce statute also extended to desertion, which accounted for the largest number of divorces in Wyoming as well as elsewhere.

As in other areas of the United States, desertion in Albany and Laramie counties was most often a case of a husband's and, to a much lesser extent, a wife's slipping away.<sup>4</sup> Although the trend in desertion eventually declined, between 1869 and 1900 roughly two-thirds of all divorces recorded in Albany County involved desertion; in 60 percent of them a husband simply left his wife and often his children. Laramie County duplicated this pattern; desertion declined over time but accounted on the average for 44 percent of the divorces. Men were the more likely to depart; in 53 percent of the Laramie County desertions a husband left his family (Figures 1A and B). Although several men sent their wives to relatives before they disappeared,<sup>5</sup> in other cases wives refused to leave their families to pioneer in Wyoming or to follow their railroading husbands.<sup>6</sup> Still others were unwilling to endure the isolation of ranch life. Luther Randall, for example, testified that his wife "did not like the country."<sup>7</sup> And Samuel Slaymaker said that his wife, Ella, thought "a ranch was too dull a place to live" and that "she wanted to live in a place where she could see somebody."<sup>8</sup> Ella Slaymaker left to open a hotel at Fort Fetterman, from which she realized \$500 a year. When the court asked John Skinner why his wife had left, he replied, "She merely did not want to live here in this country. That was all I got out of her." For Morris Idelman's wife, the life of a prosperous merchant in Cheyenne with the city's numerous social possibilities was not enough. In 1880 she announced that she was "dissatisfied with the country" and returned to Europe.<sup>9</sup> Some women were

<sup>4</sup>Civil Cases 598, 603, 675, 727, 756, 829, 864, 880, 893, 910, 917, 934, 939, 961, 970, 992, 996, 999, 1043, 1048, 1106, 1142, 1286, 1356, 1467, 1454, 1489, 1604, 1630, 1645, 1656, 1679, 1703, 1728, 1757, 1882, 1909, 1934, 1999, 2030, 2072, 2107, 2112, 2137, 2149, 2157, 2264, 2279, 2292, 2304, 2317, 2323, 2355, 2359, 2373, 2383, 2391, 2394, 2395, 2403, 2404, 2423, 2424, 2429, 2461, 2466, 1470, 2485, 2521, 2534, 2566, Albany County.

<sup>5</sup>Civil Cases 230, 438, 1044, 1904, 948, Albany County.

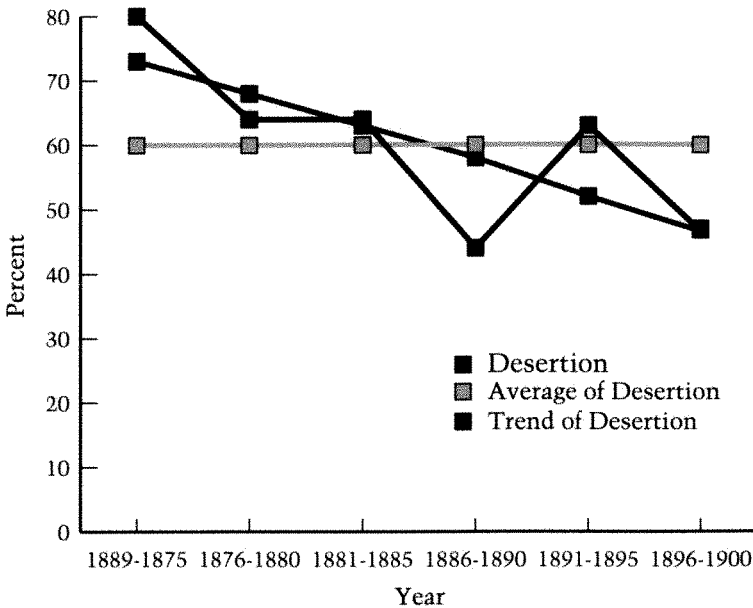
<sup>6</sup>Civil Cases 752, 936, 1069, 1985, 1466, 2387, Albany County; 2-162, Laramie County.

<sup>7</sup>Civil Case 231, Albany County.

<sup>8</sup>Civil Case 1324, Albany County.

<sup>9</sup>Civil Case 2141, Albany County; 3-255, Laramie County.

FIGURE 1A  
ALBANY COUNTY, WYOMING—DESERTION



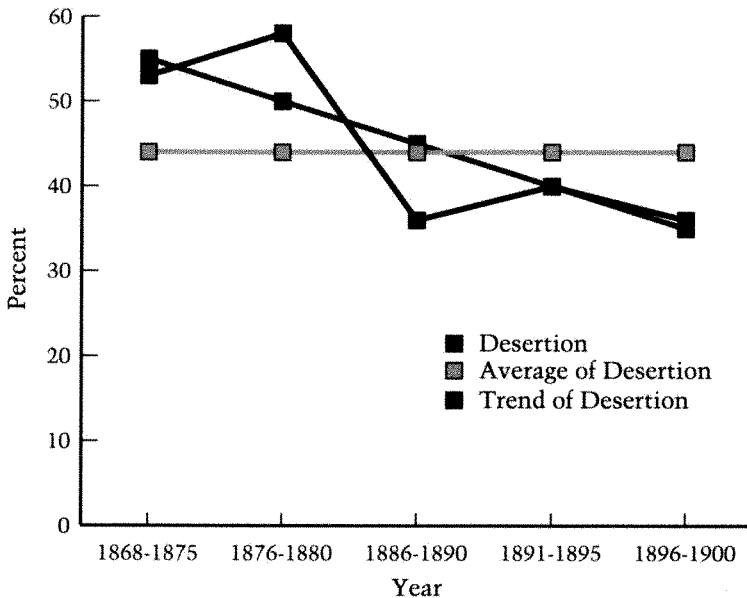
forced out of their homes and told to make their own way.<sup>10</sup> Mary Knabe's husband put her and her child out on the street in Council Bluffs, Iowa, on a Sunday afternoon in November 1869; Mary went west until she arrived in Laramie, where she supported herself and her son by washing and sewing. For Mary Knabe, being ejected from her house was tantamount to her husband's desertion.<sup>11</sup>

Petitions pleading desertion (much more common in Albany than in Laramie County) also masked other unacceptable marital behaviors—adultery, cruelty, or drunkenness, or an emotionally comatose marriage. Often such charges could not be substantiated, yet they were acceptable to the court. Hearsay or confessed reports of extramarital affairs, drinking that did not incapacitate a partner, mental or physical cruelty, or general marital malaise were in some instances resolved informally by a husband's or wife's leave-taking and then formalized by a divorce. Besides abrogating the one-year requirement necessary to a charge of desertion, these complex desertion suits also

<sup>10</sup>Civil Case 1162, 1969, 2227, Albany County; 2-432, Laramie County.

<sup>11</sup>Civil Case 213, Albany County.

FIGURE 1B  
LARAMIE COUNTY, WYOMING—DESERTION



illustrate some of the pressures attendant on nineteenth-century marriage.

Whether from a charitable impulse or the inability to garner evidence for the more serious charge of infidelity, the desertion provision could be used to end a marriage in which unwitting adultery had occurred. William Crout, who would be divorced three times in Albany County, charged his wife, Melissa, with desertion; the court records showed that she had deserted Crout to live with Charles Stansberry. In letters attached to the case, Melissa Crout, who "would not give Stansberry's shirt stuffed with satin for Crout," and Stansberry confessed that they had eloped. Stansberry wrote that Melissa had taken sick and that he had paid a visit to her room. He admitted:

From that time I was in love with a married woman. After some time I thought it was folly to think any more about it until one evening being unwell retired to my room very early. I had not been in bed but a short [time] when I overheard a conversation between Melissa and Crout charging him of being a thief and everything that is bad and asked him for money to go

home which he denied and said that she would live with him for she had no friends to send for money. Little did he know that she had a friend in the next room that would give the money as free as the water that runs. After this conversation I heard her ask him for a divorce which he denied, and he consented and then went for a lawyer to make out the papers. I saw in a moment that there was a chance for me and I improved the opportunities and I won the case.<sup>12</sup>

A few months after his divorce, William Crout remarried, but his luck was no better. Rebecca Crout deserted him. When the chancery commissioner quizzed him about her reasons for leaving, Crout claimed that she had left because he "did not pet her as much as he should" and because he had given a horse to his daughter rather than to his wife.<sup>13</sup>

In a similar case, John Webb charged his wife with desertion, although she had obviously been living in an adulterous relationship with Webb's brother in Colorado. Instead of returning to Iowa to visit her parents in 1876, Sena Webb decamped with her brother-in-law, by whom she had a child. In a candid letter, Joe Webb acknowledged that they had "yielded to a hot, unbridled passion," and outlined the circumstances of their affair in order to exonerate Sena:

She acknowledged her heart mine but her hand and honor yours. She said she would rather die than be untrue to you. She begged and entreated me from her knees to leave her forever, ere she fell from the high pillars of honor she had ever rested upon. She begged me if I respected her, [by] all I revere on earth by the memory of all those near and dear to me to leave her whilst yet we were guiltless in the eyes of God and our conscience. But no. With a persistency seldom equaled, I continued my entreaties until the 4th of September, 1876, Saturday when you were in town. She yielded all to me that very night, the first of our intercourse she became impregnated. Hence, Lillian.<sup>14</sup>

<sup>12</sup>Civil Case 234, Albany County. How these letters from Melissa Crout and Charles Stansberry, written to a sister and sister-in-law, found their way into the docket remains a mystery. Perhaps Melissa's sister agreed to pass the letters on to Crout to speed the process.

<sup>13</sup>Civil Case 607, Albany County.

<sup>14</sup>Civil Case 989, Albany County.



Whether out of remorse, duty, or trouble with her adulterous relationship, Sena Webb returned to her husband in 1877 or 1878. He agreed to support her and *all* of her children, but declined to live with her. Meantime, against her wishes, Joe Webb resumed his correspondence in February 1878, begging her to return to him in Colorado. By April that year, Sena had decided that her attempt at reconciliation had failed and agreed to join her lover, who admitted that without her he was "drifting toward recklessness fast." Despite the obvious evidence, John Webb chose "desertion" rather than "adultery" when he approached the court.<sup>15</sup>

In 1888 Myra Allen elected to prosecute her husband, Arthur, on the grounds of desertion, although she had letters to prove and witnesses to testify that he had engineered a train wreck at Missoula, Montana, in order to leave his wife. The most damning evidence, however, was a letter in which Myra Allen's lover explained the obstacles to their reunion, not the least of which was Myra's revealing letter in which she wondered why "Hal-lie" ran after her husband and "could not attract a single man."<sup>16</sup> Similarly, Margaret Aiken concluded that her husband had deserted her when he left for the Black Hills "with a lot of prostitutes" and Tom Miller's Variety Show, although a charge of adultery might well have carried the day.<sup>17</sup> Gaylord Bell, too, charged desertion, but his petition clearly stated that his wife had left him to "live in the company of Jacob Ryan," with whom he believed his wife had committed adultery.<sup>18</sup>

Although desertion cases in Albany County also masked situations in which physical cruelty and drink forced one partner from the home, more numerous were those that indicated emotional dissatisfaction with the relationship or complaints more in tune with Wyoming's indignities provision.<sup>19</sup> In 1869 Emma Cutler refused to follow her husband farther west and returned to her mother's home in Waltham, Massachusetts. Despite an impassioned letter from husband's attorney, reminding her of her marriage vows and her husband's apparent willingness to reconcile with his wife, Eliza balked. "I was a girl not seventeen years old, thought I loved him, and it is his fault that my feelings were changed. I have long since made up my mind that I should not ever live with him again as I have neither love nor respect for him. . . . I am better off with my

<sup>15</sup>Ibid.

<sup>16</sup>Civil Case 1894, Albany County; see also 958, 1438, 1468, Albany County, for other suits involving adultery and desertion.

<sup>17</sup>Civil Case 3-104, Laramie County.

<sup>18</sup>Civil Case 2-562, Laramie County.

<sup>19</sup>For examples, see Civil Cases 1119, 2318, 675, Albany County.

mother and my children than I was with him. Years of experience have taught me there is no friend to be depended upon in sickness and health like a mother."<sup>20</sup> Julia Ford did not travel across country to desert her husband; she simply abandoned him within the couple's home by refusing sexual companionship and children. The court was especially sensitive to the latter charge and questioned James Ford closely on his wife's birth-control program, which apparently included measures other than abstinence.<sup>21</sup> Olive Sheldon waited until her children were grown to leave a marriage evidently long since hopeless. "If I was dead it would then be all right," she wrote in her parting note. "I am just as dead to you as though you had closed my eyes and seen me lowered in the ground. There will be no going back. The world is wide, wide enough for you and me. Let there be peace. As to the next life, I will have what I have earned, nothing more."<sup>22</sup> Similarly, Anah and Henry Whittemore fought over money and conduct. Henry claimed that, besides her refusal to prepare his meals, Anah, "instead of being a companion to him . . . absented herself from his company and home until late hours of the night . . . [and] that she has repeatedly told plaintiff that she married him for his money and as soon as she got all of his money that she intended to leave him."<sup>23</sup>

The situation was much the same in Laramie County: plaintiffs often cited desertion when vague disappointments or incompatibility were at the root of one partner's departure. Isabella Pyper apparently referred to general disillusionment with her marriage, stating that "she did not consider herself James' wife." With that she decamped, leaving her two children behind.<sup>24</sup> Elizabeth Wilkins vowed that she could not make her home anywhere near any of her husband's relatives, and George Wallace voiced his unmanly disappointment in his wife's refusal to work. She testified that her husband "wouldn't live with a woman who wouldn't support him and knew women who would."<sup>25</sup> And William Mater's wife claimed that he "did not make money fast enough, did not support her in the style she wished to live [and] that she could do better."<sup>26</sup>

<sup>20</sup>Civil Case 38, Albany County.

<sup>21</sup>Civil Case 1121, Albany County.

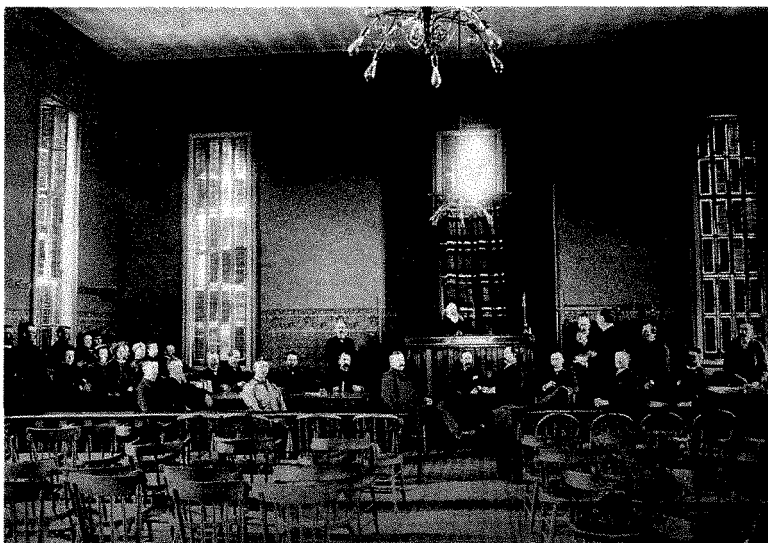
<sup>22</sup>Civil Case 1817, Albany County.

<sup>23</sup>Civil Case 2399, Albany County.

<sup>24</sup>Civil Case 2-255, Laramie County.

<sup>25</sup>Civil Case 2-254; 2-253, Laramie County; see also 2-78, 3-7, Laramie County.

<sup>26</sup>Civil Case 2-478, Laramie County.



When divorcing women went to court, they entered a profoundly male world. Early in its history, Wyoming's women won the right to sit on juries, as this photograph from about 1890 shows, but they seldom sat on juries in divorce cases. (Wyoming State Museum)

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### THE ELASTIC NATURE OF DESERTION

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Clearly, desertion encompassed any number of marital failures; emotional dissatisfaction with a marriage, a partner's failure to fulfill the role of breadwinner or helpmate, suspicion of infidelity, and drinking proved successful in court under the rubric of desertion. Two cases from Albany County, in particular, illustrate the elastic nature of desertion as a legal definition in nineteenth-century Wyoming. Distinguished by the detail of their testimony and the complexity of the financial and emotional relationships that bound and finally broke their marriages, *Kellogg v. Kellogg* and *Fein v. Fein* demonstrate how courts could stretch desertion to incorporate a number of unhappy circumstances not covered by statute.

The Feins initially went to court over John Fein's alleged desertion of his wife on December 10, 1883. Married in 1874 to her former husband's partner, Barbara Fein successively ran a saloon, a boarding house, and a restaurant, where both she and her two children worked. The Feins moved onto a ranch in May 1875 to "prove up," returning to Laramie in July 1876. All apparently went well until December 1883, when Barbara's daughter sickened from the effects of a botched criminal abor-

tion late in her pregnancy. The culprit: one of the Feins' boarders. When the effects of the misconduct came to light, according to Barbara Fein, "[Fein] had a fuss with the girl and because I would not send her away, and because I would not give him any more money, he left."<sup>27</sup> While making other living arrangements, Fein suggested that his wife should move to a remodeled house on the creek. Barbara Fein agreed, on condition that she would receive the rent from the restaurant; she discovered, however, that both the property her husband owned and the \$10,000 she had contributed to their joint ventures had disappeared. At that point, her efforts centered on securing her interest in the property, long since mortgaged and passed into other hands.

John Fein admitted that, although he could not stand living with his wife, he was perfectly willing to come to some domestic agreement. His wife could either return to him on the ranch or take up residence in the house by the creek. Far more critical for him was to resist her charges of his defrauding her of any claim to his property. In his defense, he claimed that his wife had contributed no money or labor to their various ventures, and had no interest in the property in question—either homestead or city property, or property from their marriage or from her previous marriage. As for the loss of his own fortune and property, he attributed his ruin to "[m]isfortune, bad management and bad luck."<sup>28</sup>

John and Martha Kellogg were married in August 1872 in Laramie. Two years later, having amassed enough capital from John's trade as a blacksmith, the couple moved to a homestead on the Little Laramie River, where they lived for fifteen years. Their next move took them to a coal mine on Mill Creek and eventually, like many other financially ruined homesteaders, back to the town and to any work at hand. From John Kellogg's perspective, his wife deserted him in March 1889 when she refused to sleep with him. Under cross-examination, he admitted that perhaps he had denied her because "he got vexed at her for going with another man. Her own daughter," he said, "caught her in the park with another man [at] ten o'clock at night. It would make anybody mad." Asked if he had ever ordered her to leave, he replied, "I never ordered her to leave the house; but after she got in with this man I told her that if she

<sup>27</sup>Coroner's Inquest 41, Albany County, Wyoming State Archives; Wyoming Supreme Court Docket No. 2, Case No. 31, Wyoming State Archives. As it was, Mary Roth died from the effects of a septic abortion, having delivered a nearly full-term child. The event was aggravated by her admission of infanticide before her death and her paramour's timely flight from the town.

<sup>28</sup>*Ibid.*

loved him better to go with him, but she still kept him. She is living with him now."<sup>29</sup>

Predictably, Martha Kellogg had a different version of events. According to her, in March 1889, her husband had returned home drunk, had abused her and her daughter, and had ordered her to leave: "Well, I heard him say that he would do so much better by the children if I was away."<sup>30</sup> Instead of leaving physically, Martha admitted to denying him conjugal companionship, but stayed on in the house until August 1890, when she went to sew for a woman near Cheyenne and from there to live with her sister. In contrast to her husband's protestations of support, Martha claimed that her parents had been responsible for feeding both her and the children. In addition, her husband had squandered his money on drink. For Martha, her final departure had been only one in a long line of separations. She told the court that she could no longer live with him: "I tried for it for seventeen years; I left him several times and went back, but it was just the same."<sup>31</sup>

The critical issue for the court in both cases was whether Martha Kellogg or John Fein had *reasonable cause* to abandon their spouses, households, and children, despite the fact that *reasonable cause* was nowhere a part of the desertion statute. To determine this, the officers of the court concentrated on John Kellogg's drinking, asking him to describe his habits. "Well," he answered, "I have been here since 1869. I am an old timer in this county and we all take our sprees sometimes; after that I would work as two men to get over it. I could do more work than any two men; I could do more work with machinery because I understood it."<sup>32</sup> Even an appeal to pioneer brotherhood and claims against his wife's chastity went for naught. The court understood that his intemperance threatened family life and allowed that Martha Kellogg had reasonable cause to leave her home in granting her a divorce on the grounds of desertion. Similarly, the court questioned John Fein about his heartless behavior and bad business practices and decided that he had no bona fide reason for leaving. For Barbara Fein and Martha Kellogg, their decrees were pyrrhic victories: they had prevailed but were without means.

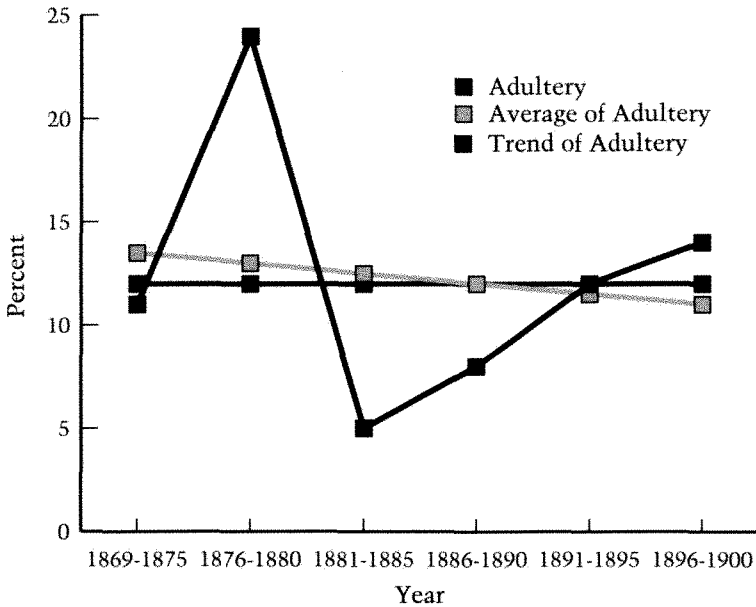
<sup>29</sup>Civil Case 2048, Albany County.

<sup>30</sup>Ibid.

<sup>31</sup>Ibid.

<sup>32</sup>Ibid.

FIGURE 2A  
ALBANY COUNTY, WYOMING—ADULTERY

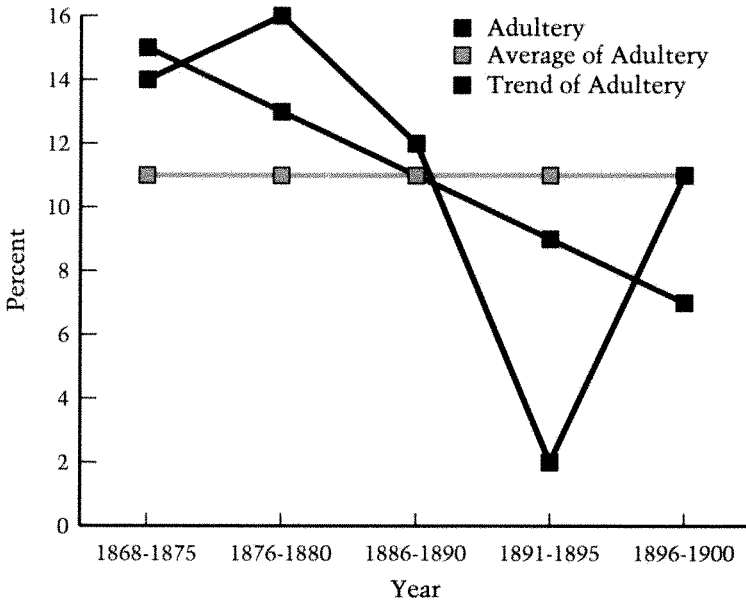


### ADULTERY REQUIRES CLOSER SCRUTINY

If Albany and Laramie County courts were flexible in their interpretation of desertion, they were more stringent in their interpretation of adultery, demanding witnesses or other incontrovertible proof of illicit intercourse. Hence judges listened to hotel managers, hostelry guests, detectives, whorehouse cronies, and remorseful paramours, and took account of venereal disease in gathering evidence of adultery. Accounting for roughly 12 percent of the divorces in the period, adultery showed signs of diminishing as a cause for marital dissolution (Figures 2A and B). Nonetheless, for one segment of the divorcing couples, infidelity remained an option, and the discussions surrounding sexual transgression shed light on another aspect of life in nineteenth-century marriage in Wyoming.

Following the national trend, men were far more likely to complain of their wives' infidelity or questionable misconduct. Because women had no institutionalized places of assignation or the financial means to follow their errant mates, their husbands could more easily catch their spouses in compromising

FIGURE 2B  
LARAMIE COUNTY, WYOMING—ADULTERY



circumstances at home, in the countryside, in hotels on the Union Pacific route, or across the nation, if need be. Isaac Menke provided convincing evidence that his wife, Elizabeth, had "fled to the arms and lustful embraces of one Sidney LaStrange" and that the pair had traveled to a boardinghouse in a town along the railroad line.<sup>33</sup> In *Hall v. Hall*, William Clark testified that he saw Hall's wife having intercourse beside the road near the rolling mills in Topeka, Kansas.<sup>34</sup> In another case, Charles Clark obtained convincing testimony from a hotel manager and a guest in Eldorado, Kansas, that his wife, her lover, and another couple had engaged in criminal intercourse in 1881.<sup>35</sup> Charles Harden resorted to employing detectives to track down his wife in Los Angeles, where the investigators reported that they espied his wife and Clarence Rodgers through a crack in the door of an adjoining room. With some wonder, they commented that Rodgers "came into the room holding his penis in *both* hands," and noted Cordelia Harden's

<sup>33</sup>Civil Case 83, Albany County; see also 3-356, 6-39, 7-13, Laramie County.

<sup>34</sup>Civil Case 604, Albany County.

<sup>35</sup>Civil Case 1006, Albany County.



Photographs entered into the court record suggest the pathos of marital dissolution. Eleanor Clark's picture was lovingly inscribed on the back to her two sons, whose custody she lost as a consequence of a *menage à trois* or *quatre* witnessed by a hotel clerk spying through a transom. (Wyoming State Museum)

douching both before and after their "connection."<sup>36</sup>

Because of the bordellos near Laramie's railyard and Cheyenne's Chicago district, men could more easily conceal their sexual escapades from their wives. Yet in several instances Albany and Laramie County wives did not hesitate to cross into the tenderloin to get the goods on their husbands. In 1883 Laura Crawford discovered that her husband had been intimate with three prostitutes in Armdale, Kansas. Accordingly, she traveled to Kansas and obtained the women's corroborated testimony that her husband had been unfaithful numerous times.<sup>37</sup> In 1893 Ella Cobb confronted her rival at a house of ill fame, reporting in her deposition:

I thereafter went to the house of Monte Grover and asked to see

the girl, Little Ella, whereupon she came out, and I asked her to give me the ring which my husband had given her, whereupon she pulled the same from her finger and handed it to me; she then told me that my husband was [a] regular visitor at this house. Where-

<sup>36</sup>Civil Case 2565, Albany County. Cordelia Harden's fling with Clarence Rodgers was not her only transgression. She had reportedly had a series of lovers: one Crum, who had been convicted of stealing horses; Fred Williams; and one Hill—all of whom worked for her husband on their ranch. Despite her adultery, her husband still felt friendly toward her but wanted the divorce.

<sup>37</sup>Civil Case 1151, Albany County.





Husbands resorted to hiring detectives and other agents to collect the evidence many courts demanded for proof of adultery by erring wives. Pinkerton detectives peered through a knothole in the door of an adjoining room to catch Cordelia Harden with her lover. (Wyoming State Museum)

upon I asked her to forego him; in answer to which she said she would be willing to let him come back to me if he wanted to.<sup>38</sup>

Although Ella Cobb's chief complaint against her husband, Samuel, was an economic one (their farm was "conducted on the communistic plan," and he compelled her to contribute her teacher's wages to the collective against her wishes), she traveled to Wichita, Kansas, to obtain more serious information about his sexual misconduct and received her divorce on the grounds of adultery.<sup>39</sup> In 1895 Helen Barnes persuaded both the housekeeper and the landlord at a bordello, Monte Hall's, to testify that her physician husband had been intimate with an

<sup>38</sup>Civil Case 2143, Albany County. Charles Cobb had brought "Little Ella" along from Cheyenne as he and his wife made their wedding trip.

<sup>39</sup>Civil Case 2544, Albany County.

inmate, Ada Robinson.<sup>40</sup> To ferret out her husband's activities, Mary Alice Scott went to Belle Williams's brothel in Cheyenne, where she found that it mattered little to her husband's inamorata that he was married "as long as she got his money."<sup>41</sup>

Men and women often admitted their peccadilloes in letters to friends, in conversation with others, or even in court—sometimes with remorse and sometimes without. "When my wife was in the States," wrote William Burnham to his associate, "I went to San Francisco to meet her. There I was tempted by a she devil and let my foot slip." Subsequent letters from his "she devil," another visit to a house of ill repute, and his deceit in business affairs caused his wife to separate from him.<sup>42</sup> Burnham pleaded with his friend to shield his wife from any hurtful talk and admitted that his weakness had cost him the best of wives. In the same vein, Perry Newell, a boarder and hand on the Vail ranch in Albany County, admitted in court that he and Maggie Vail were caught in the act on the Vails' sofa by her husband.<sup>43</sup> In *Barker v. Barker*, two men testified that they had been intimate with Barker's wife, which the latter confirmed in contrite letters to her husband and her lovers.<sup>44</sup> On a less remorseful note, Isaac Davis admitted his adultery with Lizzie "Pawnee Liz" Stevens to his father-in-law, and boasted that he got "a damn sight better fucking over here than I ever did at your house."<sup>45</sup> Henry Jones, in *Schoonmaker v. Schoonmaker*, also confessed to his involvement with Schoonmaker's wife and obliquely referred to his own sexual prowess, claiming that "the only reason for Mrs. Schoonmaker drawing a six-shooter on Mrs. Wardell was I was sleeping with Mrs. Wardell more than Mrs. Schoonmaker. Therefore she was jealous."<sup>46</sup> In Arthur Smith's suit against his wife, Mary, he reported that Shady Hall coyly hinted at sexual involvement with Smith's wife when Hall said, "You don't suppose I have women come here without I have something to do with them, do you."<sup>47</sup>

<sup>40</sup>Civil Case 2356, Albany County. Leroy Barnes initially had a legitimate reason for his presence at Monte Hall's: he was attending Hall's final illness.

<sup>41</sup>Civil Case, 2-182, Laramie County; see also 4-370, Laramie County.

<sup>42</sup>Civil Case 137, Albany County.

<sup>43</sup>Civil Case 1946, Albany County.

<sup>44</sup>Civil Case 2-568, Laramie County.

<sup>45</sup>Civil Case 706, Albany County.

<sup>46</sup>Civil Case 962, Albany County.

<sup>47</sup>Civil Case 1736, Albany County. *Smith v. Smith* is also notable for a woman's electing to enter prostitution. "I am going to turn out," Mary Smith is reported to have said, and later her husband, looking through a window at Fannie Cook's bawdy house, heard her say in response to Tom Ferguson's

Other men simply saw a liaison outside marriage as more uninhibited or economically advantageous; they thought they could do better on their own and did not wish to support wives or children. Stephen Mills, for example, simply said that he was sorry he married his wife, Alice, "as he wanted to be free and easy and go and stay or sleep with as many women as he saw fit."<sup>48</sup>

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### CRUELTY, BOTH PHYSICAL AND MENTAL, GAINS GROUND

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In addition to adultery, Albany County courts also recognized—albeit slowly—cruelty as permissible grounds for divorce. Cruelty accounted for approximately 10 percent of the divorces in the period, and the chancery commissioner recommended dissolution in only two cases before 1880, in one of which a husband petitioned the court because of his wife's attempt to kill him (Figures 3A and B).<sup>49</sup> Even after 1880 Albany County judges did not hear many divorces predicated on cruelty, and when magistrates did hear such a suit, the complainant most often offered evidence of unambiguous battering, choking, pinching, or assault with weapons and household wares, although Wyoming law made provision for mental harm under its "indignities" clause.<sup>50</sup> In a handful of cases in the 1880s, the court began to accept failure to perform the traditional roles of husband or wife as sufficient for divorce. Asa Clark, for example, won a divorce from his wife, Vashti, on the grounds of cruelty in 1883, claiming that she would not prepare his meals, keep the house neat, or care for the children properly, and Ezra Flemming and Susan Tracy successfully charged their spouses with publicly impugning their chastity.<sup>51</sup> Fred Munn, too, was able to obtain a divorce when he provided convincing evidence that his wife associated with lewd women and visited beer gardens alone.<sup>52</sup>

After 1890 and increasingly toward the end of the century, complainants in Albany County succeeded in their divorce petitions on the grounds of mental cruelty under both the cru-

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invitation to go to bed, "This is the last night I will stay with you for five dollars." Arthur Smith tried to summon the police, but the lawman proved reluctant to go into an establishment that paid its monthly fine.

<sup>48</sup>Civil Case 3-229, Laramie County; see also 2385, 2472, Albany County.

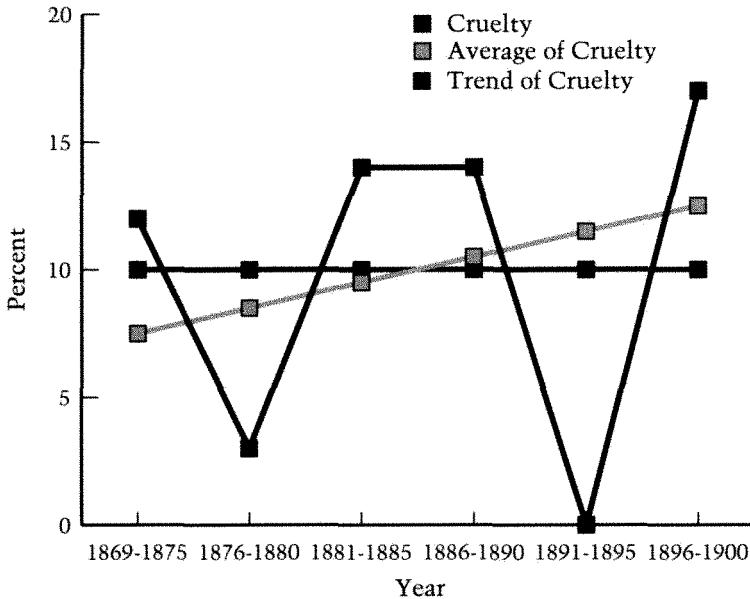
<sup>49</sup>Civil Case 67, 480, Albany County.

<sup>50</sup>Civil Cases 995, 1031, 1516, 1666, 1873, 2441, 2448, 2458, Albany County.

<sup>51</sup>Civil Case 1138, 1236, 1350, Albany County.

<sup>52</sup>Civil Case 1544, Albany County.

FIGURE 3A  
ALBANY COUNTY, WYOMING—CRUELTY

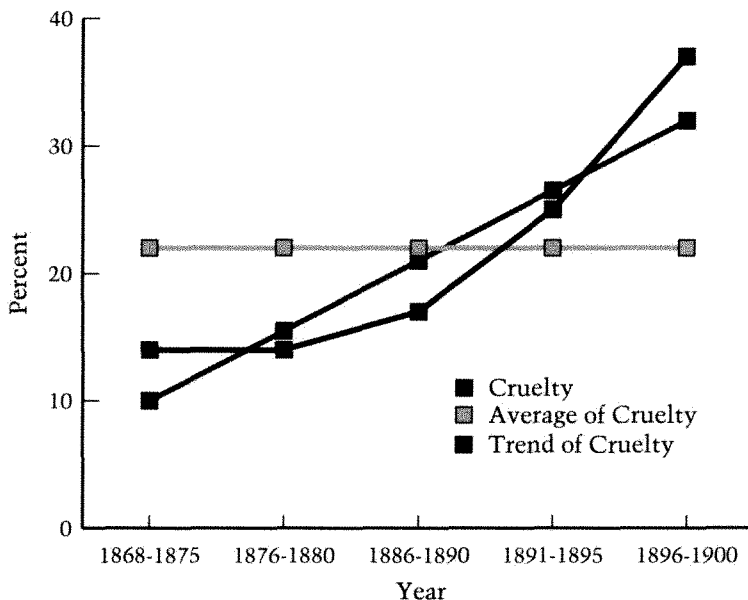


elty and indignities clauses. Although Kate Bennett testified that her husband "was guilty of extreme cruelty toward me in every way possible except by actual blows," his constant fault finding, name calling, and taunts about his illicit affairs in local bawdy houses made her life unbearable.<sup>53</sup> Otto Gramm, the president of the rolling mill, also claimed that his wife's mental abuse interfered with his work and contributed to his skin rash. Catherine Gramm, he testified, moved his library and office to the barn, spied on him through the windows of his factory, and threatened townspeople with the loss of their mill jobs if they crossed her.<sup>54</sup> Winnie and Franklin Bevans accused one another of extreme cruelty and indignities. Winnie averred that Frank, a Union Pacific conductor, would come off the road drunk and would abuse her, both physically and mentally; while Frank testified that Winnie vexed him by her refusal to cook, keep him company at home, or care for their daughter, and by her

<sup>53</sup>Civil Case 1977, Albany County.

<sup>54</sup>Civil Case 2514, Albany County.

FIGURE 3B  
LARAMIE COUNTY, WYOMING—CRUELTY



assaults with shears, teacups, plates, pokers, and a bicycle pump.<sup>55</sup>

In Laramie County judicial interpretation and behavior regarding cruelty developed differently. As in Albany County, most cruelty suits listed incidences of physical violence or assault with handy tools and housewares. (One case recorded a threat to do away with a wife with a Union Pacific ticket punch.<sup>56</sup>) Laramie County differed from its neighbor in that suits predicated on cruelty appeared with some frequency from the beginning, and in greater proportions. While cruelty accounted for roughly 10 percent of the divorces during any quinquennial period in Albany County, it was the cause of 22 percent of divorces in the same periods in Laramie County (Figure 3). Of more importance is that suits in Laramie County succeeded regularly on the basis of mental cruelty or indignities before the practice became commonplace in Albany

<sup>55</sup>Civil Case 2473, Albany County.

<sup>56</sup>Civil Case 6-195, Laramie County.

County. As early as 1878, Viola McGregor claimed that her husband had abused her in every way except striking her, and between 1886 and 1890, 53 percent of Laramie County divorces cited instances of mental cruelty or indignities.<sup>57</sup>

Essentially, charges of mental cruelty fell into three distinct groups: unwifely or unhusbandly conduct, verbal abuse, and emotional neglect. The Sissons' marriage dissolved because of William Sisson's late hours, visits to bordellos, and correspondence with another woman, while the Downeys parted because the husband simply ignored his wife and generally denied his marriage.<sup>58</sup> Nora and Ben Van Dyke eventually divorced for other reasons, but their earlier petitions arrayed a host of unbecoming spousal behaviors.<sup>59</sup> In the same fashion Lillie Hunter escaped her marriage by citing her husband's "frenzies" and general rudeness.<sup>60</sup> Although husbands sometimes laid claims against their wives' conduct, most plaintiffs charging cruelty were women. Among the exceptions was May Gilman, who vilified her husband to her neighbors and embarrassed him on a number of occasions, including stripping to the buff and parading around the yard under a full moon.<sup>61</sup> Between 1895 and 1900, more husbands than wives in Laramie County accused their partners of various persecutions, tyrannies, vulgarities, and unsponse-like behavior. Mental cruelty, once almost solely a women's prerogative, became a powerful weapon for husbands.

The Furniss divorce suggests how men, especially railroaders, may have used charges of mental cruelty to end their marriages as well as to preserve their social standing, counting on their wives' reluctance or lack of money to bring a cross-petition. John Furniss, a railroad engineer, initially charged his wife with the usual catalog of indignities: blackening his reputation among the neighbors; unwarranted ejection from the couple's

<sup>57</sup>Civil Case 3-218, Laramie County. The absence of any cases for analysis from 1881 to 1885 is especially vexing with regard to the development of interpretations of cruelty, although it seems reasonable to assume from the frequency of cases citing cruelty—both mental and physical—between 1886 and 1890 that 1881-1885 marked the acceptance of "indignities" by the two counties' courts.

<sup>58</sup>Civil Case 4-586; 5-393, Laramie County.

<sup>59</sup>Civil Case 2-253, Laramie County. Finally divorced in 1896, the Van Dykes had already appeared in court on other occasions. This particular petition was one of the few instances in which the court denied a divorce. From the list of charges and counter-charges, some of which appear ludicrous, the court may have decided that the Van Dykes deserved one another.

<sup>60</sup>Civil Case 5-202, Laramie County; see also 4-398, 6-221, 5-63, 5-58, Laramie County.

<sup>61</sup>Civil Case 4-247, Laramie County; see also 5-63, Laramie County.

home; a quarrelsome, insulting, and abusive temperament; threats against his life; and mismanagement of the children and household. In the absence of a cross-petition, this list would have convinced the Laramie County Court of Ella Furniss's marital missteps and won her husband a speedy divorce.<sup>62</sup>

But Ella Furniss fought back. In her cross-petition, she denied all his allegations; the fault, she maintained lay with her husband. Far from besmirching his reputation in the neighborhood, she had disclosed his shortcomings only to those who needed to know: the county commissioners (to obtain public aid) and her minister (to get advice on her husband's venereal disease). Ella Furniss admitted that she had thrown her husband out of the house, but for good reason: she charged him with leaving the secretions of his venereal disease in the household wash-bowls, endangering the children's health and disgusting the roomers. As for her neglect of the children, she claimed the opposite: her husband had contributed little financially to their support, even begrudging them schooling. What she earned from music lessons, book canvassing, and boardinghouse keeping, moreover, he converted to his own use, spending the money in whorehouses and on riotous living. As if that were not enough, she said he disrupted her boardinghouse by spying in the pantries and kitchens and complaining that "there was too much fuel burned, that there were too many vegetables on the table, and [that] there was too much flour wasted." The court agreed with Ella's version of her husband's conduct and awarded her a divorce on the grounds of neglect.<sup>63</sup>

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#### INTEMPERANCE AND NEGLECT AS DISRUPTIVE FORCES

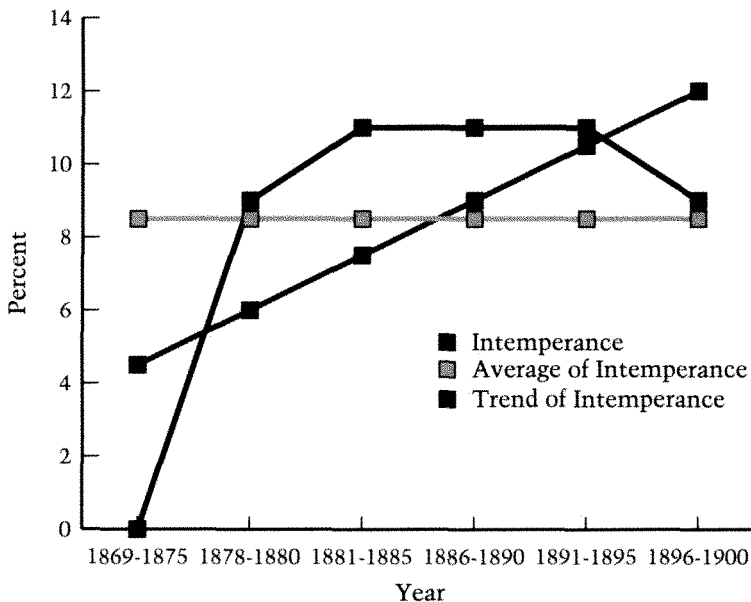
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From the outset both county courts recognized drink, which accounted for approximately 10 percent of the divorces in both counties, as a reason for divorce (Figures 4A and B). Intemperance, the court understood, undermined a man's ability to provide for his family by interfering with his capacity to work and leading him into other immoralities. The problem for the courts in a society in which male sociability centered on the saloon was to determine when a defendant drank to excess. In a petition for divorce in 1872, when Emilie Waldschmidt accused

<sup>62</sup>Civil Case 5-391, Laramie County. It is interesting to note that the majority of men initiating mental-cruelty suits against their wives were associated with the Union Pacific Railroad.

<sup>63</sup>Ibid. Although Ella Furniss was aware that her husband probably had extramarital relationships and that such a charge was not useful after she had thrown him out, in the end she confronted her husband and his lover, Lillian Hunter, in their love nest.

FIGURE 4A  
ALBANY COUNTY, WYOMING—INTEMPERANCE



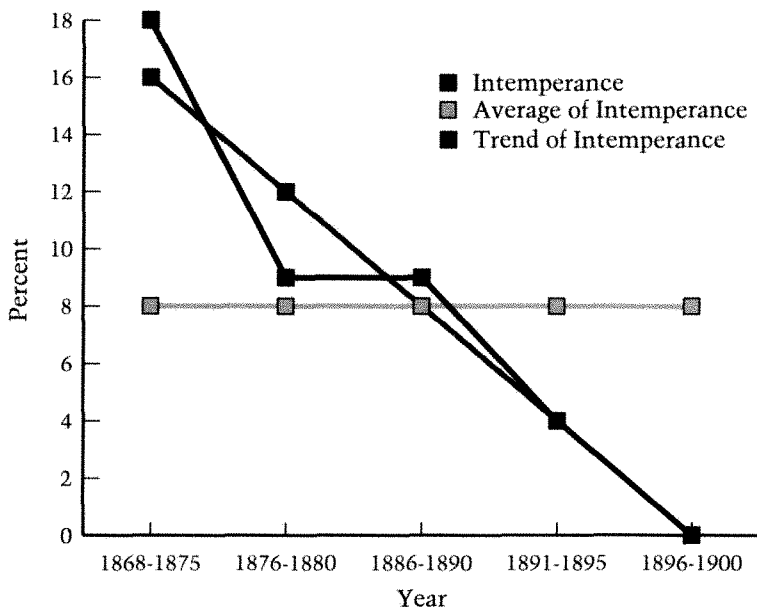
her husband, Albert, of habitual drunkenness, the Laramie County bench had to struggle to define "intemperance." Numerous witnesses for the plaintiff testified that he drank enough to keep him from work of any kind, although one claimed that he did not stagger when he drank and did as much work in several months as the witness did in a day. Others saw his drinking as intermittent—drunk one day and sober the next—or as merely social. Witnesses who had dealings with Emilie, however, tended to the view that Albert was so drunk that Emilie had to keep the boardinghouse going and the family afloat. Their evidence convinced the court, whose members thereafter settled on gauging drunkenness by the degree to which liquor undermined a husband's capacity to work and the extent to which a woman assumed the support of the family.<sup>64</sup>

Drink forced more than one Wyoming woman to assume the role of breadwinner. Tom Tutton's, James Baillie's, and John

<sup>64</sup>Civil Case 2-148, Laramie County; see also 4-617, Laramie County. The Waldschmidt case also describes the geographical movement typical of westerners, their ready acceptance of separation from family for greater opportunity or work, and the range of people's acquaintances across time and distance. Besides those in Laramie, several witnesses in St. Louis, Omaha, and St. Joseph knew the Waldschmidts.



FIGURE 4B  
LARAMIE COUNTY, WYOMING—INTEMPERANCE



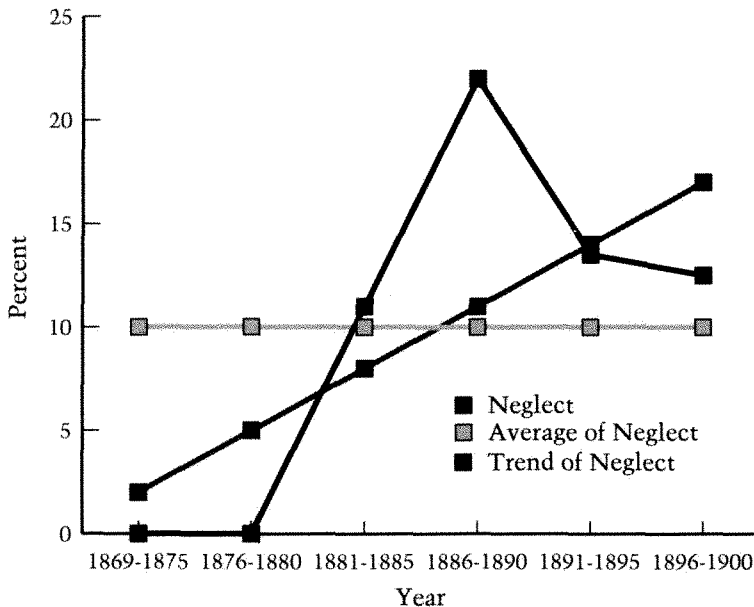
Wright's need for drink led them to saloons, gambling tables, and brothels, and Ida Devereaux, Mary Washburn, Louisa Feulner, and Louisa Wright joined the Laramie workforce to support themselves and their children in the face of their husbands' alcoholism.<sup>65</sup> Martha Bramel, the wife of a divorce lawyer, Charles Bramel, testified that his drinking had incapacitated him to such an extent that she could no longer trust him as her agent. "I managed my own business," she declared. "What he did, he did at my direction and most it was wrong in a measure." The cashier at the bank corroborated her estimate of her husband's ability; he was allowed to perform "the required slight attention" to her affairs but nothing that demanded "good judgment."<sup>66</sup>

Just as the proportion of cases naming cruelty rose in the two counties, so did neglect, accounting for 10 percent of the cases in Albany and 13 percent in Laramie, as the courts after 1882 accepted women's disenchantment with their husbands' performance as familial providers (Figures 5A and B). Desertion forced many women to rely on their own resources, but judges

<sup>65</sup>Civil Case 1731, 1082, 1990, 1045, 1102, 1114, Albany County.

<sup>66</sup>Civil Case 1978, Albany County.

FIGURE 5A  
ALBANY COUNTY, WYOMING—NEGLECT



increasingly accepted a woman's complaint that her husband had failed to provide the necessities of life even though he was still present in the household.<sup>67</sup> In Laramie County neglect apparently served to speed a desertion proceeding that might have stretched over a year.<sup>68</sup> Some men evidently expected their wives to fund their ease. Miriam Brown testified that her husband had supported her for a few weeks after their marriage and then refused to work. "He laughed," she claimed, "and said that was what he got a wife for—to earn money for him to sport on."<sup>69</sup> Richard Sowden vowed that he "would rather starve than grub sage brush," and Charles Knadler said he "didn't want to be employed."<sup>70</sup> Adolph Helmer simply filched his wife's earnings and her loan repayments and used them for his own pleasure.<sup>71</sup>

<sup>67</sup>Civil Cases 1118, 1305, 1773, 1819, 1837, 1838, 2003, 2061, 2071, 2139, 2392, 2454, 2462, 2474, 2561, Albany County; 2-253, 2-261, Laramie County.

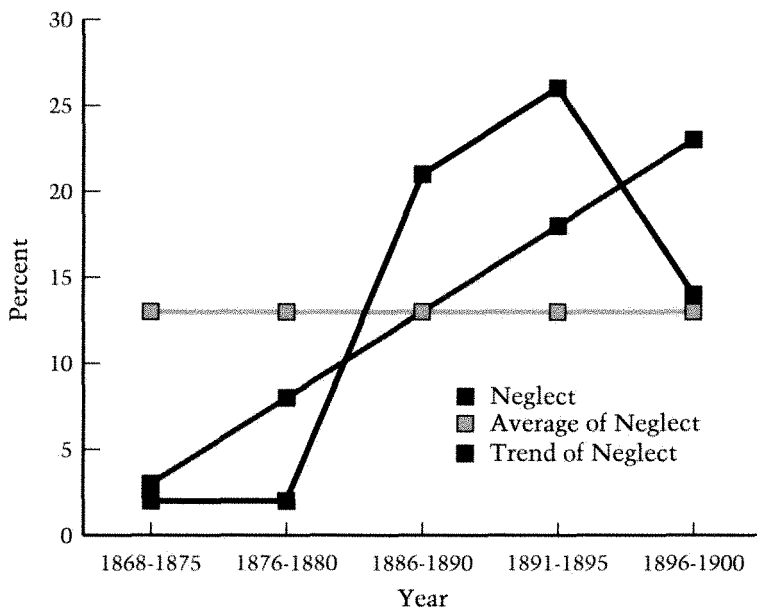
<sup>68</sup>Civil Cases 5-257; 5-285; 6-217-11; 7-128; 7-174; 7-257, Laramie County.

<sup>69</sup>Civil Case 1115, Albany County.

<sup>70</sup>Civil Cases 1707, 2520, Albany County; see also 2-253, 2-343, Laramie County.

<sup>71</sup>Civil Case 2510, Albany County.

FIGURE 5B  
LARAMIE COUNTY, WYOMING—NEGLECT



Almost all the cases indicate to some degree the involvement of neighbors, relatives, boarders, and lawyers in marriages in the two counties. Newspapers listed divorce cases, providing a schedule for those wanting to attend the legal theater, and commented on them for public delectation. A former roomer in the Bevans household, W.S. McDowell, testified that Winnie Bevans had admitted that she could live happily with her husband if she cared to, while another witness said that Winnie was far more interested in her own social life and in spending her husband's money than in her marriage.<sup>72</sup> When Minnie McRae implored her husband's ranch foreman, Peter Mordhorst, to stay at the house for her protection, he brushed her off. A few weeks later, after a particularly violent episode between the McRaes, Mordhorst decided to leave, but not before he had a conversation with his boss:

After a little while he came in and wanted to know if I wanted to take the woman's part. If I did, I could pitch in. I said I don't want to take your wife[s] or no other woman's part, but I won't see any of them abused.

<sup>72</sup>Civil Case 2473, Albany County.

Then on the next morning I got ready to leave, and he came out and said you had better have your say. You get more excited over a little thing like that than I do myself. Then he said, "That woman, I will break her to mind me, or I will lick her regular."<sup>73</sup>

For Mordhorst, that was enough, and he testified for Minnie McRae before the chancery commissioner. On several occasions, adjacent roomers, partygoers, and passersby aided Minnie Moorland when her husband beat her.<sup>74</sup> Townspeople intervened in 1887, horsewhipped James Cooke, and ran him out of town for his public wife-beating. Lawyers, too, acted as marriage counselors when they attempted to effect reconciliations or recommended that parents remove a daughter from a potentially lethal situation.<sup>75</sup>

In 1889, in an odd enclosure in *Wilder v. Wilder*, Robert Morris recorded the dicta of the presiding judge, M.C. Sanfley. Sanfley had said:

I have a prejudice against divorces, and I am free to confess it. I view them with a feeling almost akin to horror. It is not my place to say anything about the laws of this territory upon that subject, I nevertheless, desire to take this occasion to say that they seem to be extremely lax. The interest of society is not promoted, as a rule, by granting divorces; like homicide, they should be resorted to only in cases of extreme necessity. What interest does society now have in perpetuating any relation between these two people? Shall the holy estate of matrimony be further contaminated by having these people as a living illustration and exponent of that relation? I don't see that it does; this case seems to be an exception to the rule.<sup>76</sup>

<sup>73</sup>Civil Case 1873, Albany County.

<sup>74</sup>Civil Case 2-442, Laramie County.

<sup>75</sup>Civil Cases 995, 1666, 2362, Albany County. The last case in the foregoing list represents an instance in which lawyers were successful in reuniting a couple by acting as mediators in their marital dispute. John Symons, John Hill's counsel, wrote to Hill, "It appears that Mr. Corthell has advised Mrs. H. to remain a little longer until the late storm in your domestic affairs has blown over, or until both of you feel in a better frame of mind than you do at present, and Mr. Corthell thinks she will be willing to return home. Under these circumstances I don't think that it would be good policy for you to push the matter, and it is my opinion that Mrs. H. will come around all right." Clearly, both lawyers were operating under certain time-honored maxims governing conflict resolution.

<sup>76</sup>Civil Case 4-551, Laramie County.

Unfortunately for Sanfley, there were a good many exceptions to the rule in Wyoming. His rhetoric perhaps summed up legal attitudes toward divorce. Besides suggesting a basic conservatism in combination with a reluctant pragmatism, the judge's remarks stressed an overweening concern with public perceptions. In many ways, they help us understand what influenced the application of statutes to specific cases and, in turn, why divorce developed as it did in Wyoming.

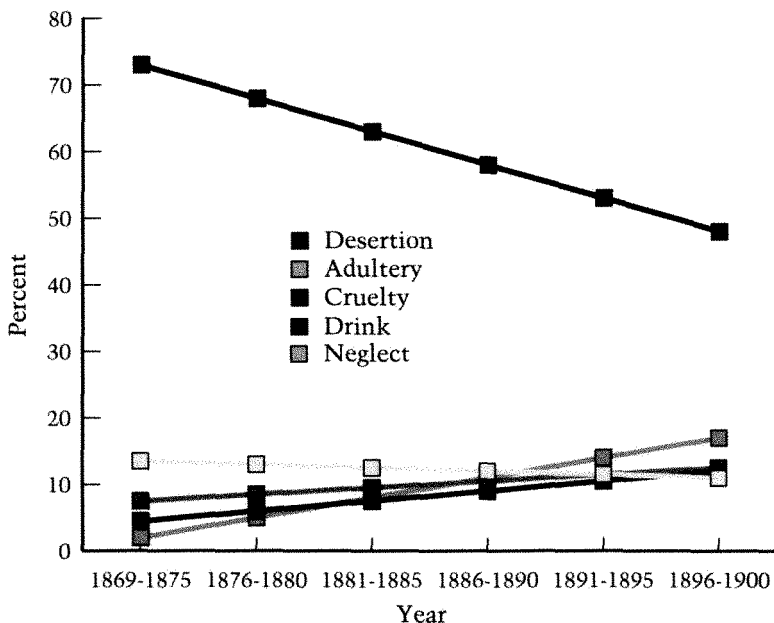
By and large Wyoming replicated regional and national trends: a diminution in desertion and adultery and a corresponding increase in cruelty and neglect, with two major variations (Figures 6A and B). The first of these was the counties' early tendency to subsume the more serious marital difficulties under the heading of desertion; the second, their comparatively slow recognition of mental cruelty under the state's indignities clause. While Montana's Lewis and Clark County began to grant divorces on the basis of mental cruelty after 1880 wholly in the absence of any statute authorizing such dissolutions, the phenomenon appeared routinely in Laramie County only after 1890, although a serviceable clause was on the books. In both Montana counties, desertion rarely included other grounds for divorce.<sup>77</sup> The explanation may lie in the social expectations and self-consciousness associated with rail towns and their populations' aspirations toward middle-class membership.<sup>78</sup>

Railroad corporate policy affected a community's economic health and, less visibly, its social mores. The railroad permeated all aspects of community life in Laramie and Albany counties. Their businesses depended on the railroad's commerce and contracts; their service industries catered to travelers and railroad workers in transit; and their citizens moved in and out of the line's employ or allied enterprises. The railroad, too, provided an avenue into the middle class for first-generation, native-born men as operatives (engineers, clerks, conductors), and employment security for immigrants in its maintenance jobs (wipers, tenders, mechanics).

<sup>77</sup>Paula Petrik, "If She Be Content: The Development of Montana Divorce Law, 1865-1907," *Western Historical Quarterly* 28 (July 1987), 261-91. Lewis and Clark County's Silver Bow courts often used desertion in combination with cruelty, but the divorce was granted on the grounds of cruelty. Addition of cruelty to a desertion petition was apparently a means to circumvent the one-year-absence condition and speed a proceeding, rather than to disguise a more severe form of marital breakdown.

<sup>78</sup>Kathleen Underwood, *Town Building on the Colorado Frontier* (Albuquerque, 1987), 109, 113. Although the author does not specifically address the railroad's influence in Grand Junction, Colorado, on attitudes toward the family and marriage, she does indicate that the workforce included more white-collar operatives over time and that the family increasingly made its presence felt in the community.

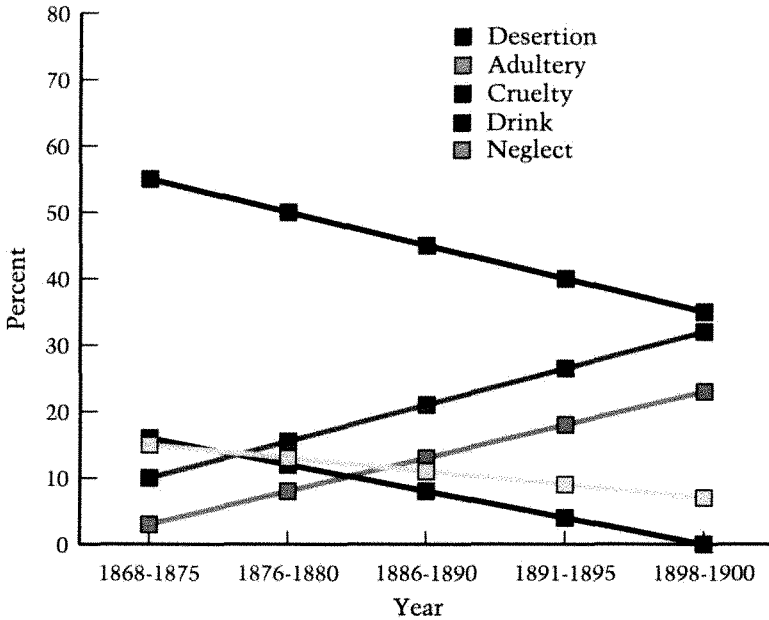
FIGURE 6A  
ALBANY COUNTY, WYOMING—DIVORCE TRENDS



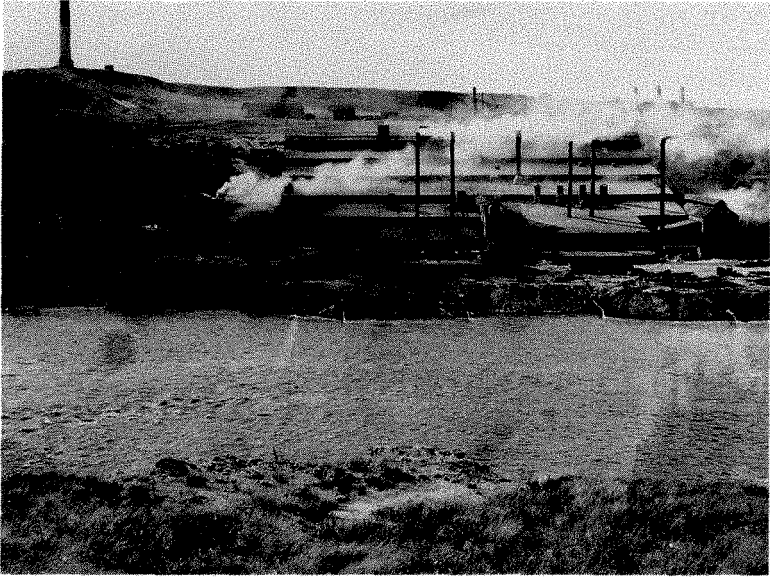
By its nature, the railroad required a certain sort of worker: punctual, dependable, temperate, and settled—qualities associated with the middle-class family. Drunken switchmen or engineers could cause train wrecks; tardy workers brought about delays; and larcenous conductors cut into company profits. Employees who deviated from the standard both on and off the job faced dismissal or stymied their own promotion, and those who depended on the railroad's business might see their custom and contracts go to others. Respectability, therefore, ranked high on the residents' list of social requirements, and divorce petitions in Albany County and, to a lesser extent, Laramie County, although they often mentioned incidents of adultery or cruelty, were granted on the basis of desertion even when it was clear that one spouse had not deserted the other. In this fashion, aspirants to the middle class cloaked marital breakdown with the unfortunate (and easily explicable) absence of a spouse and avoided the social stigma associated with drink, domestic violence, and sexual misconduct. In short, a flexible use of desertion allowed middle-class hopefuls to preserve their credentials.

That there was a discrepancy between the use of desertion between Albany and Laramie counties supports this observa-

FIGURE 6B  
LARAMIE COUNTY, WYOMING—DIVORCE TRENDS



tion. Such concepts as the companionate marriage were familiar to Cheyenne's veteran middle class, and couples demanded that the law conform to their marital expectations. Thus mental cruelty came more quickly into legal usage in Cheyenne. In contrast, Laramie was home to those who looked forward to middle-class membership or those who had recently arrived among the bourgeoisie. New concepts of marriage and family life were unfamiliar to them, and the use of mental cruelty was, therefore, slower to take hold. Both counties' laggard implementation of mental cruelty can be traced to the different rates at which candidates for the middle class felt comfortable enough to take their new habits of the heart to court.



The Ninth Circuit's copper-smelting cases demonstrated a laissez-faire approach to developing the West's resources, even when a refinery discharged effluent into the river, harming adjoining land owned by others. (Henry E. Huntington Library and Art Gallery)



# THE NINTH CIRCUIT AND NATURAL-RESOURCE DEVELOPMENT IN THE EARLY TWENTIETH CENTURY

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DAVID C. FREDERICK

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**A**t the beginning of this century, a combination of factors thrust the U.S. Circuit Court of Appeals for the Ninth Circuit into a prominent role in the exploitation of the West's natural resources. Through the vicissitudes of congressionally conferred jurisdiction, the Ninth Circuit became the court of last resort for over 96 percent of the cases it handled. Through a quirk of geography, a large proportion of the nation's mineral and timber resources lay in the territorial configuration of the Ninth Circuit. And through the evolution of the region's history, the United States government held title to much of the land in the circuit, thus giving federal rather than state courts the predominant role in adjudicating disputes involving that

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land.<sup>1</sup> What the Ninth Circuit had to say about resource disputes, therefore, took on great importance for the people who sought to tap the West's natural wealth.

In the first decade of the century, the Ninth Circuit was formally composed of three circuit judges, although district judges often sat by designation. Because of the frequency with which they served on appellate panels together—and the often contentious philosophical disagreements they recorded in their judicial opinions—two circuit judges in particular framed the debates in which important decisions were made: William B. Gilbert and Erskine M. Ross. Both approached these problems from very different perspectives; thus, whoever gained a majority for his view affected the course of land development, investment in extractive enterprises, and the viability of the United States government's enforcement of public land laws. Although the movement toward development was probably inexorable, it was at times impeded and at other times augmented by the prevailing views of Ross or Gilbert in important cases brought to the Ninth Circuit.

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### COMPETING JUDICIAL PHILOSOPHIES

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Shortly after he became circuit judge in March 1895, Erskine Ross rendered a decision as a trial judge in the circuit court that illuminated his thinking on the sanctity of property. In *Bradley*

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<sup>1</sup>"What the Seven Circuit Judges of the Circuit Court of Appeals for the Ninth Circuit Have Created for the Service of Their Litigants" (1941), p. 5, Papers of William Denman, Bancroft Library. The Supreme Court's discretionary jurisdiction meant that only a handful of Ninth Circuit decisions were superseded by decisions of the Court. On public land history, see generally Paul Gates, *History of Public Land Law Development* (Washington, 1968) [hereafter cited as Gates, *Public Land Law*]; Public Land Law Review Commission, *One Third of the Nation's Land* (Washington, 1970), 23. The most obvious exception to the generalization in the text about the role of the federal courts in the development of natural resource law was water. Aside from the signal importance of Supreme Court decisions, the state courts have undertaken the primary responsibility for the development of water law. An admittedly crude indicator is the vast differential in numbers of important state water-law cases versus those in the lower federal courts. In his treatise on western water law, for example, Wells A. Hutchins cites forty-one Ninth Circuit cases, spanning more than eighty years of water law development. By contrast, he cites over two thousand state court cases. See *idem*, *Water Rights Laws in the Nineteen Western States* (Washington, 1977), 656-725. Certainly some of the forty-one Ninth Circuit cases established important principles of water law, but the comparative importance of the western state courts over the Ninth Circuit warrants an omission of these federal cases from a discussion of the judicial battles over natural resources. For an interesting treatment of the role of the courts in California's history of water development, see Donald Pisani, *From Family Farm to Agribusiness* (Berkeley, 1984).

*v. Fallbrook Irrigation District*, he held that a California statute establishing irrigation districts unconstitutionally impaired a landowner's property rights without due process. As he eloquently stated in his conclusion to that opinion, "Unfortunate as it will be if losses result to investors, and desirable as it undoubtedly is, in this section of the country, that irrigation facilities be improved and extended, it is far more important that the provisions of that great charter, which is the sheet anchor of safety, be in all things observed and enforced."<sup>2</sup>

For jurisdictional reasons, the appeal in *Bradley* bypassed the Ninth Circuit. Until 1925 the circuit courts of appeals' limited jurisdiction did not extend to questions involving the construction of the Constitution, the constitutionality of a United States law or treaty, or the alleged contravention of the Constitution by state constitutions or laws. On direct appeal, the Supreme Court reversed Ross's decision. But neither that ruling nor jurisdictional limitations on the circuit courts of appeals dampened the veneration of property rights that Ross articulated in a range of natural-resource disputes.<sup>3</sup> His chief intellectual counterweight on the Ninth Circuit was William Gilbert, one of the first two judges appointed under the Evarts Act, which established the circuit court of appeals system in 1891. Gilbert's views on property and his philosophy on judging clashed sharply with Ross's. While the two men's differences are readily apparent, their judicial philosophies defy being labeled by such terms as "laissez-faire conservative" and "traditional conservative."<sup>4</sup>

<sup>2</sup>*Bradley v. Fallbrook Irrigation District*, 68 F. 948, 966 [C.C.S.D. Cal. 1895], *rev'd*, 164 U.S. 112 (1896).

<sup>3</sup>Act of February 13, 1925, ch. 229, 43 Stat. 936. Even then, this extension of jurisdiction to the circuit courts of appeals contained important exceptions for antitrust and interstate commerce laws, writs of error by the United States in criminal cases, suits to enjoin state statutes or state administrative action, and suits to enjoin Interstate Commerce Commission orders. *Ibid.* at § 1, 43 Stat. at 938 (amending Judicial Code § 238). See generally Felix Frankfurter and James Landis, *The Business of the Supreme Court* (Cambridge, 1928), 262-63. On the Supreme Court's action, see *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896). If the large number of newspaper clippings in his scrapbook are an adequate guide, Ross took much pride in his decision in the case. One such article stated, "A careful reading of the full text of Judge Ross' decision brings the comforting assurance that, in these times of enormous aggregation of capital, there is at least one tribunal that holds individual rights are inalienable, and cannot, in justice, be sacrificed even in the interests of an entire community, unless the fact of a direct benefit therefrom be established." Unidentified newspaper clipping, Scrapbook of Erskine M. Ross, deposited at Los Angeles County Law Library [hereafter cited as Ross Scrapbook].

<sup>4</sup>The legal historian Arnold Paul's delineation of "laissez-faire conservatism" and "traditional conservatism" as prevailing judicial philosophies in the 1880s and 1890s provides little guidance to understanding Gilbert and Ross. "Laissez-faire conservatism," explained Paul, drew "heavily on the antipaternalism

Statutory construction presented a classic battleground for both judges as they disagreed over how far to go in attempting to ferret out Congress's intent in interpreting statutes. For his part, Ross interpreted statutes to mean literally what they said. If the statute did not speak directly to a question, he saw his role as ended. In one such case, he wrote for the majority in construing a statute that prohibited anyone from locating "any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing."<sup>5</sup> Ross's construction required the miner or agent to file the power of attorney before either person knew whether a discovery warranted the filing of location papers. Gilbert dissented, because he saw no logic in a statute construed to require miners to file a power of attorney before finding a potentially lucrative site. In the natural rhythm of events, he contended, a miner would use the power of attorney only after making the discovery. In Gilbert's opinion, a simpler and more sympathetic interpretation of the statute would permit the agent for the locator to file the power of attorney concurrently with the location certificate. "The act of Congress does not say that the power of attorney must be recorded before the initiation of any of the acts of location," Gilbert maintained. "It is a harsh and narrow construction that gives to the act that meaning, and it is a construction which is contrary to the liberal teaching of numerous other decisions."<sup>6</sup>

The two jurists clashed heatedly over even the seemingly simple question of whether a statute required two witnesses to the filing of a deed by an original locator. Writing for himself and Judge William W. Morrow, Gilbert held that a conveyance

doctrines of Herbert Spencer and dedicated [itself] to the utmost freedom for economic initiative and the utmost restriction upon legislative interference." "Traditional conservatism," on the other hand, assigned "the protection of private property to a high status in the hierarchy of values, [but] was especially concerned with the problems of maintaining an ordered society in a world where the forces of popular democracy might become unmanageable." Idem, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (New York, 1960), 4-5. Michael Les Benedict's article on laissez-faire constitutionalism is somewhat more helpful in creating a framework for understanding the thinking of Ross and Gilbert, but its emphasis on constitutional decision making diminishes its usefulness in the Ninth Circuit context, because so few issues the court considered in this era involved the Constitution. The bulk of its work was much more commercial and property-oriented. See idem, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (1985), 293.

<sup>5</sup>Act of August 1, 1912, ch. 269, 37 Stat. 242, 243.

<sup>6</sup>*Sutherland v. Purdy*, 234 F. 600, 601 (9th Cir. 1916). See also *ibid.* at 604 (Gilbert dissenting).

witnessed by only one person satisfied the requirements of a statute that appeared to require two.<sup>7</sup> For a strict constructionist like Ross, this interpretation eluded reason. He contended in dissent that the statutory requirement of two witnesses "meant what it said." Ross deemed it irrelevant that Congress intended a subsequent statute to cure other defects of the conveyance. If the statute required two witnesses, it was "an essential part of the execution." Because the court had openly acknowledged the failure of the parties to obtain two witnesses, Ross refused to endorse the conveyance.<sup>8</sup>

The two conflicting theories extended to Ross's and Gilbert's approaches to contract disputes. The same principles applied; the same battle lines were drawn, as an appeal from Alaska demonstrated. In *Alaska Treadwell Gold Mining Company v. Alaska Gastineau Mining Company*, the court reviewed a decree of specific performance. Alaska Gastineau had sued for specific performance of a written contract entered into between its predecessor in interest, Oxford Mining Company, and Alaska Treadwell. Oxford Mining Company had leased certain mining property to Alaska Treadwell with a sawmill, a boarding house, and other appurtenances to the mine. As part of the arrangement, Alaska Treadwell had promised to build a water-power plant to generate electricity and to supply "a current of not to exceed three hundred (300) horsepower." The district court interpreted the contract to include starting surges of up to three or four times the normal amount for one of Alaska Gastineau's special machines.<sup>9</sup>

In an opinion by Ross in which Morrow joined, the Ninth Circuit held that the contract was not specific enough to demonstrate a commitment to deliver this amount of power by Alaska Treadwell. Ross wrote that the court should certainly consider the parties' intent when construing the written document, but that in so doing it could not add to or take away from any of the contract's provisions. "To read by construction into the written contract of the parties such a requirement is therefore to read into it a most important provision not there found."<sup>10</sup> Gilbert dissented, agreeing with the trial court's finding that the parties intended to include the disputed item. In a sentence that said much about his judicial philosophy, he explained that "[w]here a contract is susceptible of a construction

<sup>7</sup>*Eadie v. Chambers*, 172 F. 73, 75 (9th Cir. 1909), *rev'd sub nom.*, *Waskey v. Chambers*, 224 U.S. 564 (1912).

<sup>8</sup>*Ibid.* at 80-81 (Ross dissenting).

<sup>9</sup>214 F. 718, 727 (9th Cir. 1914), *cert. denied*, 238 U.S. 614 (1915), *modified*, 221 F. 1019 (1915).

<sup>10</sup>*Ibid.* at 727.



Judge William B. Gilbert (Oregon Historical Society)

in accordance with justice and fair dealing, the court should adopt it."<sup>11</sup>

These different approaches to interpretation are reflected in deed and recordation disputes. In the first two decades of this century, the Ninth Circuit heard numerous appeals from decisions adjudicating property issues. In this context, Gilbert's approach of reasonable interpretation usually prevailed over Ross's literal constructionism. In one such case, the court considered whether miners had properly marked their mining claim and sufficiently recorded notice of the site. Gilbert's opinion for the court rested on the reasonability of the descrip-

<sup>11</sup>*Ibid.* at 731 (Gilbert dissenting). For another case that illustrates the difference in approach taken by Gilbert and Ross to contract disputes, see *Turner v. Wells*, 238 F. 766 (9th Cir. 1917). In this case Gilbert (with Morrow) upheld a district court judgment for defendants under a grubstake contract that provided that, in exchange for supplies, the miner would locate prospective mines to be held by the contracting parties. The suit alleged conspiracy to defraud the plaintiff of rights under the contract by filing claims only in the defendant's name. The court affirmed judgment for defendants on the ground that the evidence was insufficient "to establish any interest of the appellant in the mining claims in controversy." 238 F. at 770. Ross dissented without opinion.

tion. He attempted to understand the customary mode of describing mines to assess whether a person with this information could find the particular location. "If he could, the notice is sufficient."<sup>12</sup> Ross found this approach unsatisfying. He complained that the notice was vague, and urged a remand for more fact finding because the description said nothing about the location of a stake in relation to a key landmark. His attention to detail and insistence on precision would not accept a lesser description.<sup>13</sup>

The exactness Ross demanded of Congress in writing statutes and of parties in drafting contracts applied equally to the standards employed by federal courts in the conduct of trials: he evaluated trial court proceedings rigorously. Gilbert, on the other hand, deferred to the trial court's fact finding and application of legal standards. He believed that if a jury found certain facts to be true, the appellate court should not upset such findings. The same pattern of deference developed for abuse of discretion issues. Ross, by contrast, suffered no angst in discovering and articulating the trial court's errors. The hands-off approach he favored in construing written documents did not at all apply to his review of trial-court proceedings. Gilbert's "activism" in searching for the intent behind the written language did not foreshadow a more intrusive approach to reviewing errors on appeal.<sup>14</sup>

On general mining disputes, Gilbert's position usually prevailed. With his view ascendant in recordation and other property disputes, litigants might anticipate that the court would attempt to infer the parties' intent from their actions. Yet Ross's occasional victories taught possible litigants that they risked losing in the Ninth Circuit if they failed to abide by the strict requirements of the property statutes. After the initial uncertainty caused by invalidating such "incomplete" conveyances, Ross's position forced litigants to become more sensitive to legal requirements. Had he consistently captured a majority, his formalistic rule might eventually have created more certainty, but Gilbert's approach may well have suited the times better, especially in Alaska, where the skill of the bar was un-

<sup>12</sup>*Smith v. Cascaden*, 148 F. 792, 794 (9th Cir. 1906).

<sup>13</sup>See *ibid.* at 797-98 (Ross dissenting). See also *Sturtevant v. Vogel*, 167 F. 448, 453-56 (9th Cir. 1909) (Ross dissenting).

<sup>14</sup>*Ralph v. Cole*, 249 F. 81, 97 (9th Cir. 1918) (Gilbert dissenting), *rev'd*, 248 U.S. 553 (1918). Compare *Consolidated Mutual Oil Co. v. United States*, 245 F. 521, 531 (9th Cir. 1917) (Gilbert dissenting) with *Heinze v. Butte and Boston Consolidated Mining Co.*, 126 F. 1, 28-29 (9th Cir. 1903) (Ross dissenting), *cert. denied*, 195 U.S. 631 (1904). By the Judicial Code of 1911, Congress abolished the circuit courts, leaving district courts as the principal courts of original jurisdiction. Act of March 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

even and access to current legal opinions limited.<sup>15</sup> A harsh construing of conveyancing principles or recordation law would have penalized many enterprising miners. By interpreting their actions and their intentions with greater flexibility than Ross, Gilbert probably recognized the commercial realities of the region more accurately.

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### THE BUTTE COPPER WAR

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For the first two decades of the twentieth century, disputes over land and mining claims, particularly in Alaska, composed a large segment of the court's docket. Many of these lawsuits meant financial riches or ruin for the individuals and small companies who appealed to the Ninth Circuit. During the same period, the court was addressing legal issues arising out of the consolidation of large mining companies in Montana and Idaho. Toward the end of the nineteenth century, as technology became more sophisticated and minerals more difficult to extract, the need for large infusions of capital led to the concentration of mining properties into fewer hands and to the development of mining companies. This consolidation occurred throughout the mining West, from Alaska to Arizona, but circumstances thrust the Ninth Circuit into a particularly prominent role in the struggle to gain control over Montana's copper, leading eventually to the agglomeration of the Anaconda Copper Company. While historians acknowledge the federal courts' key role in the Butte copper wars and the successful development of Anaconda, they shy away from explaining the contextual importance of key judicial decisions.<sup>16</sup> The consolidation

<sup>15</sup>See generally Claus Naske, "The Shaky Beginnings of Alaska's Judicial System," *Western Legal History* 1 (1988), 163 [hereafter cited as Naske, "Alaska's Judicial System"]; Ken Coates, "Controlling the Periphery: The Territorial Administration of the Yukon and Alaska, 1867-1959," *Pacific Northwest Quarterly* 78 (1987) 145; R.E. Baumgartner, "Organization and Administration of Justice in Alaska," *American Bar Association Journal* 20 (1934), 23.

<sup>16</sup>See generally Thomas Navin, *Copper Mining and Management* (Tucson, 1978), 117-24 [hereafter cited as Navin, *Copper Mining and Management*]; Rodman Paul, *California Gold: The Beginning of Mining in the Far West* (Ann Arbor, 1947). In Alaska, this movement toward consolidation was in its incipient stages during the Nome affair and the subsequent gold rush near Fairbanks. Opportunities for individual enrichment were still plentiful, and the Ninth Circuit decided numerous related cases. In Arizona the consolidation occurred in a much less litigious environment; the Ninth Circuit's effect, therefore, was considerably smaller. The copper companies in Bisbee, for example, agreed not to cannibalize each other. See Navin, *Copper Mining and Management*, at 232. Nevertheless, a few cases did arise. See, e.g., *Smith v. Hovland*, 11 F.2d 9 (9th Cir. 1926); *Martin v. Development Co. of America*,





Judge Erskine M. Ross, circa 1890 (Los Angeles Public Library)

of this copper behemoth occurred amidst the ongoing jurisprudential disagreement between Ross and Gilbert on natural-resource issues.

The idea of creating a great copper company originated with Henry H. Rogers, who, as one of John D. Rockefeller's powerful associates, had helped to build the Standard Oil Company into a position of preeminence. Rockefeller apparently disapproved of Rogers's bid, and refused to invest Standard Oil funds in the copper venture. Nevertheless, Rogers's opponents persistently (if incorrectly) attacked his copper dealings as an outgrowth of

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240 F. 42 (9th Cir. 1917). See Michael Malone, *The Battle for Butte* (Seattle, 1981) [hereafter cited as Malone, *Battle for Butte*]; Sarah McNelis, *Copper King at War: The Biography of F. Augustus Heinze* (University of Montana, 1968) [hereafter cited as McNelis, *Augustus Heinze*]; C.B. Glasscock, *The War of the Copper Kings* (New York, 1935).

the oil company, a demagogic claim with great popular appeal among Montana miners.

During the 1890s, when Rogers launched these efforts, Montana's most powerful copper concerns included the Anaconda, the Boston and Montana Consolidated Copper and Silver Mining Company, the Butte and Boston Consolidated Mining Company, and the Montana Ore Purchasing Company.<sup>17</sup> Fritz Augustus Heinze, a young entrepreneur who controlled Montana Ore Purchasing, resisted Rogers's bid to control Montana's copper properties. Heinze instituted massive litigation against the Boston companies, which prevented Rogers from implementing his initial strategy of purchasing them before acquiring the Anaconda. Heinze's battle against the other copper giants required a lot of gumption, particularly in light of Rogers's clear intent and capacity to crush anyone who stood in his way. Unfazed, Heinze used his own capacity and his understanding of state and local politics to ensure that his efforts were backed by widespread public support and a compliant state bench composed of elected judges. His success in these endeavors frustrated the Boston and New York controllers of the other copper companies. To establish the basis for diversity jurisdiction in order to avail themselves of a federal forum, the other copper companies attempted to reincorporate in New York. Heinze partially obstructed even that stratagem. After having associates purchase stock in the rival companies, he financed their minority-shareholder lawsuits to challenge the reincorporations when the directors attempted to act without obtaining consent through a shareholders' meeting. The minority shareholders won victories in state and federal courts that required the companies to start over.<sup>18</sup>

<sup>17</sup>See Malone, *supra* note 16, at 46-51, 134-35. On the origins of the Anaconda and the precursor to Rogers's bid for control of the Montana copper industry, see Kenneth Toole, "The Anaconda Copper Mining Company: A Price War and a Copper Corner," *Pacific Northwest Quarterly* 41 (1950), 312. Anaconda originally incorporated in 1891 as the Anaconda Mining Company. In 1895 it reincorporated as the Anaconda Copper Mining Company, a name it held until 1955, when it became the Anaconda Company. *Ibid.* at 45-46.

<sup>18</sup>According to one historian of mining, Heinze developed a sophisticated knowledge of the intricate vein system in the Butte district. He discovered who owned various properties and plotted the likely geographical direction for mineral veins. By purchasing the tiniest slivers of property adjacent to a rich mine, Heinze could then sue to tie up a competitor's investment. "Heinze found ample scope for predatory litigation, and by means of a few well-selected purchases of claims he started lawsuits that undermined the ownership of some of the richest properties." T.A. Rickard, *A History of American Mining* (New York, 1932), 362. See also McNelis, *Augustus Heinze*, *supra* note 16 at 17. Malone, *Battle for Butte*, *supra* note 16 at 142-43. See e.g., *Forrester v. Boston and Montana Consolidated Copper and Silver Mining Co.*, 21 Mont.

When the Butte and Boston and the Boston and Montana companies finally established federal diversity jurisdiction through legitimate reincorporation, they found an audience more receptive than the Montana state courts. One of the earliest federal cases, *Morse v. Montana Ore Purchasing Company*, illustrates some of the other extralegal dynamics shaping the outcome of the copper wars. Morse, a manager of the Boston companies, sued Heinze's Montana Ore Purchasing, claiming that the latter's mine intruded into one of Butte and Boston's mines. Although the jury found for Heinze, United States District Judge Hiram Knowles set aside the verdict and ordered a new trial on the ground that the pro-Heinze newspapers in Butte had improperly influenced the jury. The case illustrated Heinze's wide support among the people of Butte, who viewed him as the underdog in his struggle against the great copper companies. It also demonstrated why the Boston companies clearly preferred the federal courts.<sup>19</sup> Confronted by Heinze's success in Montana state courts, the Boston companies sought refuge in federal tribunals. Led by Gilbert (over Ross's dissent), the Ninth Circuit favored the forces of consolidation that attempted to put the upstart Heinze out of business.

In one such case, *Heinze v. Butte and Boston Consolidated Mining Company*, Butte and Boston alleged that it owned a one-half interest in one claim and a two-thirds interest in another. Heinze intervened to protect his own rights in the remaining divided interests in the claims. Butte and Boston asserted that Heinze was operating the mines illegally, extracting thousands of dollars' worth of ore each month, and preventing a receiver from operating the mine properly. Heinze challenged Butte and Boston's underlying claim of ownership by contending that the company had purchased its interests from an insane man who could not legally make a sale. The case raised purely issues of state law, but the Boston company had succeeded in transferring its corporate citizenship to New York, enabling it to invoke the federal courts' diversity jurisdiction. On appeal, the Ninth Circuit considered whether the circuit court in Montana had correctly appointed the receiver and

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544, 564 (1898); *MacGinniss v. Boston and Montana Consolidated Copper and Silver Mining Co.*, 119 F. 96, 101 (9th Cir. 1902).

<sup>19</sup>*Morse v. Montana Ore-Purchasing Co.*, 105 F. 337, 348 (C.C.D. Mont. 1900). Knowles, a district judge since 1890, had been a territorial judge in Montana as early as Andrew Johnson's administration. This Harvard-educated jurist clearly understood the political machinations of the Butte mining camps. For more on Knowles, see *Judges of the United States* (Washington, 1983), 277-78. Malone describes William Clancy, a Montana state judge, as a pliant loyalist of Heinze's, who routinely upheld the young copper mogul's interests irrespective of the issue. *Idem*, *Battle for Butte*, *supra* note 16 at 143-44.

ruled on the possession issues. Barely two years after the court had sharply rebuked the use of receivers in a scandal arising out of the gold rush in Nome, Alaska, Gilbert wrote for the majority in upholding the appointment of the receiver.<sup>20</sup> He conceded that the Nome cases stood for the proposition that extraction of ore from a mine "by a receiver is not to be permitted, except upon convincing proof of the necessity of such mining operations." He confessed that his deferential approach to trial proceedings contributed to the decision. The "record does not show that under all the circumstances" the trial court "so abused its discretion as to entitle the appellants to a reversal of its orders."<sup>21</sup>

In a lengthy dissent, Ross disagreed with much of Gilbert's analysis. He first challenged the majority's unwillingness to remand for a legal proceeding to determine the sufficiency of Butte and Boston's title, favoring more fact finding on Heinze's allegation that the company had purchased its interest from an insane person. He next disputed the court's conclusion on the receivership issue, stating that few situations justified the appointment of a receiver with the power to operate a mine, and that that was not one of them. The receiver's role would have been to enforce the injunction. Demonstrating his willingness to correct perceived errors by scrutinizing district court proceedings, Ross would have rejected this claim, which was important in protecting Anaconda's growing empire.<sup>22</sup>

While Heinze struggled with the Boston companies in state and federal courts, Rogers and his colleagues began to buy significant interests in Montana's major copper companies with the aim of cornering the market. After purchasing the Anaconda company outright in 1899, the Rogers group formed the Amalgamated Copper Company as a holding company to control Anaconda and the companies they planned to add to the stable, which included the Washoe Copper Company, the Parrot Silver and Copper Mining Company, the Colorado Smelting and Mining Company, the Boston and Montana Consolidated Copper and Silver Mining Company, and the Butte and Boston Consolidated Mining Company. Soon thereafter, Amalgamated acquired a majority of the Parrot stock, all of the Washoe and Colorado companies' stock, and, by 1901, a major-

<sup>20</sup>For more on the Nome scandal, see *Tornanses v. Melsing*, 106 F. 775 (9th Cir. 1901); *In re Noyes*, 121 F. 209 (9th Cir. 1902); Morrow, "The Spoilers," *California Law Review* 4 (1916), 89; Naske, "Alaska's Judicial System," *supra* note 15 at 163.

<sup>21</sup>*Heinze v. Butte and Boston Consolidated Mining Co.*, 126 F. 1, 11 (9th Cir. 1903), *cert. denied*, 195 U.S. 631 (1904).

<sup>22</sup>*Ibid.* at 27-29 (Ross dissenting).

ity in Boston and Montana and Butte and Boston. Heinze's Montana Ore Purchasing Company remained the largest Montana mining company outside Amalgamated's control.<sup>23</sup>

By 1903, after losing another series of state court proceedings to Heinze, Amalgamated ordered its own mines shut down. Amalgamated's management recognized that its workers were enamored of their charismatic opponent, and evidently hoped that shutting the mines—ostensibly because of the litigation—would rile its fifteen thousand miners and turn them against Heinze. The gambit nearly worked. Only a dramatic public oration by Heinze soothed the restless workers. This small rhetorical victory, however, could not compensate for the financial drain on him caused by the protracted litigation war. In a desperate bid, in 1904 he flouted a federal injunction by secretly mining a disputed passageway. He attempted to intimidate United States District Judge Knowles, but Ninth Circuit Judge William W. Morrow dispatched Idaho District Judge James H. Beatty to re-establish the court's authority. Beatty held Heinze in contempt of court and the Ninth Circuit refused to review the order, thereby upholding the fine of twenty thousand dollars.<sup>24</sup> Had the federal courts protected Heinze's interests with the same vigor as the Montana state courts did, the upstart copper magnate might well have succeeded in unjustly taking ores and mining claims from his competitors.<sup>25</sup> Instead, his defeat in federal court essentially forced him to sell out to Amalgamated in 1906 for an estimated ten and a half million dollars. He also agreed to dismiss 110 lawsuits that were tying up property worth between seventy million and one hundred million dollars.<sup>26</sup>

The man who succeeded in bringing the pugnacious Heinze to the negotiating table was John D. Ryan, who went on to lead the Anaconda Copper Mining Company into its final stages of consolidation and into a long period as one of America's first-

<sup>23</sup>Michael Malone and Richard Roeder, *Montana: A History of Two Centuries* (Seattle, 1976) 158-59; F. Ernest Richter, "The Amalgamated Copper Company: A Closed Chapter in Corporation Finance," *Quarterly Journal of Economics* 30 (1916), 387, 388-90.

<sup>24</sup>See Malone, *Battle for Butte*, supra note 16 at 173-77; McNelis, *Augustus Heinze*, supra note 16 at 76-83. *Heinze v. Butte and Boston Consolidated Mining Co.*, 129 F. 274 (9th Cir. 1904), cert. denied, 194 U.S. 632 (1904).

<sup>25</sup>As Malone observes, "It is interesting to note that the [Montana] supreme court, perhaps reflecting the anti-trust sentiment of the state, frequently sustained the rulings of Heinze's Butte judges." *Battle for Butte*, supra note 16 at 182.

<sup>26</sup>For an interesting account of these negotiations, see B.C. Forbes, *Men Who Are Making the West* (New York, 1923), 244-47 [hereafter cited as Forbes, *Men Making the West*]; Malone, *Battle for Butte*, supra note 16 at 187.

rank corporations.<sup>27</sup> Throughout his long and successful business career, Ryan had a penchant for consolidation and won recognition as the leader of both the copper and brass industries. He also headed Montana's largest power company. While negotiating with Heinze, he bought a majority of the stock in the Alice Gold and Silver Mining Company, one of the last of the independent Montana mining companies. This acquisition sparked major litigation nearly a decade later when minority shareholders, taking a page from Heinze's book, challenged the sale of Alice's assets to the Anaconda.<sup>28</sup>

On Ninth Circuit review, Ross saw the facts as a classic squeeze-out. The Alice majority shareholders, controlled by Ryan, had voted to sell the company's assets to Anaconda for a bargain-basement price in exchange for Anaconda stock. Because of a recent decision of the Supreme Court, the minority stockholders could not resort to antitrust laws.<sup>29</sup> Accordingly, Ross wrote an opinion annulling the sale on the ground that it had fetched an inadequate price and that the directors had failed as trustees to protect the interests of *all* the stockholders. In a highly unusual disposition, his opinion was reported first with the notation "Ross, Circuit Judge, dissenting in part," followed by a short opinion of Gilbert's in which District Judge Charles Wolverton of Oregon joined.<sup>30</sup> Ross evidently lost his support on the panel to annul the sale to Anaconda. With his customary deference to the district court, Gilbert maintained that the trial judge had correctly followed a Supreme Court decision requiring corporate property to be sold to the highest bidder upon dissolution.<sup>31</sup> Just as he had in the earlier Heinze suit, he was able to pull another member of the court to his side in permitting the consolidation of the Anaconda over Ross's dissent.

Even if Ross's opinions in these crucial cases had prevailed, the Montana copper war might have had the same outcome, given Anaconda's vast financial resources. Anaconda's eventual victory was expedited, however, by Gilbert's opinions for the

<sup>27</sup>See Carrie Johnson, "Electrical Power, Copper, and John D. Ryan," *Montana* 38 (1988), 24; Forbes, *Men Making the West*, supra note 26 at 229-30.

<sup>28</sup>*Geddes v. Anaconda Copper Mining Co.*, 245 F. 225, 226-31 (9th Cir. 1917), rev'd, 254 U.S. 590 (1921).

<sup>29</sup>See 245 F. at 227 (citing *Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U.S. 165 [1915]).

<sup>30</sup>*Ibid.* at 226. See also 245 F. at 243 (opinion of Gilbert). Wolverton, an Oregon federal district judge from 1905 until his death in 1926, often sat on the circuit court of appeals.

<sup>31</sup>245 F. at 243 (opinion of Gilbert). Gilbert was not swayed by Ross's contention that the bid auction was a sham because it involved only one company, the Anaconda.

court and by Heinze's miscalculation in violating the federal injunction. Nevertheless, Heinze's combative litigation strategy, which at times required the services of thirty-five lawyers, tied up Anaconda for so long that it never achieved its goal of controlling the national copper market. By the time the Montana copper wars ended in 1906-07, Arizona's mines were booming, but Heinze's litigation efforts had helped to prevent Anaconda from buying up the copper mines of the Southwest. In this sense, the Butte battle arguably prevented the national consolidation of copper interests.<sup>32</sup> The controlling influence of Gilbert's position, however, helped to facilitate Anaconda's victory in Montana.

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### TIMBER DEPREDATION ON PUBLIC LAND

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Lumber, water, and coal were needed for the mining process, and as part of its gambit to control Montana's copper mining industry, the Anaconda Company's chief backers launched a concerted effort to gain inexpensive, plentiful supplies of these resources. The company particularly required vast quantities of lumber, since, unlike the great open-pit copper mines of Arizona and Utah, Anaconda's Montana mines were shafted or tunneled, and thus necessitated a huge amount of heavy timber to shore up their walls. In 1888 Anaconda used forty thousand board feet per day in its deep-shafted mines alone.

Marcus Daly, a key figure in the Anaconda Company until his death in 1900, entered into partnership agreements with lumber magnates to meet these needs. Because he was able to secure cheap and plentiful timber supplies, he gained a tremendous edge over his mining competitors through these deals, one of which was with the lumber baron Andrew B. Hammond.<sup>33</sup> Hammond and others allegedly obtained some of this lumber by illegally cutting timber on public lands. In 1878 Congress enacted legislation conferring the right to cut timber "on the public domain for mining and domestic purposes."<sup>34</sup> The United States brought civil suits against Hammond and other

<sup>32</sup>See Malone, *Battle for Butte*, supra note 16 at 203; on Heinze's use of lawyers, see McNelis, *Augustus Heinze*, supra note 16 at 52.

<sup>33</sup>Malone, *Battle for Butte*, supra note 16 at 42-43; Navin, *Copper Mining and Management*, supra note 16 at 30-32, 203-4; K. Ross Toole and Edward Butcher, "Timber Depredations on the Montana Public Domain, 1885-1918," *Journal of the West* 7 (1968) 351, 353-60 [hereafter cited as Toole and Butcher, "Timber Depredations"].

<sup>34</sup>Act of June 3, 1878, ch. 150, 20 Stat. 88. For background material on early efforts to protect public timber from depredation, see Gates, *Public Land Law*, supra note 1 at 531-61.

commercial loggers to recover the value of timber allegedly obtained in violation of the statute's limited purposes. The stage was set for another clash between Ross and Gilbert. This time Ross would prevail, though the battle lines were not immediately drawn.

After years of intermittent activity, two of the timber-trespass suits made their way to the Ninth Circuit in 1904 and 1905. In the first, *United States v. Bitter Root Development Company*, the court reviewed a Montana circuit court decree that the United States had improperly brought a bill in equity when a remedy existed at law.<sup>35</sup> The substance of the government's claim was that Daly had used Bitter Root to defraud the government of two million dollars' worth of timber. The case proved easy for the court to decide, and Gilbert's majority opinion masked the disagreements that were to come. The court dispatched the government's theory that the legal remedy was inadequate because of "the trouble and difficulty of unraveling before a jury the devious and confusing methods adopted by the appellees in creating corporations." The "greater convenience of the equitable remedy is no ground," wrote Gilbert, "for depriving a party of his constitutional right to a jury trial."<sup>36</sup>

The next important case, *United States v. Clark*, opened the breach between Ross and Gilbert on the timber-trespass issue. The government sued W. A. Clark for fraudulently procuring public land that contained plentiful timber. The scheme purportedly relied on homestead claims by fifty persons who were retained by Clark's operatives. Once they secured the patents to the lands, the homesteaders allegedly violated the terms of the congressional statute prohibiting procurement except in good faith and for their own exclusive use. They then sold their property rights, which ended up in Clark's hands. Clark, who was one of Daly's cronies, failed to persuade the trial court to sustain a demurrer to the government's bill.<sup>37</sup> The Ninth Circuit reversed. In an opinion by Ross that Morrow joined, the court held that "the evidence in the present record falls far short of establishing that [Clark] knew, or had reason to know, of any such frauds at the time of his respective purchases."<sup>38</sup>

<sup>35</sup>*United States v. Bitter Root Development Co.*, 133 F. 274 (9th Cir. 1904), *aff'd*, 200 U.S. 451 (1906). On the federal government's timid prosecutorial efforts to this time, see Malone, *Battle for Butte*, *supra* note 16 at 227 n.24.

<sup>36</sup>133 F. at 278; see also *ibid.* at 276-77. Daly had died before the bill was brought; the government thus named his wife, Margaret P. Daly, as executrix, on the bill.

<sup>37</sup>*United States v. Clark*, 129 F. 241, 244 [C.C.D. Mont. 1904].

<sup>38</sup>*United States v. Clark*, 138 F. 294, 303 (9th Cir. 1904); *aff'd*, 200 U.S. 601 (1906).



Gilbert sided with the government and believed that Clark had enough notice of potential wrongdoing to inquire about how the lands he bought had been obtained from the United States.<sup>39</sup> *Clark* foreshadowed a common pattern in the two jurists' approaches to civil suits brought by the United States to recover for timber depredation. Ross consistently struck down the government's interests, whereas Gilbert tended to view its claims in a sympathetic light.<sup>40</sup> The case also reiterated their dichotomous views on contract and deed interpretation issues, insofar as Gilbert expressed a greater willingness to ferret out the ill intent of the parties to the purported scheme, whereas Ross more narrowly construed the written documents without attempting to divine the parties' aims.

The greatest of the Montana copper-timber cases involved Hammond, one of the most important figures in the development of the western lumber industry. One student of his life has written obliquely that Hammond's "logging crews cut timber from land he had purchased from the railroad, but there is little doubt that his woodcutters also strayed onto adjacent federal lands."<sup>41</sup> In its largest suit in the Ninth Circuit, the United States attempted to establish that Hammond's "straying" was part of a more nefarious scheme to defraud the common weal of twenty-one million board feet of timber from public land in Montana. At trial, the jury returned a verdict against Hammond, but only for one-quarter (\$51,040) of the damages sought by the government.<sup>42</sup> Given its general lack of success in pressing such actions in the West, this verdict nevertheless represented a major victory for the federal government.

In an opinion by Ross that District Judge Frank Rudkin joined, the Ninth Circuit reversed and remanded for a new trial. "[A]fter a very attentive examination of the record," Ross ruled that the verdict could not stand.<sup>43</sup> The district court had instructed the jury to find as a matter of law that, if the government prevailed, it should receive interest on the award. Because the government delayed filing suit for seventeen years, the

<sup>39</sup>138 F. at 303 (Gilbert dissenting).

<sup>40</sup>Malone criticized the Supreme Court's affirmance in *Clark* in very uncharitable terms, saying that Justice Holmes "reasoned incredibly in his majority opinion that Clark had not been aware of the tricks his subordinates played upon Uncle Sam through fraudulently acquired homesteads." *Battle for Butte*, supra note 16 at 44. See *United States v. Clark*, 200 U.S. 601 (1906).

<sup>41</sup>Gage McKinney, "A. B. Hammond, West Coast Lumberman," *Journal of Forest History* 28 (1984) 196, 197.

<sup>42</sup>For the district court opinion, see *United States v. Hammond*, 226 F. 849 (N.D. Cal. 1914).

<sup>43</sup>246 F. at 45.

accrued interest exceeded the value of the lumber as uncut timber.<sup>44</sup> The court remanded the case for the jury to determine the propriety of such an award. In dissent, Gilbert objected to what he viewed as Ross's heavy-handedness in devising an objection and then reversing on that ground. "It is not to be doubted that, if the precise objection had been pointed out and the authorities cited, the court below would have given appropriate instructions," he wrote. "Counsel at the conclusion of a trial ought not to be permitted to hold back an important point of objection to an instruction, and thereby mislead the trial court and secure a reversal on appeal."<sup>45</sup> After remand, the case apparently ended in settlement, the government accepting a modest \$7,000 of the \$211,854.10 it had originally sought from Hammond.<sup>46</sup>

The outcome in *Hammond* accorded with the federal government's general failure to get much satisfaction in other timber-depredation suits it brought in the Ninth Circuit during the early twentieth century. The Ninth Circuit typically decided these cases with a single opinion, but this unanimity flowed from two fundamentally different judicial tenets. Ever suspicious of exercises of federal power, Ross sided against the government in case after case. Without ever articulating any specific animus or bias, he undoubtedly favored the national government's opponents in civil litigation.<sup>47</sup> Gilbert, on the other hand, responded more favorably to United States interests on timber issues. This position, however, did not override his generally deferential approach to reviewing appeals. These divergent perspectives merged to produce unanimity in public land/timber cases when juries ruled in favor of the government but awarded low damages.

In one of the earliest of these cases, the United States sued for the manufactured value of ninety thousand feet of lumber at seven dollars per thousand feet (\$630). The jury evidently believed that the timber was cut in "good faith" and returned a verdict for only thirty-five dollars.<sup>48</sup> On appeal, Gilbert wrote for the court in an opinion joined by Ross and Morrow. Unsurprisingly, Gilbert briefly articulated his philosophy of deference to trial courts' fact findings and evidentiary rulings.<sup>49</sup> At the

<sup>44</sup>246 F. at 50.

<sup>45</sup>246 F. at 54 (Gilbert dissenting).

<sup>46</sup>Toole and Butcher, "Timber Depredations," *supra* note 33 at 359.

<sup>47</sup>As Toole and Butcher have written, "In literally dozens of cases, the government won in the lower courts, only to lose on appeal." *Ibid.*

<sup>48</sup>*United States v. Van Winkle*, 113 F. 903, 905 (9th Cir. 1902).

<sup>49</sup>*Ibid.* at 904.

same time, the unstated message was a ringing defeat for the United States in its effort to recoup timber-depredation damages. This result accorded with Ross's general distrust of assertions of national authority, especially against persons attempting to develop the West's resources. In two factually similar cases, the court upheld jury verdicts of \$300 and \$6,102 when the United States sought \$2,500 and \$17,751, respectively.<sup>50</sup> Of the \$84,346.38 the Justice Department recovered in timber depredations during 1909, slightly more than a quarter was from litigation in the Ninth Circuit. But for their few large recoveries against mining companies, the government had little to show for its litigation efforts.<sup>51</sup> In 1910 alone, the Justice Department filed sixty-six timber-depredation suits, alleging a total of \$436,350.86 in money damages, yet received awards of only \$8,851.26, of which it collected a mere \$4,318.13.<sup>52</sup>

As suspicious as he may have been of efforts by the United States to collect damage awards against loggers who allegedly violated public land laws, Ross took a dark view of attempts to defraud the government of title to public lands. Thus, in contrast to the depredation suits, the government had far greater success in acting to revoke land patents obtained by fraud. In cases concerning proper patents under the mining laws, for example, the court upheld findings of fraud when the persons involved acquired claims to public land upon misrepresentations that they had found paying quantities of minerals.<sup>53</sup> The court also cracked down on a purchaser who knew that the patentee had obtained the land by fraud.<sup>54</sup> Under homestead laws, a person could get a patent to public land for the purpose of establishing a homestead. These laws did not permit homestead patents for mining purposes. In a series of land-fraud suits brought by the United States attorney in Oregon, the Ninth Circuit spoke with a unified voice in upholding the government's position to rescind patents illegally obtained under

<sup>50</sup>*United States v. Coughanour*, 133 F. 224 (9th Cir. 1904); *Anderson v. United States*, 152 F. 87 (9th Cir. 1907).

<sup>51</sup>Attorney General, *Annual Report*, 1909, 11, 242-43. In a ranking of the top five districts in terms of dollars recovered through such depredation suits, only one—northern California (\$10,989.19)—was in the Ninth Circuit. The others in the top five were Colorado (\$15,332.50); southern Florida (\$12,661); western Louisiana (\$8,991.73); and Wyoming (\$8,509.47).

<sup>52</sup>Attorney General, *Annual Report*, 1910, 403. This rate of recovery—a little over 2 percent—was exceeded slightly the following year when the government recovered \$148,130.66 on suits requesting \$2,800,182.44. See Attorney General, *Annual Report*, 1911, 345 (approximately 5 percent).

<sup>53</sup>E.g., *Multnomah Mining, Milling and Development Co. v. United States*, 211 F. 100 (9th Cir. 1914).

<sup>54</sup>E.g., *Frick v. United States*, 255 F. 612 (9th Cir. 1919).

homestead laws.<sup>55</sup> These cases presented straightforward and relatively easy questions to decide. In other major patent revocation litigation involving oil lands, the government took on the Southern Pacific Railroad and sparked a series of cases as contentious as the court has seen in its history.

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### CALIFORNIA OIL DISPUTES

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The Ninth Circuit's handling of Alaska gold mining, Idaho and Montana copper mining, and Pacific-Northwest forestry issues provided the doctrinal moorings for assessing the court's work in a series of lawsuits over California oil. The oil controversies combined aspects of mining law, the congressional land grants to the railroads, and a decision by the president to reserve certain oil-rich lands for use by the navy. The root of these disputes stemmed from the land-grant subsidy laws of the 1860s, which provided that the railroads would receive alternate tracts of public land in a "checkerboard" arrangement upon completing segments of railroad track. The original grants had been subject to the proviso that title would not pass to lands containing minerals.<sup>56</sup> Long after the government issued the patents, it discovered oil on some of these lands. The government faced the question of how to regain title to the lands it had deeded before the discovery of oil. A second concern was how to protect lands reserved by executive order from "drainage" caused by drilling on the railroads' adjoining tracts.<sup>57</sup> As

<sup>55</sup>For the land-fraud suits, see, e.g., *United States v. Jones*, 242 F. 609 (9th Cir. 1917); *McClure v. United States*, 187 F. 265 (9th Cir. 1911); *McLeod v. United States*, 187 F. 261 (9th Cir. 1911); *Jones v. United States*, 179 F. 584 (9th Cir. 1910). This last case brought to light an elaborate conspiracy involving a United States senator from Oregon, the United States commissioner of the General Land Office, and others, to defraud the government of public lands through abuse of the homestead provisions.

<sup>56</sup>The original statute of 1862 provided that the grant to the railroad company would be of "every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, . . . Provided, That all mineral lands shall be excepted from the operation of this act. . . ." Act of July 1, 1862, ch. 120, § 3, 12 Stat. 489, 492. Two years later, Congress increased the subsidy to ten alternate sections and twenty miles. It also amended the "mineral land" prohibition so that it "shall not be construed to include coal and iron land." Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358. See also Act of July 27, 1866, ch. 278, § 3, 14 Stat. 292, 294. For an examination of these problems from the perspective of Standard Oil Company of California, which lobbied hard to free these lands for exploration and drilling, see Gerald T. White, *Formative Years in the Far West: A History of Standard Oil Company of California and Predecessors Through 1919* (Salem, N.H., 1962), 433-59.

<sup>57</sup>J. Leonard Bates, *The Origins of Teapot Dome* (Urbana, 1963) 166-67 [here-

they had with many other natural-resource disputes, Gilbert and Ross differed in their approaches to these questions, their prior opinions offering a glimpse of the nature of their disagreement.

In 1911, in one of the earliest such suits, private mining speculators sought to uphold their claim to title against the Southern Pacific Company.<sup>58</sup> The miners contended that because the land-grant statute prohibited the transfer of mineral lands to the railroads, the normal rules of mineral discovery applied and the court should uphold their claim to title. Sitting as trial judge in circuit court, Ross disagreed. In a significant victory for the railroad, he held that, absent a finding of fraud or mistake on the railroad's part in securing the land patent, the court would not entertain a collateral attack against the title.<sup>59</sup> This decision, which the Justice Department followed closely, elicited an expression of "approval" in a letter written by Attorney General George Wickersham. The letter caused an uproar when the railroad surreptitiously obtained it and produced it during the appeal.<sup>60</sup> Recognizing the importance of a ruling on these issues by the nation's highest court, the Ninth Circuit certified the questions presented without rendering its own judgment on them.<sup>61</sup> The Supreme Court in turn upheld Ross's decision in *Burke v. Southern Pacific Railroad Company*.<sup>62</sup>

The *Burke* ruling required the government to prove fraud by the railroad to invalidate title to oil lands obtained under the land-grant subsidies.<sup>63</sup> In a suit against the Southern Pacific to recover six thousand acres of land in Elk Hills, California, valued at eighteen million dollars, the government first attempted

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after cited as Bates, *Teapot Dome*]; Homer Cummings and Carl McFarland, *Federal Justice* (New York, 1937), 398 [hereafter cited as Cummings and McFarland, *Federal Justice*].

<sup>58</sup>*Roberts v. Southern Pacific Co.*, 186 F. 934 (C.C.S.D. Cal. 1911), *aff'd*, 219 F. 1022 (9th Cir. 1915).

<sup>59</sup>*Ibid.* at 942-46.

<sup>60</sup>Cummings and McFarland, *Federal Justice*, *supra* note 57 at 401.

<sup>61</sup>See *Burke v. Southern Pacific Railroad Co.*, 234 U.S. 669, 672 (1914). Under § 239 of the 1911 Judicial Code, Congress authorized the circuit courts of appeals to "certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision." The Supreme Court could decide just those questions or request the whole record and render judgment on the case "as if it had been brought there for review by writ of error or appeal." In both instances the Court's decision was binding on the circuit court of appeals. Act of March 3, 1911, ch. 231, § 239, 36 Stat. 1087, 1157. See generally James Love Hopkins, *The Judicial Code* (Chicago, 1911), 204.

<sup>62</sup>234 U.S. at 710-11.

<sup>63</sup>234 U.S. at 692.

to meet this "fraud" requirement.<sup>64</sup> It alleged that "the lands are mineral lands and were known to be such to the defendant railroad company at the time they were listed and patented."<sup>65</sup> In a major victory for the government, the trial court ruled that the railroad had procured the patent to public lands in Elk Hills by fraud. Meanwhile, the attorney general had also announced plans to file a series of suits to challenge patents to one hundred sixty five thousand acres, of which twenty thousand lay in Naval Petroleum Reserves No. 1 (Elk Hills) and No. 2 (Buena Vista Hills). The value of the lands exceeded five hundred million dollars.<sup>66</sup> These suits were later consolidated, and, in an important ruling in 1915, the district court denied Southern Pacific's motions to dismiss.<sup>67</sup>

During the pendency of the railroad's appeal in the Elk Hills suit and discovery in the consolidated reserves case, the Ninth Circuit addressed a related question in the case of *Consolidated Mutual Oil Company v. United States*, which challenged the viability of drilling leases in the reserves. *Consolidated Mutual* foreshadowed the lines over which the court would battle in the government's bid to wrest control over the naval-reserve lands from the railroad.<sup>68</sup> The United States sued to block drilling on the reserves created by executive orders and to reclaim title to the land. Under an executive order in 1909, President Taft had set aside certain lands as an oil reserve for the navy's use. The order contained an important caveat: "All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."<sup>69</sup> Congress had subsequently enacted a statute validating the order.<sup>70</sup>

In an opinion that exemplified the hallowed place of property rights in his jurisprudence, Ross wrote an opinion reversing the district court's decree for the United States. Joined by Judge William H. Hunt, he observed that the oil companies "then had in the lands here in question valuable rights of possession and conveyance, which the courts of the country would protect and enforce, . . . rights, too, acquired by the license, if not by the

<sup>64</sup>See Attorney General, *Annual Report*, 1912, 40. Conforming its pleadings to Ross's decision, the government filed this suit claiming fraud before the Supreme Court's ruling.

<sup>65</sup>Attorney General, *Annual Report*, 1911, 31.

<sup>66</sup>Attorney General, *Annual Report*, 1912, 40.

<sup>67</sup>*United States v. Southern Pacific Co.*, 225 F. 197 (S.D. Cal. 1915).

<sup>68</sup>*Consolidated Mutual Oil Co. v. United States*, 245 F. 521 (9th Cir. 1917).

<sup>69</sup>245 F. at 526 (quoting the executive order).

<sup>70</sup>Act of June 25, 1910, ch. 421, 36 Stat. 847.

invitation, of the government, and in the pursuance of which the lessee of this property had then, according to the records, already expended more than \$20,000."<sup>71</sup> Ross felt certain that President Taft, whom he respected a great deal, intended the executive order "to apply to all locations and claims existing at the time of the making of the withdrawal order to which the locators or claimants had some valid right," and thus to exempt these particular claims.<sup>72</sup>

Gilbert dissented in an opinion that reiterated his deference to trial courts and his obeisance to United States national interests as he perceived them to have been articulated by the president and Congress. For Gilbert, the appeal presented the solitary issue of "whether the court below, in appointing a receiver, abused the discretion which was vested in it."<sup>73</sup> Having framed the issue thus, his answer was readily evident to even the most inexperienced follower of the court's decisions.<sup>74</sup> After criticizing the majority for presuming to infer Taft's "intent" in framing the executive order, Gilbert offered a ringing affirmation of the federal government's power to protect the oil reserve: "Lands which have ceased to be public lands, by reason of the initiation of pre-emption and homestead and other claims, are still so far public lands that the United States may protect them from waste."<sup>75</sup>

In two important rulings, therefore, Ross had required the government to carry the difficult burden of proving fraud to rescind a railroad land grant and had permitted an oil company to continue its leasing operations in petroleum reserves that had been set aside by executive order and act of Congress. Both

<sup>71</sup>245 F. at 527.

<sup>72</sup>245 F. at 527. Ross retained in his scrapbook a warm letter from Taft written on November 21, 1921, a few months after Taft became chief justice of the United States. In the letter, Taft recalled that "we became friends now thirty years ago" and expressed his delight that Ross was "still making [himself] the Rock of Gibraltar out in the Ninth Circuit." Taft to Ross, November 21, 1921, Ross Scrapbook, *supra* note 3. Inasmuch as Ross saved few letters for posterity, the three that he kept from Taft—one even from Taft's service as civil governor of the Philippines in 1901—suggest his healthy respect for the one-time president and chief justice. In the other letter, Taft wrote seeking permission to propose Ross for membership in the American Bar Association. Taft to Ross, March 30, 1914.

<sup>73</sup>245 F. at 531 [Gilbert dissenting].

<sup>74</sup>See, e.g., *Heinze v. Butte and Boston Consolidated Mining Co.*, 126 F. 1 (9th Cir. 1903), *cert. denied*, 195 U.S. 631 (1904).

<sup>75</sup>245 F. at 532 [Gilbert dissenting]. With some exasperation, Gilbert remarked of his colleagues: "Perhaps the members of this court would not have appointed a receiver upon the showing made, but this is not the question here. The question is whether the court below manifestly abused the discretion which was lodged in it."

decisions were major defeats for the government, but if the Justice Department could win the Elk Hills and consolidated naval-reserves suits, it would be able to foreclose the massive drilling that was sure to occur if the railroad retained its land patents. Shortly after *Consolidated Mutual Oil*, the Ninth Circuit handed down its decision in the Elk Hills case. Though Ross was not on the panel, his viewpoint was well represented. In a decision that one historian has described as "a little hard to believe," the court reversed the district court ruling that the Southern Pacific had fraudulently obtained title to the land.<sup>76</sup> Idaho District Judge Frank Dietrich, who eight years later would be elevated to the Ninth Circuit, wrote for himself and Hunt. In a lengthy opinion canvassing the facts and scrutinizing the trial record, he conveyed no small uncertainty in ruling against the government:

Without further discussion, our general conclusion is that the lands were not, in 1903-04, known to be valuable for their mineral. The conditions were such only as to suggest the probability that they contained some oil, at some depth, but nothing to point persuasively to its quality, extent, or value. Or, putting it in another way, the conditions were such as to suggest the possibility of oil in paying quantities, and to induce the more venturesome—such as were willing to take chances—to prospect the field; but we are satisfied they were not "plainly such as to engender the belief" that any given section or other legal subdivision contained oil of such quality and quantity, and at such depth, as would render its extraction profitable.<sup>77</sup>

Gilbert disagreed with these sentiments, but did not share his thoughts for posterity. Perhaps because the decision seemed certain to advance to the Supreme Court anyway, he dissented without opinion, a practice much more common in the early twentieth century than today.<sup>78</sup>

While the government appealed the Ninth Circuit's decision in the Elk Hills case to the Supreme Court, the district court finally closed discovery in the massive consolidated naval-reserves case, estimated to be worth close to one-half billion

<sup>76</sup>See Bates, *Teapot Dome*, *supra* note 57 at 171; *Southern Pacific Co. v. United States*, 249 F. 785 (9th Cir. 1918); *rev'd*, 251 U.S. 1 (1949).

<sup>77</sup>249 F. at 804-5.

<sup>78</sup>See *ibid.* (Gilbert dissenting). But see, e.g., *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 895 F. 516, 520 (9th Cir. 1990) [Noonan, J., dissenting without opinion].



dollars.<sup>79</sup> Required by the *Burke* decision to prove that the Southern Pacific had obtained the lands through fraud, the government alleged that "the 'Big Four' of the Central and Southern Pacific Companies . . . were all parties to a deliberate, long-enduring, and wide-embracing scheme to acquire from the government wrongfully vast areas lying on the west side of the San Joaquin Valley, involving some of the richest oil lands that the world has ever known."<sup>80</sup> Judge Benjamin F. Bledsoe expressed shock that the government could accuse "some of the most prominent, most forceful, most far-seeing men that our state has produced [of engaging] in the diabolical plan of consummating one of the greatest frauds of the age."<sup>81</sup> His incredulity surely would have drawn a spirited rebuttal from Lewis McKisick, who, when representing the United States against the Stanford estate twenty-four years earlier, had described one of the Big Four, Leland Stanford, as the "most conspicuous criminal of the Century."<sup>82</sup>

Bledsoe's ruling was less a surprise than the tenor of his language. The government's case appeared to be weaker than in the Elk Hills litigation, which the Ninth Circuit had decided in the railroad's favor.<sup>83</sup> But the Supreme Court reversed the Ninth Circuit in the Elk Hills case, thus vindicating Gilbert's view and renewing hope that the government might yet prevail in an appeal in the consolidated case upon which Bledsoe had just ruled.<sup>84</sup> Incredibly, Attorney General A. Mitchell Palmer announced that the government would not appeal Bledsoe's decree.<sup>85</sup> His decision "utterly ruined" the naval petroleum reserve at Buena Vista, and, according to one scholar, "has remained incomprehensible, outside of possible aspersions on Palmer's integrity."<sup>86</sup> As for the Elk Hills reserve, the Supreme Court's decision saved it for the moment, but a new threat

<sup>79</sup>*United States v. Southern Pacific Co.*, 260 F. 512-13 (S.D. Cal. 1919).

<sup>80</sup>*Ibid.* at 513.

<sup>81</sup>*Ibid.*

<sup>82</sup>McKisick to Holmes Conrad, December 10, 1895. Department of Justice Central Files, Year Files 1892, File 7622: Assorted Letters, Boxes 631 and 632, Record Group 60, National Archives. For more on the *Stanford* suit, see David C. Frederick, "Railroads, Robber Barons, and the Saving of Stanford University," *Western Legal History* 4 (1991), 225.

<sup>83</sup>See 249 F. at 805.

<sup>84</sup>*United States v. Southern Pacific Co.*, 251 U.S. 1 (1919).

<sup>85</sup>As he explained in his 1920 Report, "it seemed clear that an appeal would have been not only wasteful of time and money, but it might well be deemed frivolous." Attorney General, *Annual Report*, 1920, 112.

<sup>86</sup>Jeffrey M. McKeage, "The Naval Petroleum Reserves: A Modern Perspective," *Journal of the West* 28 (1989) 52, 55.

surfaced within two years, when the Harding administration took office. The fate of Elk Hills became inextricably linked with a place in Wyoming called Teapot Dome. Appropriately, William Gilbert would end up having a major say in the final disposition of the Elk Hills reserve, but he would have to wait nearly a decade.<sup>87</sup>

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### EARLY ENVIRONMENTAL CASES

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Gilbert's view of the government's national interests in natural-resource litigation did not prevail in the most important cases decided by the Ninth Circuit during the first two decades of the twentieth century. Ross's position garnered a majority in critical cases that went against the government's interests.<sup>88</sup> For reasons they did not record, the two most frequent members of Ninth Circuit panels deciding those cases, Morrow and Hunt, sided with Ross. Some of the disputes involved giants of the commercial world and corporations of great regional and national significance. Although Gilbert and Ross disagreed often on the government's position in cases critical to the development of natural resources in the West, on the question of exploiting those resources at the expense of the environment, the two jurists came down on the same side. However stark their contrasting philosophies, both judges strongly believed in the importance of capitalizing on the West's natural resources for development. Their means to this end differed but the objective held fast. Cases raising issues with distinctly environmental effects brought this conjunction of views into sharp focus.

In 1906 Ross and Gilbert united to decide a significant case involving a claimed nuisance created by the discharge of a large copper-smelting plant: *Mountain Copper Company v. United States*.<sup>89</sup> The United States brought suit against the copper company for allegedly using its mining, roasting, burning, smelting, and refining equipment to cause undue harm to trees and other timber on adjoining public land. Bolstered by exten-

<sup>87</sup>See *Pan-American Petroleum Co. v. United States*, 9 F. 2d 761 (9th Cir. 1926), *aff'd*, 273 U.S. 456 (1927).

<sup>88</sup>This happened in at least four major cases. See, e.g., *Morrison v. United States*, 212 F. 29 (9th Cir. 1914), *rev'd*, 240 U.S. 192 (1916); *Consolidated Mutual Oil Co. v. United States*, 245 F. 521 (9th Cir. 1917); *Hammond v. United States*, 246 F. 40 (9th Cir. 1917); and *Southern Pacific Co. v. United States*, 249 F. 785 (9th Cir. 1918).

<sup>89</sup>*Mountain Copper Co. v. United States*, 142 F. 625 (9th Cir. 1906), *appeal dismissed*, 212 U.S. 587 (1908).

sive trial testimony of allegedly irreparable timber damage, the government requested a permanent injunction against Mountain Copper's smelting operations. The circuit court issued a decree permanently enjoining the copper company from roasting, burning, and smelting copper or other ores at its works at Keswick, in Shasta County, California. The court reasoned that no known means existed to smelt copper without discharging sulphurous and arsenical fumes, and issued a permanent injunction to halt irreparable injury to public lands.<sup>90</sup>

In an opinion for himself and Gilbert, Ross reversed the circuit court decision. These two judges, who were among the most experienced in the entire United States, agreed that in striking the balance between harm to the United States because of the discharges and detriment to the company of enjoining its activities, the weight of interests fell on the side of the copper company. Ross carefully courted Gilbert's vote in the opening paragraphs of the opinion by dispelling any notion that national sovereign power, to which Gilbert typically deferred, was at stake. Ross observed that the government had sued "not in its sovereign capacity, but as a landowner, to enjoin alleged injuries to its property, not directly, but indirectly, through the maintenance of an alleged nuisance by the defendant on its own property."<sup>91</sup> Ross thus lowered the government's position to that of any normal landowner, before reciting the general rule that "when the government comes into a court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less."<sup>92</sup>

Once he had denigrated the special aura of the complainant, Ross then belittled the value of the property upon which the alleged nuisance purportedly had wreaked havoc. The four thousand acres in the "damaged zone" was "mountainous in character, with little or no soil, practically worthless for agriculture or horticulture."<sup>93</sup> To protect this land the government asked the court to shut down a smelting plant that produced an average of six hundred tons of copper ore per day. The court rejected the proffered less harmful alternative—the erection of a condensation chamber—as far too costly for the negligible benefit it would produce. Such a device would make only a modest dent in the amount of sulfuric acid released and would cost between three million and five million dollars. Ross con-

<sup>90</sup>For the facts of this case, see 142 F. at 625-29.

<sup>91</sup>*Ibid.* at 629.

<sup>92</sup>*Ibid.*

<sup>93</sup>*Ibid.* at 638.

cluded, and Gilbert agreed, that the "maximum injury" to the United States was a "mere trifle" compared with the harm to Mountain Copper if the injunction stayed in force.<sup>94</sup>

The dissenting opinion of Nevada District Judge Thomas Hawley expressed an eloquent concern for the environment. He contended that Judge Lorenzo Sawyer had crafted the relevant controlling principle in the seminal case of *Woodruff v. North Bloomfield Gravel Mining Company* two decades before.<sup>95</sup> In *Woodruff*, Sawyer had granted a permanent injunction to stop a mining company from causing a nuisance to downstream landowners by discharging debris into a river.<sup>96</sup> Hawley deemed *Woodruff* indistinguishable and asserted that "[u]nless the doctrines therein announced are erroneous, it should be followed. If the ruling in that case was wrong, it should be overruled."<sup>97</sup> He admonished Ross's ledger-balancing approach and maintained that a profitable corporation "has no right . . . to destroy the property of the individual landowners in the vicinity or seriously to impair and injure the health of those living upon their own lands in the vicinity of its works."<sup>98</sup>

Despite the plaintive appeal by Hawley, a court dominated by Ross and Gilbert would rule consistently in favor of business interests as they exploited natural resources at the environment's expense. Two years after *Mountain Copper*, the court decided a case that closely paralleled the facts of *Woodruff*. In *McCarthy v. Bunker Hill and Sullivan Mining and Concentrating Company*,<sup>99</sup> landowners sought an injunction against a copper-smelting operation run by a number of copper-mining companies in Idaho, whose operations had irrevocably polluted the streams from which the landowners drew water. Relying on *Mountain Copper*, the circuit court in Idaho refused to grant the requested injunction.<sup>100</sup>

The Ninth Circuit affirmed in an opinion by Ross in which Gilbert and Montana District Judge William Hunt joined. In *McCarthy*, he took a new tack to defeat the landowners' inter-

<sup>94</sup>*Ibid.* at 637-38.

<sup>95</sup>*Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (C.C.D. Cal. 1884). For an interesting commentary on Sawyer's decision in historical context, see Duane Smith, *Mining America* (Lawrence, 1987), 69-73.

<sup>96</sup>18 F. at 809.

<sup>97</sup>142 F. at 644 (Hawley dissenting).

<sup>98</sup>*Ibid.* at 647 (Hawley dissenting).

<sup>99</sup>*McCarthy v. Bunker Hill and Sullivan Mining and Concentrating Co.*, 164 F. 927 (9th Cir. 1908), *cert. denied*, 212 U.S. 583 (1909).

<sup>100</sup>*McCarthy v. Bunker Hill and Sullivan Mining and Concentrating Co.*, 147 F. 981, 985 (C.C.D. Idaho 1906), *aff'd as modified*, 164 F. 927 (9th Cir. 1908), *cert. denied*, 212 U.S. 583 (1909).

ests against the polluting smelter companies. Deviating from his usual jurisprudence, he deferred to the trial-court proceedings: "[A]n appellate court will not ordinarily interfere with the action of the trial court in either granting or withholding an injunction in cases in which the evidence is substantially conflicting, and especially where the trial judge, at the request of the respective parties, has had the benefit of a personal inspection of the premises."<sup>101</sup> Ross made no attempt to explain this departure from his typically intrusive approach to reviewing trial errors, which he had employed two years earlier in *Mountain Copper*. Because the court in *McCarthy* reviewed a ruling that rejected an injunction, he rested the decision on a deferential approach he often eschewed. This case also marked some movement away from Ross's earlier position of fealty to the individual property owner's concerns to the exclusion of the community's interests.<sup>102</sup> In the celebrated *Fallbrook* case, he had struck down a state irrigation district law because it allegedly infringed a landowner's due-process property rights. No constitutional issue arose in the copper-smelting cases, and Ross's concern for the small landowner in them was similarly lacking.

The trial court in *McCarthy* had determined that the high value of the mining activity far outweighed the detriment to the landowners' property. In the Coeur d'Alene region, where twelve thousand people lived, the mines produced approximately 40 percent of the lead extracted in the United States and an estimated thirteen million dollars yearly in lead and silver.<sup>103</sup> Testimony in the case had also revealed that the mining operators would lose their capital investment of twelve million dollars and a total of at least twenty-five million dollars. Estimated losses to the region's inhabitants and other property owners would exceed fifty million dollars if the court enjoined these mining activities in Idaho.<sup>104</sup> The court might have followed Sawyer's lead in the *Woodruff* case by enjoining the smelting operations until protective technology redressed the problem. Such a remedy, however, would nevertheless have struck Idaho's principal business interests a potentially irreparable blow. The Ninth Circuit instead ruled in absolute terms. Either the mining activity continued or it ceased.

If expressing greater concern for the environment or the adjoining landowners entered into the thinking of Ross or Gilbert,

<sup>101</sup>160 F. at 940.

<sup>102</sup>See notes 3, 38, 71, and accompanying text.

<sup>103</sup>See 164 F. at 936.

<sup>104</sup>*Ibid.*

neither judge articulated it in a judicial opinion. The closest Ross came was in a 1911 case involving the mammoth Washoe smelter in Montana. Ross counseled the complaining farmers that the "court [was] always ready and willing" to protect them against wealthy mining corporations "in all proper cases." After all, he continued, he himself was "a farmer, and has been for more than 40 years."<sup>105</sup> Although Ross's candor about his own extracurricular activity was accurate (he owned over a thousand acres in southern California), his projection of the court's willingness to protect landowners against mining companies was somewhat disingenuous.<sup>106</sup> He was surely committed to upholding the rights of property owners in most situations. The context of mining pollution, however, was not one of them.

When weighing the respective interests of the parties involved, Ross and Gilbert invariably sided with the mining companies. As the great copper-smelting companies gathered strength in the first decade of the twentieth century, environmental concerns mounted. By 1913 legal commentators observed that the smelting pollution question had "assumed serious importance in recent years."<sup>107</sup> The Supreme Court had not directly addressed the question of pollution nuisance, but it had ruled that the great importance of the mining industry was not necessarily enough to cut off all the complainant's rights.<sup>108</sup> "[T]he right of the lesser interest is not thereby subordinated to the greater," though that "is sometimes a consideration when a plaintiff seeks relief by injunction rather than by an action at law."<sup>109</sup>

The Ninth Circuit's copper-smelting cases well demonstrated the laissez-faire approach to developing the region's natural resources. The position of Gilbert and Ross seemed to be that the West was large enough to accommodate polluting smelter operations, even if adjoining landowners suffered as a result. This view, however fervently expressed in the discharge

<sup>105</sup>*Bliss v. Washoe Copper Co.*, 186 F. 789, 825 (9th Cir. 1911), *cert. dismissed*, 231 U.S. 764 (1913).

<sup>106</sup>On Ross's landownings, most of which he earned as a legal fee before becoming a judge, see George Cosgrave, *Early California Justice* (San Francisco, 1948), 71; John Sherer, *History of Glendale and Vicinity* (Glendale, 1922), 305-6.

<sup>107</sup>Comment, "Mining and Water Law: Pollution of Water by Mining Operations: Injunction," *California Law Review* 1 (1913), 545.

<sup>108</sup>*Arizona Copper Co. v. Gillespie*, 230 U.S. 46 (1913).

<sup>109</sup>*Ibid.* at 56. The Court added, "The wrong and injury, whether it results from pollution of a stream or otherwise, is not condoned because of the importance of the operations conducted by the defendant to either the public or the wrongdoer, and for that wrong, there must be a remedy."

cases, was not so iron-clad that it clashed with the fledgling conservation movement, which was struggling to protect certain public lands from development.<sup>110</sup> In 1918 the Ninth Circuit issued an important pro-conservation opinion that helped to preserve the Grand Canyon. In *Cameron v. United States*, the court ruled unanimously that the United States could restrict mining and logging activities on land that Congress had expressly set aside to become the Grand Canyon National Forest.<sup>111</sup> The court swept aside Cameron's contention that the secretary of the interior lacked authority to deny his application for a mineral claim near the rim of the Grand Canyon. Cameron doubtless hindered his cause by charging a toll to everyone using the trail leading into the canyon and by maintaining a hotel and refreshment stand adjacent to it. He also attempted to prevent the government from constructing certain land improvements such as walks, railings, and seats that were needed for the convenience and protection of the public in its enjoyment of the Grand Canyon. District Judge William H. Sawtelle, who more than a decade later would himself be elevated to circuit judge, entered a decree for the government enjoining the toll taking and ordering Cameron's buildings torn down.<sup>112</sup> Ross upheld this decision, which the Supreme Court also affirmed.<sup>113</sup>

The *Cameron* case represented both a major victory for the conservation movement and a more overt concern for the environmental consequences of development than the Ninth Circuit had demonstrated regarding copper-smelting. In the pollution-discharge cases, the Ninth Circuit under Gilbert and Ross was far more deferential to business interests than were other circuit courts of appeals.<sup>114</sup> By upholding the government's authority to protect the Grand Canyon, however, the court

<sup>110</sup>See generally Samuel Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920* (Cambridge, 1959); Elmo Richardson, *The Politics of Conservation: Crusades and Controversies, 1897-1913* (Berkeley, 1962); Benjamin Hibbard, *A History of the Public Land Policies* (Madison, 1924), 472-75.

<sup>111</sup>*Cameron v. United States*, 250 F. 943 (9th Cir. 1918), *aff'd*, 252 U.S. 450 (1920). See generally Comment, "Mining Law: Jurisdiction of Land Department to Declare Mining Claims Invalid," *California Law Review* 9 (1921), 433, 434.

<sup>112</sup>250 F. at 943 (describing district court ruling).

<sup>113</sup>*Cameron v. United States*, 252 U.S. 450 (1920).

<sup>114</sup>See, e.g., *American Smelting and Refining Co. v. Godfrey*, 158 F. 225, 130, 235 (9th Cir. 1907) (upholding injunction for nuisance and distinguishing Ninth Circuit's decision in *Mountain Copper* based on value of the damaged property); *Thropp v. Harpers Ferry Paper Co.*, 142 F. 690 (4th Cir. 1902) (upholding injunction for pollution that interfered with downstream landowner's reasonable use of the stream).

signaled some willingness to support the nascent conservation movement. These disparate cases involving environmental concerns suggest that Gilbert and Ross finally found common ground on a natural-resource issue, after years of disagreement on so many others.

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## CONCLUSION

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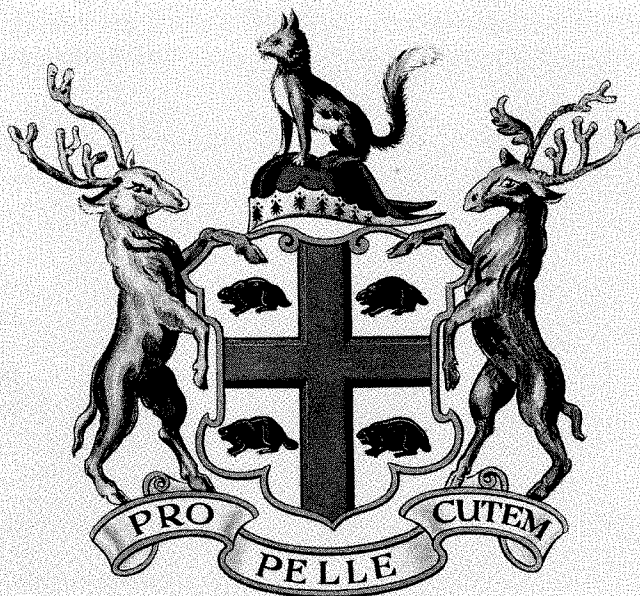
Drawn to the West in the mid-nineteenth century by visions of wealth, people from all over the world arrived in search of gold, silver, and copper. Exploiting these natural resources required great infusions of labor and capital. In many instances, extraction irreparably scarred the land. Throughout its history, the Ninth Circuit has faced the inherent tensions between preserving the environment and permitting the exploitation of the resources within its territorial jurisdiction. Ross and Gilbert contributed to western development by carrying on a dynamic dialogue on resource issues for the three decades of their joint service on the Ninth Circuit. Cautious by nature, deferential to trial-court decisions, and respectful of the federal government's litigation interests, Gilbert favored an approach rooted in the common sense of trying to determine what the parties intended and deferring to the federal government when it sought to regulate the use of public lands. Undeniably brilliant, Ross espoused a different set of values and a different style of judging. He fought for the Confederacy at a tender age, and from those experiences perhaps developed the suspicion of national power that he expressed in his judicial opinions. The United States government fared poorly when he reviewed its attempts to protect the public lands. Such suits, he intimated, attempted to extend the power of the central government too far into the affairs of individuals and corporations. Notwithstanding a few smelter cases, he displayed a marked willingness to chide mistakes at the trial-court level and to reverse decisions when he believed that the court had erred either in its fact-finding mission or in its application of the law.

In the expression of their different philosophies, the two men gave different credence to the written expressions embodied in contracts, deeds, and property records. Ross was the lawyer's lawyer who insisted on exactness and adherence to the strict confines of the written word. Gilbert was much more the interpreter who sought fairness and justice as he perceived it in the intentions of the parties as they expressed them. Ross was not above sending the parties back to the drafting table if an agreement were imprecise. Gilbert intuitively understood that the commercial enterprises of gold seekers, miners, and other peo-



ple in a still-wild West did not readily lend themselves to the practice of the high state of law demanded by Ross. Gilbert prevailed in the great copper consolidation war that broke out in Montana. But when the United States accused timber operators of illegal logging on public land and charged railroad and oil companies with improperly exploiting the naval petroleum reserves, Ross succeeded in pushing the court in the direction of corporate interests.

The two complemented each other well. In most of the smaller-scale resource cases, Gilbert's view prevailed. But in his sometimes acid dissents Ross undoubtedly signaled the need for westerners to be more meticulous in their affairs, particularly if they cared about the outcome in federal court. Had Ross's view consistently prevailed in property and contract disputes, unduly harsh results would have ensued. Because Gilbert's opinion triumphed more often, the court worked to decipher the parties' intentions and to render just, if not always the most technically accurate, results. The particular rules they crafted in many cases have been superseded by subsequent statutes and judicial rulings, but the jurisprudential disagreements between Ross and Gilbert illustrate the immediate social importance of the Ninth Circuit's decisions on the development of mining, lumbering, and oil-drilling activities, as well as on the protection of one of the West's most distinctive natural monuments.



Hudson's Bay Company  
Incorporated 2<sup>nd</sup> May 1670

The Armorial Bearings  
of  
The Governor and Company of Adventurers of England  
trading into Hudson's Bay

College of Arms  
26 September 1921

Garret King of Arms

The Hudson's Bay Company's coat of arms (Hudson's Bay Company Archives, Provincial Archives of Manitoba)

# LAW AND EMPIRE: THE EXTENSION OF LAW TO VANCOUVER ISLAND AND NEW CALEDONIA

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BARRY MORTON GOUGH

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A sub-theme of western North American history that is shared equally by Canada and the United States concerns the role of the Hudson's Bay Company and the development of the areas of the Oregon Country that were divided by the Treaty of Washington in 1846, west of the Rocky Mountains. As the British Empire was being worked out on the western margin of the continent, it was in fact an empire within an empire. It was a form of empire that had legal obligation attached to it, with an arm of law that reached farther than any empire in the world, save perhaps for that of the Russians in Alaska.

The nature of Hudson's Bay Company law in the West was founded in obligation—if not the sort of obligation volunteered by the Gentlemen Adventurers of England trading into Hudson's Bay, then certainly one demanded of it by the British government, to whom it was fully accountable for its charter and its license. The Company's charter of 1670 contains no reference to native trusteeship, only rights of trade with the Indians. By the late third quarter of the eighteenth century, however, trusteeship had become an adopted policy of the British Empire. The British conscience had become roused against abuses of empire. As Margery Perham, an expert on British imperial obligations, puts it, "Had not Burke, commending his principles with winning eloquence, said of the American colonists, that the question was not whether the British government had

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a right to render people miserable but whether it had not an interest to make them happy?"<sup>1</sup> The British were moved to correct the abuses of the slave trade and then to legislate slavery out of existence in 1833, some thirty years before the abolition of serfdom in Russia.

So zealous was British public policy on this matter that the 1837 Select Committee of Parliament, when investigating the nature of aboriginal affairs in strife-torn frontiers of British imperial settlement, put the matter quite unequivocally. As Perham explains it, "God, it said, would require at Britain's hands how she had used her power over 'untutored and defenceless savages,' and, again, 'our system has incurred a vast load of crime.'" The Select Committee Report went on to cite the territory usurped, the European vices and diseases introduced, the drink and guns imported.<sup>2</sup> "The British Empire," wrote the report's high-minded members, "has been signally blessed by Providence in her eminence, her strength, her wealth, her prosperity. . . . These were given for some higher purpose than commercial prosperity and military renown. . . . He who has made Great Britain what she is will require at our hands how we have employed the influence He has lent to us in our dealings with the untutored and defenceless savages."<sup>3</sup> By 1837, then, the same time that self-government was being promoted in the Canadas, the metropolitan forces of empire had adopted a new standard for frontier behavior. Empire-makers wrestled with the question of how colonial self-government was to develop side by side with native trusteeship.<sup>4</sup> It was a duality that was to perplex British policymakers for the rest of the century, and that continues to trouble Canadians as heirs of empire to this time.<sup>5</sup>

British imperial trusteeship had long been part of British law and authority in the western reaches of North America. Because of interracial strife in seventeenth-century America, the English had treated with the natives for access to native lands.

<sup>1</sup>Margery Perham, *Colonial Reckoning: The Reith Lectures, 1961* (London, 1963), 79.

<sup>2</sup>*Ibid.*, 79-80. *Report of the Select Committee on Aborigines* (1837: reprint, London, 1837), 7:425.

<sup>3</sup>*Ibid.*, 105. For a fuller analysis of this theme, see George Mellor, *British Imperial Trusteeship 1783-1850* (London, 1951).

<sup>4</sup>W.P. Morrell, *British Colonial Policy in the Mid-Victorian Age: South Africa, New Zealand, The West Indies* (Oxford, 1969), 2. This was not the only issue of the day, the other being the obligation of self-defense for self-governing colonies.

<sup>5</sup>W. Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Durham, N.C., 1973).



A Canadian fur trader sorts the pelts of beaver, fox, mink, and other animals. (National Archives of Canada)

In 1763, by Royal Proclamation, this had become codified. Through measures of the crown's agents, the British government sought to establish a lasting peace with the Indians, both in the colonies and on adjacent frontiers and beyond. The principle was that aboriginal rights in land be recognized, which in turn meant securing to the Indians their just and due rights. Peace could not be achieved without the concurrence of the Indians, and that required recognizing aboriginal interests in land. Such a policy was consistent with English colonial practice in the earliest charters of English colonies in America, and was to be followed throughout much of western Canada.<sup>6</sup>

As far as criminal law was concerned, under the Canada Jurisdiction Act of 1803, offences committed in the Indian Territories could be tried in Lower and Upper Canada; the act allowed the governor of Lower Canada to appoint territorial justices who could commit offenders for trial. As one scholar has shown, such long-range justice raised problems of double stan-

<sup>6</sup>This is now the subject of several works, including Denis Madill, *B.C. Indian Treaties in Historical Perspective* (Ottawa, 1981), Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver, 1974), chs. 11 and 12, and Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver, 1990).

dards of implementation: "blood for blood: could be applied only when natives killed whites, not when traders murdered each other." The statutes of 1803 and 1821 did not intend to apply the rule of law to Indians.<sup>7</sup> They were intended for, and directed against, the traders and colonists. Throughout the Red River territory in the first decade of the nineteenth century, the "Pemmican War," as it is called, was a frontier war involving whites, natives and Métis, the likes of which had never been known in the American Midwest or West. It invited the investigation of a special commissioner,<sup>8</sup> and led to the explicit intervention of the all-powerful secretary of state for war and the colonies, Lord Bathurst, who insisted that the two great contestants, the Hudson's Bay Company and the North West Company, cease and desist their frontier war and seek an amalgamation.<sup>9</sup> Behind the great union of 1821 was the Colonial Office's mandate that peace must come to the Red River frontier.

Whitehall's hand was highly visible in the corporate affairs of London and of Montreal, and for the space of nearly thirty years the new, consolidated Hudson's Bay Company was able to keep at arm's length the critics who saw their mode of justice, their brand of empire, as damaging to free trade, to representative institutions, and even to treatment of the native peoples over whom they had, by license, a monopoly.<sup>10</sup>

<sup>7</sup>On this, see Hamar Foster, "Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859," *American Journal of Legal History* 34 (1990), 47 [hereafter cited as Foster, "Long-Distance Justice"]. Foster points out that Morton was wrong in contending that these statutes applied equally to Indians. A.S. Morton, "The Canada Jurisdiction Act (1803) and the North-West," *Royal Society of Canada Transactions*, 3d ser., 32 (1838), sec. 2, 122. According to Louis Knafla, "While never expressed officially, the Company in practice accepted the rule of aboriginal law for the domestic concerns of native people. The Queen's Bench of Quebec confirmed this in the later-19th century when it upheld an historic decision, notable for its recitation of native customs in the West, that even Company employees were subject to native institutions such as the law of marriage when they chose to be bound by them according to local custom." Louis A. Knafla, *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Toronto, 1986), 35.

<sup>8</sup>W.B. Coltman, *Papers Relating to the Red River Settlement . . .* (London, 1819). The correspondence is to be found in C.O. 42/181, Public Record Office, London [hereafter cited as PRO]. See also Jean Morrison, ed., *The Northwest Company in Rebellion: Simon McGillivray's Fort William Notebook, 1815* (Thunder Bay, 1988).

<sup>9</sup>George Davidson, *The North West Company* (Berkeley, 1918), ch. 7, remains the best study of the reasons for union. From the Company's perspective, see E.E. Rich, *The History of the Hudson's Bay Company*, 2 vols. (London, 1957-58), 2: ch. 16 [hereafter cited as Rich, *History*].

<sup>10</sup>See John S. Galbraith, *The Hudson's Bay Company as an Imperial Factor, 1821-1869* (Berkeley and Los Angeles, 1957) [hereafter cited as Galbraith, *Hudson's Bay Company*], esp. ch. 16 on the Company "under fire" during deliberations of the Parliamentary Committee, 1857.

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THE ARM OF THE LAW GROWS LONGER

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The new Hudson's Bay Company of 1821 was very different from that of the year before, because it could now enforce by statute an enhanced rule of law. On July 2, 1821, by "an Act for regulating the Fur Trade and establishing a Criminal and Civil Jurisdiction within certain Parts of North America,"<sup>11</sup> the king was empowered to grant or give license to any company for the exclusive privilege of trading with the Indians "in all such parts of North America, not being part of the lands or territories hitherto granted to the said Governor and Company of Adventurers of England trading to Hudson's Bay, and not being part of any of His Majesty's Provinces in North America." This twenty-one-year license, which was to expire, after renewal, in 1859 (just after the Fraser River gold rush had brought British Columbia into the British Empire as a colony proper), extended British law and order throughout all the Company's trading realms. It was initiated on December 5, 1821, when Bathurst granted to the Company sole and exclusive privilege of trading with such Indians. The arrangement was without rent, what was required was the condition that an accurate register of persons in Company employ should be handed to the government each year, and that the Company would undertake, and indeed give security, that it would ensure due execution of all criminal and civil processes in suits exceeding £200. The Company further agreed to abide by all rules of the British government for managing trade as should appear to it "effectual for gradually diminishing or ultimately preventing the sale or distribution of spirituous liquors to the Indians and for promoting their moral and religious improvement."<sup>12</sup> The improving impulse was beginning to assert itself explicitly. A sea change was coming over the waters: London's grasp was pushing through every creek and river bed where the fur traders were pushing their wares, often with rum. But even then, checking drink on the frontier was a hazardous, impossible task. Still, the imperial fiat existed. The all-seeing Lord Palmerston said of the Hudson's Bay Company that its functions should be to strip the local quadrupeds of their furs, and keep the local bipeds off their liquor. That way the world, at least in the Canadian wilderness, could be a happier, a godlier, place.<sup>13</sup>

<sup>11</sup> 1 & 2 Geo. IV (1821), c. 138.

<sup>12</sup> A.S. Morton, *History of the Canadian West to 1870-71*, ed. Lewis G. Thomas, 2d ed. (Toronto, 1973), 629.

<sup>13</sup> I am reliant here on James Morris, *Heaven's Command: An Imperial Progress* (New York, 1973), 216n, for this bon mot. Palmerston did not understand the necessity of drink in the trade, for liquor was used by traders to induce the

In fact, despite all strictures to the contrary, including a Company regulation of 1834 expressly forbidding the practice on the frontier, the Hudson's Bay Company continued to employ drink as a mechanism of trade. This it did most notably in two areas where competition was keen: in the Yukon, against the Russians, and in the Snake River Country, against the Americans. The Company's policy was usually to buy cheap and sell dear, but on these competitive margins of trade it sold cheap and bought dear, to the great benefit of its shareholders, for it preserved the fur monopoly throughout the heartland of the trading area and was even able to enforce successful conservation schemes throughout the zone for a sustained yield in furs. No sheriff accompanied Samuel Black into the Peace River watershed to see if he were doling out tots of rum to the Indians and Métis; no law officer trudged with Peter Skene Ogden over the mountain passes to the Snake River to see that he did not debauch the natives. The Company traders, like the American mountain men against whom they were competing, were truly a law unto themselves. The only difference was that they were a well-organized monopoly in pursuit of trading gains in territories where they had uncertain title, which was not in and of itself much of an impediment to their progress—though at one stage Ogden was warned not to trespass into what might be Mexican territory for fear of an international dispute that might ruin once and for all the gains that he had already made.<sup>14</sup> Accordingly, this state of affairs continued for some time, and would have done so for longer had not American settlement come into the rich agricultural lands of the Willamette and the lower Columbia, beginning in 1840. Settlement was to turn the tide of empire and to force a resolution, by threat of war, of the nagging question of the position of a boundary separating British from United States possessions west of the Rocky Mountains in Old Oregon.

Throughout the fur-trading realm, Company traders pursued a policy with the Indians that might be classified as peace for the purpose of profit. "Our laws," one trader told a Songhees chief, existed "to protect all Indians, no matter what place they

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natives to trade and to hunt. As Duncan McGillivray wrote, somewhat acidly, "The love of rum is their first inducement to industry." A.S. Morton, ed., *The Journal of Duncan McGillivray* (Toronto, 1929), 30, 47; also lxxi-lxxiv. Another interpretation of the relationship of drink to trade states that it was customary for natives to insist on spirituous liquors as their right to undertake hunting and/or trading. See Barry M. Gough, ed., *The Journal of Alexander Henry the Younger*, 2 vols. (Toronto, 1988, 1992).

<sup>14</sup>F.W. Howay, W. Sage, and H. Angus, *British Columbia and the United States: The North Pacific Slope from Fur Trade to Aviation* (New Haven, 1942), 42.



come from, for trade with us."<sup>15</sup> In these circumstances, Company traders interfered not at all in internecine crimes, civil or criminal. But if Company property were attacked or stolen, or a European or Company employee were interfered with, that was an altogether different matter. Retributive justice was soon put into play. Sir George Simpson, governor of Ruperts Land, remarked in his *Narrative of a Journey Round the World . . . 1841 and 1842*: "In the absence of any other means of obtaining redress, our people had recourse to the law of Moses, which, after the loss of several lives on the side of the natives, brought the savages to their senses, while the steamer's mysterious and rapid movements speedily completed their subjugation. In fact, whether in matters of life or death or of petty thefts, the rule of retaliating is the only standard of equity which the tribes on this coast are capable of appreciating."<sup>16</sup> Simpson may later have had cause to regret this remark when, during the 1857 parliamentary inquiry into the affairs of the Company, Lord Lincoln (soon himself to be secretary of state for the colonies) reminded members at Westminster that Company traders acted under the law of tooth and fang.<sup>17</sup> As if to bear this out, a chief factor and trader of the Company at Fort Victoria wrote that "The policy of the H.B.Co. was a standing one,—one order was to hunt up murderers at any cost and hence is due a good deal of good feeling etc. between the Indians and H.B.Co.'s employees."<sup>18</sup>

Cases may be cited from the records of the Hudson's Bay Company of such examples of the *lex talionis* at work. Some of them involved "gunboat expeditions" by Company ships, as against the Clallum in 1828, or against the Clatsop in the following year at the mouth of the Columbia River.<sup>19</sup> This sort of law became a habit on the frontier, but only when circumstances warranted.<sup>20</sup> When, in November 1847, Marcus and

<sup>15</sup>Quoted in Barry M. Gough, *Gunboat Frontier: British Imperial Authority and Northwest Coast Indians, 1846-1890* (Vancouver, 1984) [hereafter cited as Gough, *Gunboat Frontier*].

<sup>16</sup>*Ibid.* at 229 n. 23.

<sup>17</sup>*Hansard Parliamentary Debates*, 3d ser., vol. 106 (1849), 562.

<sup>18</sup>Roderick Finlayson, "History of Vancouver Island and the Northwest Coast" (typescript, n.d.), 61, British Columbia Archives and Records Service.

<sup>19</sup>Rich, *History*, supra note 9 at 2: 623, 641. For additional sources, see Gough, *Gunboat Frontier*, supra note 15 at 226 n. 16.

<sup>20</sup>The Company's gunboat practices were continued by the Royal Navy (see Gough, *Gunboat Frontier*, supra note 15). Cases of navy police work continued until 1890, when power passed to the civil authority. I would argue that the successive shifts from Company to Colony (dominated by the Company at least until 1864) and then to Canadian authority after 1871 (when British Columbia became a province of Canada) show a continuity of development in

Narcissa Whitman and members of their party were murdered at Waiilatpu, near what is now Walla Walla, the Company provided virtually the sole law and authority in the area, despite the fact that the United States had acquired sovereignty over it. On that occasion, Company traders called for the additional support of the Royal Navy, and Captain George Courtenay of the British frigate *Constance*, upon investigating the circumstances (having come out of his way from the more pleasant circumstance of Hawaii to the hazardous Columbia River and Puget Sound), held the opinion that the traders Peter Skene Ogden and James Douglas had overestimated the size of the threat. Doubtless it was a most atrocious murder, but Courtenay could not get enough information from the tight-lipped Bay traders as to the crime, and concluded his report to his superior by saying that it was time for the Americans to pay for their own legal protection in their own territories.<sup>21</sup> This event was an important watershed, for the British government was now disinclined to give succor to the Company south of the line, and this further accelerated the Company's retreat to Vancouver Island as its new base of operations.

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#### THE COLONIZATION OF VANCOUVER ISLAND

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By Charter of Grant the Hudson's Bay Company was given colonization powers over Vancouver Island, though not over the Queen Charlotte Islands and the mainland, New Caledonia. The Company had capital. It had establishments in place. Not least, it had experience in dealing with the local natives. Even the Company advertised to the Colonial Office its high-minded aspirations in this regard. In October 1848 Sir John Pelly, the governor, urged that the British government consider whether "the object of colonization, embracing as I trust it will the conversion to Christianity and the civilization of the Native population, night not be most readily and effectively accomplished through the instrumentality of the Hudson's Bay Company."<sup>22</sup> This view coincided nicely with that of the Colonial Office

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police work but one in which civil law comes to succeed that of the 1803 and 1821 statutes for Europeans and the customary tribal practices of the various natives.

<sup>21</sup>Courtenay to Douglas, August 17, 1848, in Rear-Admiral P. Hornby to H.G. Ward, November 28, 1848, Adm. 1/5589, Y145. See also Courtenay to Douglas, September 3, 1848, B.223/b/37, fols. 34-34d, Hudson's Bay Company Archives, Provincial Archives of Manitoba.

<sup>22</sup>Quoted in F.W. Howay and E.O.S. Scholefield, *British Columbia from Earliest Times to the Present*, 4 vols. (Vancouver, 1914), 1: 498.

and the British government. Accordingly, when the Charter of Grant appeared in its final form, it reported that the colonization of the island by British subjects under Company auspices "would conduce greatly to the maintenance of peace, justice and good order, and the advancement of colonization and the promotion and encouragement of trade and commerce in and also the protection and welfare of the native Indians residing within that portion of our North American Territories called Vancouver's Island."<sup>23</sup>

Once British sovereignty was achieved, a system of government had to be effected for purposes of colonization to prevent American squatters and other unauthorized settlement and the possible subverting of British title. This brought forward the question of how the colonization was to be undertaken. Once the Charter of Grant was made legal, the new scheme of law—civil and criminal—was mandatory. The British government put in place the new mode of government for the Colony of Vancouver Island, with a governor being sent with commissions and instructions. In instructions to Governor Richard Blanshard dated September 15, 1849, Lord Grey, the secretary of state for the colonies, made clear how Vancouver Island was to differ in its law from that of New Caledonia. The new law was to "remove . . . the restrictive force of certain provisions."<sup>24</sup> The government brought forth a bill for this in 1849 and amended the old statutes of 1803 and 1821, amendments that were necessary to unencumber the colony from the fur traders' control.<sup>25</sup>

The new law entirely removed the restrictive force of the old one and gave the new governor unbounded powers.<sup>26</sup> Not only was he governor, he was also commander-in-chief and vice-admiral. Because there was no provision for a chief justice, he was that, too. The Colonial Office did not arrange for a chief magistrate, a magistrate, a justice of the peace, or a sheriff. It intended to meet the needs of the day, as indeed it did. Thus the crisis at Fort Rupert in 1850 and 1851 brought forth the interim appointment (confirmed by the Colonial Office) of John Sebastian Helmcken as justice of the peace, as well as

<sup>23</sup>Draft of Grant, encl. in order-in-council, September 4, 1848, B.T. 1/470/2506, PRO. For Privy Council modifications to and discussion of this and other provisions, see Privy Council Report, October 31, 1846 [signed W.L. Bathurst], in C.O. 305/1, 185-87v., PRO.

<sup>24</sup>Instructions to Richard Blanshard, September 15, 1849, C.O. 305/2, 14-14v., PRO.

<sup>25</sup>B. Hawes, Memorandum on Colonization of Vancouver Island, September 15, 1849, C.O. 305/2, 1 ff, PRO.

<sup>26</sup>12 & 13, Vic., c. 48.

consideration of the appointment of a chief magistrate, which was eventually accomplished. Admittedly, the new law put in place a scheme of law and order. A "law of fang" was not exactly in existence. The European legal instruments of 1803 and 1821 were the basis. Marriage practices conformed to English law, aided by the Hudson's Bay Company decision to extend the solemnization of marriages in the late 1830s with the sending out of a touring Church of England minister appropriately called the Reverend Beaver.

However, in labor law the system of law was essentially semifeudal. Indenture contracts—the prevailing Company practice—existed for the coal miners sent to work the mines at Fort Rupert and, later, Nanaimo. Even in landholding, the dominance of the Hudson's Bay Company and its subsidiary, the Puget's Sound Agricultural Society, was sufficient for observers to note the oppressive nature of Company rule.<sup>27</sup>

Nevertheless, the new rule of law had the Privy Council's and the Colonial Office's blessing. Illiberal at one level, centralized at another, it was an extension of London's colonial and corporate rule of the mid-nineteenth century. The 1849 regulation empowered the man-on-the-spot to administer law. This was theoretically to be clear of Company control, or so the British government hoped.

High-minded as Grey and his advisers were, they never had in doubt that the administration of justice of the Colony of Vancouver Island was to be separate from Company matters. It did not work that way. The governor was powerless against James Douglas and the Company. In ill health, he wrote home requesting to be relieved of his duties, and this was agreed upon, leaving the field wide open to the Company as interim lawmakers. Nonetheless, the Company's imperium was passing.

As regards the mainland, New Caledonia, it remained under the old statutes of 1803 and 1821 until 1859. On November 19, 1858, at Fort Langley, Governor Douglas announced English common law to be in place in the new colony. And when the license lapsed in May 1859, the final encumbrance was ended.<sup>28</sup>

In the expansion of British law to the farthest western frontier of what was to become Canadian territory, the British government had first employed the instrumentality of the Hud-

<sup>27</sup>Galbraith, *Hudson's Bay Company*, *supra* note 10 at 294.

<sup>28</sup>For discussion of this, see John C. Bouck, "Introducing English Statute Law into the Provinces: Time for a Change," *Canadian Bar Review* 57 (1979), 74-87; and R.G. Herbert, "A Brief History of the Introduction of English Law into British Columbia," *U.B.C. Legal Law Notes* 2 (1954), 93-101. The relevant imperial statute is 21 & 22 Vic., c. 99. See also Foster, "Long-Distance Justice," *supra* note 7 at 44 n. 108.

son's Bay Company and had then put in place a colony, on Vancouver Island, under the auspices of that same firm. By 1849 that process was complete. The imperial statutory laws of 1803, 1821, and 1849 reflected the process, which was to continue through the changes of 1858 and 1859 with the establishment of the Crown Colony of British Columbia. In the interim, the area, which was classified as "Indian Territories" in the documents, was ruled by a scheme of law in which the natives were left much on their own. Only when they interfered with whites or with property did the law intervene. For some years after 1849 on Vancouver Island and 1858 in British Columbia, the tendency of this duality of law continued. This was because the means and effectiveness of law enforcement and prosecution were related to the power of the colonial purse and the willingness—increasingly diminishing—of the imperial government to support the local judiciaries and the colonial establishments.

Ultimately, the project of the imperial government was effected and the transition complete. It is instructive to look at the address of the secretary of state for colonial affairs, Sir Edward Bulwer Lytton, when, in moving the motion for the second reading of the Government of New Caledonia Bill (the 1858 statute alluded to earlier), he remarked in tones of Victorian liberalism and constitutional authority:

"I do believe that the day will come, and that many now present will live to see it, when, a portion at least of the lands on the other side of the Rocky Mountains being also brought into colonization and guarded by free institutions, one direct line of railway communication will unite the Pacific to the Atlantic. Be that as it may, of one thing I am sure—that though at present it is the desire of gold which attracts to this colony its eager and impetuous founders, still, if it be reserved, as I hope, to add a permanent and flourishing race to the great family of nations, it must be, not by the gold which the diggers may bring to light, but by the more gradual process of patient industry in the culture of the soil, and in the exchange of commerce. It must be by the respect for the equal laws which secure to every man the power to retain what he may honestly acquire; it must be in the exercise of those social virtues by which the fierce impulse of force is tamed into habitual energy, and avarice itself, amidst the strife of competition, finds its objects best realized by steadfast emulation and prudent thrift. I conclude, Sir, with a

humble trust that the Divine Disposer of all human events may afford the safeguard of His blessing to our attempt to add another community of Christian freemen to those by which Great Britain confides the records of her empire, not to pyramids and obelisks, but to States and Commonwealths whose history shall be written in her language."<sup>29</sup>

Such remarks represented the thought of the makers of empire of that age. Such views were not only triumphant but were in the ascendant for the latter half of the nineteenth century. And they had their adherents for some time thereafter. The empire builders of the Canadian Far West had erected a legal and constitutional edifice that owed its existence to the power of the ministers of the crown and to the determination of lawgivers to see the Queen's warrant and writ observed in the most distant of dominions.

<sup>29</sup>*Hansard*, 3d ser., vol. CLI (1858), 1106-07.

## BOOK REVIEWS

*Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West*, edited by John McLaren, Hamar Foster, and Chet Orloff. Regina, Saskatchewan, and Pasadena, California: Canadian Plains Research Center and Ninth Judicial Circuit History Society, 1992, 322 pp., \$19.95, paper.

Canada is a neighbor and a crucial trading partner of the United States. The border is porous, and there is fantastic traffic in both directions. Canadian law, then, must be the single most important body of foreign law with which the fifty states come in contact, and vice versa. But does a single law school in the United States offer a course on Canadian law? There are scattered courses on Chinese law, Russian law, European Community law, African law, but not on Canadian law. (There are no courses on English law, for that matter.) One excuse, to be sure, is that the legal system of Canada (except for Quebec) is "the same" as that of the United States, but this is as ridiculous as claiming that French and Spanish are "the same" because they are both Romance languages.

I mention this point to underscore what is most refreshing and novel about this collection of essays in western legal history. It brings the Canadian West into the picture, as an equal partner of the American West, so to speak. Many of the essays make this point explicit: the Canadian and American West form a single culture area, which cannot be fully understood if we take the border too literally as a barrier. The book, then, is an exploration of samenesses and differences, and of mutual interactions. The "samenesses," however, are not the dry little sticks that "comparative law" tends to look at, or the narrow vision that looks on all common-law jurisdictions as "the same," but, rather, samenesses derived from commonalities of lived experience and social development. The differences, too, are rooted in the differences in surrounding societies.

A collection of essays is never easy to review. Usually some essays are better than others, and there is rarely a coherent theme that allows a reviewer to cast his or her eye over the book as a whole. The cross-border aspect of this collection makes it somewhat unusual, for the reasons just mentioned.

I should also add that the quality of the essays is quite high; I don't think there's a loser in the crowd. After an introduction by Hamar Foster and John McLaren, there is a particularly fine overview by John Phillip Reid, "The Layers of Western Legal History," and for sheer narrative interest, I also single out Hamar Foster's piece, "Killing Mr. John: Law and Jurisdiction at Fort Stikine, 1842-1846."

Personally, I must confess to the usual American ignorance of Canada and Canadian history; this book was a tonic and a revelation at point after point. I was also surprised to find out, by way of John McLaren's piece about the judges of British Columbia and the Chinese, how much judicial influence flowed north across the border. McLaren explains this phenomenon in terms of "ideological similarities" and "commonality of belief and perception" among the two sets of judges, which led them to behave in similar ways, and which opened the Canadian judges to American influence (pp. 244-45). "Influence" is a vague and slippery term; what this essay does is to flesh it out, and provide it with some social meaning. David R. Percy's essay on Canadian water law, and the "influences" of the Western states on Canadian developments, may be read in a similar way.

John R. Wunder's essay, "Anti-Chinese Violence in the American West, 1850-1910," and Christian Fritz's study of constitution-making in the American West are not strictly comparative, but they are nonetheless valuable contributions to their respective fields. A number of essays remind us that the "conquest" of the West was a conquest in the literal sense—not simply the overwhelming of natural obstacles, but also a war against the natives who lived in these "empty" spaces. Indeed, Richard Maxwell Brown refers to a "western civil war of incorporation," and aboriginal rights are a theme in essays by Paul Tennant and Stephen Haycox. Most of the essays deal with the late nineteenth and early twentieth centuries, although R. C. Macleod, in "Law and Order on the Western-Canadian Frontier," goes a bit further back in time, and Kenneth C. Coates and William R. Morrison, in one of the most interesting essays in the book, deal with American activity in the Canadian north during the Second World War, when Canada virtually gave up sovereignty in the affected districts.

In their preface, Foster and McLaren admit that the book does no more than "scratch the surface of transboundary history" in the West (p. 19). But they are, in a way, too modest. Most books only scratch whatever surface they are concerned with; on the other hand, as far as "transboundary history" of the West is concerned, the editors and their contributors have



virtually *invented* the subject, and for this we owe them a quite sizable debt. I hope this is only the beginning.

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*The Eagle Bird: Mapping a New West*, by Charles F. Wilkinson. New York: Pantheon Books, 1992, 203 pp., bibliography, \$20.00, cloth.

Charles Wilkinson begins his latest collection of essays with three places—Yaquina Head on the Oregon Coast, Indian Ledge near the headwaters of the Umpqua River, and Salmon Falls Creek in northeastern Nevada—that inspire wonder, “that simple and pure and fine emotion” (p. 7). In addition to wonder, however, each of these places has also inspired another simple Euro-American emotion: the drive to conquer. Yaquina Head has been bulldozed for crushed stone, clearcuts are visible from Indian Ledge, and Chinook salmon have not run in Salmon Falls Creek since hydroelectric dams blocked their route. The contrast between the wonder that such places inspire and the cold calculations they too often invite is the subject of the essays in *The Eagle Bird*.

To bridge the gap between wonder and calculation, Wilkinson modifies Aldo Leopold’s injunction that we need to “think like a mountain” by urging “thinking like an ecosystem . . . in terms of interconnectedness, cooperation, diversity, and community” (p. 185). The distinction between mountains and ecosystems in part reflects the need to recognize that we humans are connected not only with the biological and geological world, but with the other members of our species in a community that is no less “natural” for also being “social.”

For Wilkinson, this shift—the creation of an ethic of place—is crucial, because it offers the possibility of moving beyond the contentiousness that characterizes policy-making on resources in the West. The roots of this contentiousness lie in what the historian Patricia Limerick has called the region’s “legacy of conquest,” a process that has “involved the drawing of lines on a map, the definition and allocation of ownership (personal, tribal, corporate, state, federal, and international), and the evolution of land from matter to property.”\* As the first group of essays in *The Eagle Bird* demonstrates, this heritage has contin-

\*Patricia Nelson Limerick, *The Legacy of Conquest* (New York, 1987), 27.

uing relevance. The essays outline the current disputes over the meaning and power of those lines on the map: battles over the jurisdictional diversity of Indian reservations, over water diversions and in-stream values, over trees as timber and as forests, over wilderness and salmon and wolves.

These disputes involve alternative beliefs about ownership and understanding of the land and other resources, and about alternative claims of legitimacy to the use of resources; questions about our understanding of abundance and scarcity, even about the nature of resources (are wolves a resource or are they varmints?). Is a community like Stanley, Idaho, "rich" when its members have an unsullied view of the craggy Sawtooth Mountains and when sockeye salmon run into Redfish Lake, or only when enough cows can be grazed or trees cut or minerals mined to allow the purchase of a new pickup each year?

While Wilkinson is a conservationist (he sits on the governing board of the Wilderness Society), he urges us to remember that we "exist within a community and that consensus is the preferred method of resolution" (p. 145). The process that he offers is community-based: if the health of the salmon run requires a reduction in grazing, the reduction shouldn't be so drastic as to decimate the community dependent upon the grazing. All of the members of the community—the people, the land, its animals and vegetation, the water and the air—are entitled to equal respect; none has a special claim over the others.

This is the ethic of place that Wilkinson urges, a feeling for the land and the interconnectedness of things. It requires a shift in our mental reality from the conquest of nature to a recognition that the land itself requires cooperation; that diversity—biological, political, and cultural—is the potential strength of our communities. The ethic of place demands a movement from conquest to ecology, from Manifest Destiny to self-destiny through dialogue.

While the call for dialogue and accommodation that lies at the heart of Wilkinson's ethic of place is welcome during a period of increasingly strident debate, the essays in *The Eagle Bird* may de-emphasize the real difficulties facing the traditionally boom-and-bust West. The region faces significant and economically dislocating changes as the extractive industries that form the basis for much of the intermountain West's economy encounter environmental and economic limits. High production from the national forests and cheap hydroelectricity and irrigation water from federal dams have contributed to the endangerment of spotted owls and Snake and Sacramento River Chinook salmon; subsidized grazing and mining are potential victims of budgetary limitations. The impact of the various

changes may be ameliorated if the West recognizes the need for resolution through consensus, but the changes are nonetheless likely to be painful.

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*Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present, 1492-1992*, edited by Peter Nabokov. New York: Viking Penguin, 1991, 474 pp., illustrations, notes, index, \$25.00, cloth.

As attorneys and advocates, we often find ourselves speaking for other people, arguing their cases before juries of their peers. But, as we all know from rules of evidence, it is not the words of the attorney that are to be considered by the jury. Only testimony from the parties and witnesses themselves may be considered in reaching a verdict. And it is often the party's own testimony that sways the jury, because it is real and emotional to the speaker. That is also true of *Native American Testimony*, edited by Peter Nabokov. Letting Native Americans speak for themselves sways the reader far more than an erudite legal argument of an advocate or scholar. The book's simplicity is the key to its effectiveness.

Nabokov cleverly uses prefaces and short summaries to provide information on governmental policies affecting the Native Americans and to move the reader from one time period to another. The excerpts begin with Indian prophecies of the coming of the white man and the changes it will bring. We then read of initial encounters between whites and Native Americans. The Native Americans are astounded by white culture. Charles Alexander Eastman, a Santee Sioux, writes of his uncle's report of white society: "The greatest object of their lives seems to be to acquire possessions—to be rich. They desire to possess the whole world" (p. 22). This major difference in outlook leads to most of the confrontations between Native Americans and whites—over possession of land. The difference in values and priorities is made apparent by the speakers. Whites did not recognize anything of merit in Indian society or culture, so there never was an integrative, adaptive melding of the two cultures. Whites required Indians to change and accept white culture. When Crazy Horse was dying, he said, "We preferred our own way of living. We were no expense to the government then. All we wanted was peace and to be left alone" (p. 179).

Each point or policy is illustrated by a few short entries. The

sheer number of the entries, and the variety of tribes affected, overwhelm the reader with the folly of the government. How could the Indians' message not be heard by those making policy? Was it so basic and heartfelt that it was lost in the plethora of words used by politicians, lawyers, and others accustomed to speaking and advocating a position? Did the advocates drown out the parties involved? The simplicity of the message seems to have been lost, yet the reader is struck by how easy it would have been to listen. An anonymous Eskimo woman writes, "My grandmother told me that the white man never listens to anyone, but he expects everyone to listen to him. So, we listen! The wind isn't a good listener. The wind wants to speak, and we know how to listen. My father always told me the Eskimo is a listener. We have survived here because we know how to listen. The white people in the lower forty-eight talk. They are like the wind; they sweep over everything. I used to think we could survive them too. But I'm not so sure. When I look at my grandchildren, I am not sure at all" (p. 431). Those reading this book cannot but begin to listen.

*Native American Testimony* allows its subjects to tell their story in their own words. They are speaking contemporaneously with the policy that is affecting them. This is not a future generation looking back and commenting; these are eighteenth- and nineteenth-century people telling their own stories. The reader can hear their words, uncluttered by any other voice. And because we know the outcomes of those eighteenth- and nineteenth-century policies, the words are even more chilling. It would be interesting to follow these readings with white viewpoints, to prove how differently two cultures regarded the same issue. But history is written by the victors, and in this clash of cultures the whites were victorious. It is easy to find white voices in history. This book preserves some of the Native-American voices.

Nabokov's book is a valuable reference for anyone involved with Native Americans, with the West, and with law, or politics. But more than that, it is an example of how not to legislate. *Native American Testimony* provides lessons from our past for our present and future relations with Native Americans. All we have to do is listen.

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*American Indian Water Rights and the Limits of Law*, by Lloyd Burton. Lawrence, Kansas: University Press of Kansas, 1991, 174 pp., notes, index, \$22.50, cloth.

The University of Kansas Press is to be congratulated for bringing Lloyd Burton's doctoral dissertation to a wider audience with the publication of *American Indian Water Rights and the Limits of Law* as part of its "Development of Western Resources" series under the general editorship of John G. Clark. The only note of disappointment may emanate from the photocopying industry, whose members will miss the sound of coins dropping into their machines as dog-eared copies of the 1984 University of California at Berkeley dissertation fade from circulation.

A work combining the disciplines of history, law, and political science, Burton's book provides enlightening reading for those concerned with the shifting allocations of water in the contemporary West. His main contention is that the current spate of Indian water-rights settlements are removed only in time from previous negotiations between natives and colonists, such as the one that resulted in the sale of the island of Manhattan for a few glass beads. The two eras of negotiations are similar in that both have divested Indians of their natural resources in exchange for money or tokens, a situation conducive to manipulation by the dominant power group. The federal judiciary alone has managed to preserve the rights of Indians, with decisions such as *Winters v. United States* (1908), *Arizona v. California* (1963), and *Cappaert v. United States* (1976). Burton provides current interest to his cautionary tale by stating that the advent of a more conservative Supreme Court, with its majority of Nixon and Reagan appointees, will be less supportive of Indian water rights, thus shifting the fulcrum of the litigation lever that Native Americans have used to advantage since the 1970s. As an alternative to negotiations subject to manipulation and litigation in a politically charged atmosphere, Burton proposes the creation of an American Indian Water Rights Commission that would place all participants on an equal footing.

The core of the book is an assessment of water-rights settlements in Arizona, specifically for the Ak Chin and Tohono O'Odham Indian reservations. This portion of the book is essentially a study in politics, which Burton learned at the knee of Representative Morris Udall during a stint as a congressional intern. Burton presents a historical discussion of Indian water rights and a synopsis of Indian law as it pertains to the field of natural resources to preface his case study. His main interest in his examination is to find an explanation for the janus-faced

behavior of the Interior Department. Interior's Bureau of Reclamation devoted itself to a massive construction program that led to the appropriation of water supplies in the West while its Bureau of Indian Affairs mustered only a lackluster effort to defend Indian water rights from these appropriations. Burton's summary of Indian law stresses his assertion that the federal judiciary has stood firm as the one bulwark against assaults on Indian rights by an intellectual elite of western water interests.

Burton makes a sound argument for the establishment of a federal commission to oversee water-rights settlements. Negotiations that have been completed so far depend on the skills of the negotiators, rather than on the merits of a particular claim. Those tribes that lack access to knowledgeable and motivated counselors may fare less well in a negotiation process compared with others better situated. Those who come to the negotiation table late, after others have made their best deal, may find that flexibility in obtaining access to water supplies is limited.

*American Indian Water Rights and the Limits of Law* is a solid first book: interesting, challenging, and thought-provoking. It does have some flaws, however. As in all legal disputes, there are two sides to every controversy (sometimes more). Burton portrays the Bureau of Indian Affairs as a do-nothing agency, but its record is somewhat more complicated than that. Through its Indian Irrigation Service, the BIA completed hundreds of water projects on Indian lands and its lawyers were more diligent than Burton cares to admit. While it is presumptuous to expect the author to have scrutinized the Indian Irrigation Service (an agency long overdue for historical study), his work might have benefited from an examination of BIA water projects in addition to the single example of the Navajo Indian Irrigation Project he included. He can also be faulted for his rather cursory treatment of Indian case law, which is little more than a summary. However, although practitioners of particular disciplines might criticize him for incomplete treatment, he has succeeded in blending law, history, and political science into a meaningful challenge of existing policy. Anyone occupied with the management of natural resources in the West will find his work useful reading.

Douglas E. Kupel  
Phoenix, Arizona

*The Great Thirst: Californians and Water, 1770s-1990s*, by Norris Hundley, Jr. Berkeley and Los Angeles: University of California Press, 1992, 435 pp., illustrations, notes, bibliography, \$25.00, cloth.

This book is a well documented and engaging historical account about events that shaped, or were shaped by, California's dramatic water development. The first chapter, "The Aboriginal Waterscape: Manipulation and Near Harmony," actually deals with events before 1769, reaching back to A.D. 800 and 1000.

Hundley's scholarship in reviewing the historical record is practically flawless. It is not encyclopedic in nature, but contains sufficient detail about major events to offer comprehensive overviews. The reader is guided through the eight chapters by catchy subtitles, while the text is supported by extensive footnotes and an impressive bibliography.

The second chapter begins with Spain's settlement of upper California in 1769 and emphasizes the general Hispanic commitment to "*bien pro cumunal*—the common good—a concept that defied precise definition, encouraged flexibility, and was incompatible with monopoly" (p. 58). The third commences with the conquest of California in 1846 and continues on the integration of American political culture with the gold rush, the devastations wrought by hydraulic mining, the appropriative and riparian doctrines and their clash in *Lux v. Haggin*, the efforts to control flooding, and the central planning that brought about the Reclamation Act of 1902.

The fourth chapter, "Urban Imperialism: A Tale of Two Cities," is divided between Los Angeles and San Francisco. The oft-told tales of Los Angeles' invention of the mythical pueblo water right, which the author claims established "the roots of empire" (p. 135), and of the city's Owens Valley caper, which helped Los Angeles "as early as 1910 to become the national leader in agriculture" (p. 168), are related in an absorbing and balanced manner. Unlike its southern neighbor, San Francisco did not have a river, and its local sources were controlled by a private water company. The city's actions to acquire and develop its Hetch-Hetchy project are explained, and the ironic fact that the outreach of both cities began at the same time and was spurred on by the same United States government employee, Joseph B. Lippincott, is noted.

Chapter 5 suggests that "the spectacular success of Los Angeles and San Francisco excited admiration and much envy among federal and state engineers" (p. 201). During the period from 1920 to 1960, three huge water projects, unprecedented in size, cost, and engineering accomplishments, were constructed

to develop, control, and deliver massive amounts of water for use by Californians. The author presents important aspects of each: the Boulder Canyon Project, the Central Valley Project, and the State Water Project. In chapter 6, "Hydraulic Society on the Defense," he suggests that from the mid-1960s "skepticism about the old, unquestioned belief in growth for its own sake" was to challenge dramatically the propriety of new water-development projects. The monumental lawsuit of *Arizona v. California*, the environmental movement, the public's defeat of the peripheral canal legislation, the Supreme Court's inclusion of the Public Trust Doctrine into water law, and other events illustrate the complexities confronting the "water establishment."

In chapter 7, "Water Policy at a Crossroads," Hundley questions the "durability of the traditional notion that water exists to be used, and the enormous complexity of the state water system" (p. 351). He discusses the struggles between tradition and reform, the vulnerability of dams and levees to earthquake and siltation, the environmental crises confronting the major projects, subsidized agriculture, water marketing, and calls for reform, and he expresses concern that "government is so hobbled and confused that, as a total complex of institutions it cannot provide reasonable supervision and guidance" (p. 391). The final chapter is a provocative consideration of what should now happen to "the world's largest and most complex hydraulic system" (p. 408).

This reviewer shares the author's views that change and reform in some existing policies will be needed; that democracy is not a perfect form of government; that the ultimate authority of the electorate is still intact; and that there is no water "power elite," but well-organized and competing urban, agricultural and environmental interest groups, within which are competing subgroups with conflicting interests and goals. Moreover, the most serious threat to nature and humankind is the relentless growth in population, a threat that underscores the futility of designing a water policy without addressing this complex reality. Nevertheless, questionable generalizations about an idealized symbiosis of Native Americans with nature as contrasted with "modern agribusiness" (p. 23), the "wanton destruction in the twentieth century" (p. 27), "a society mesmerized by a myth of superabundance" (p. 64), "urban imperialism" (p. 120), "the traditionally popular desire to put nature in a straitjacket" (p. 298), and "Los Angeles [and] other water hustlers" (p. 341), shed little light on the past and give no guidance for the future.

The current period of impasse in California's water policy, it is hoped, will later be recorded as a time when conflicting



interests were threatening the communities before sufficient consensus evolved from an imperfect democratic system.

Anyone interested in California's water development will profit greatly from reading Hundley's informative account and digesting its four themes, as explained in the preface—themes that provide a sound basis for future guidance. After all, as in the past, intelligent planning and compromise will be necessary to overcome and rectify previous mistakes, to utilize existing facilities wisely, and to construct additional facilities for the reasonable water needs of about nine million more Californians by 2010, when the state's population is expected to reach thirty-nine million.

Paul D. Engstrand  
San Diego

*No Duty to Retreat: Violence and Values in American History and Society*, by Richard Maxwell Brown. New York: Oxford University Press, 1991, 268 pp., notes, index, \$22.95, cloth.

In *No Duty to Retreat*, Richard Maxwell Brown studies the law of self-defense in American history. Many American states came to permit the exercise of a broad right of self-defense, without a duty to retreat, as a basis of excusable homicide. Brown, who is the foremost contemporary historian of American violence, argues that the "no duty to retreat" law has constituted an important element of in this bleak history.

Professor Brown's study is filled with arresting vignettes for those interested in western lore. After an introductory chapter describing the general outlines of the development of this significant facet of American criminal law, the author turns his attention to the myth and reality of gunfighters. All of them, including Bill Hickok and Wyatt Earp, are westerners. A third chapter details a bloody confrontation near Hanford, California, between earlier settlers and later tract purchasers from one of the many federal land grants to railroads in the West. In these chapters one learns from Hickok's murder the basis of the old adage that a poker hand of aces and eights is the "dead man's hand." The reader also learns why Walter J. Crow did not become recognized as a legendary western gunfighter.

Brown is the successor to Earl Pomeroy, the influential historian of the West at the University of Oregon. Like his predecessor, he follows his history into the twentieth century and up to the present day. He also places the West in the framework of American history. Thus a feature of chapter 4 is Ber-

nard Goetz's shooting of four black youths in a Manhattan subway in 1984. The final chapters also include Claude Dallas's recent killing of two gamewardens in southwest Idaho, as well as references to the foreign policy of recent American presidents, many of whom were westerners by background.

Brown presents his western lore within an interpretive framework of social, economic, and political theory. While he is not a legal historian and his primary purpose is to write about violence, his book is a study of law. Further, the book's legal history shares a number of its general strengths and weaknesses.

The author rightly perceives his study as another example of a fundamental change in the nature of law, or a legal transformation, in the course of American history. Consonant with keeping the king's peace, English common law had required a person to "retreat to the wall" before exercising a legal right of self-defense. Although this is an accurate statement of English legal doctrine, Brown's rendition of the history has several problems. Moralists as well as royalists favored the law requiring retreat to the wall, but many English jurors did not. Thomas Green's landmark study of English juries makes clear that in spite of the stated law they frequently excused persons who had exercised a right of self-defense without attempting any retreat at all.

As in many transformation histories, then, Brown has idealized the old law. This provides the basis for his picturing the new no-duty-to-retreat law as a form of legal, and moral, declension. Though he provides only an overview of how this transformation in the law of many American states occurred, his version of this history is suggestive. He argues that it began with the publication of an essay on homicide in 1762 by Sir Michael Foster. Like much English writing in the eighteenth century (a parallel that Brown does not draw), Foster's essay had little impact at home, but a great deal in America. Despite Foster's influence and several later American treatises supporting a no-duty-to-retreat rule, Brown portrays the major legal transformation as occurring in the period after the Civil War. Court decisions in many states were critical to the change, which culminated with a United States Supreme Court decision in 1921, in *Brown v. United States*. The opinion was written by the most renowned of all American jurists, Oliver Wendell Holmes, who, not coincidentally, was a Civil War veteran. Brown thus suggests a slow and late transformation, though his view is not without precedent, namely Grant Gilmore's history of contract law. In standard legal histories this was the classic period of the jurisprudence of legal formalism. Brown's study contains several noteworthy references to courts associating

"no duty to retreat" with "divine right." Given the moral roots of the old duty-to-retreat law, there is some irony in such references. Brown's overview should stimulate further studies of the American history of the law of self-defense.

On the always difficult questions of why this law was transformed and the significance of its change, the study is again suggestive but at a number of points confused. On the first issue, Brown's reliance upon Charles and Mary Beard's view that the Civil War was associated with the triumph of the North's incorporating force over southern agrarianism would suggest the old view that the legal transformation reflected socioeconomic change. Yet, as the book's title suggests, Brown is also concerned with cultural values, especially American individualism. In this context he makes reference to Frederick Jackson Turner's frontier thesis. How all these material and ideal parts fit together remains unclear. So does the significance of the new law. Brown seems to perceive the new law as intended to be an ordering mechanism for the emerging industrialized and urbanized American community; his reference to Patricia Nelson Limerick's "legacy of conquest" interpretation of western history would suggest such a view. Such an intention, of course, is ironic in light of his assertion that the new law encouraged violence. Brown, incidentally, provides no rigorous proof for this assertion. This leads to a final point. His association of the no-duty-to-retreat rule with violence suggests that he perceives law as having a shaping force, with both a real and symbolic power, in the history of American violence. But not infrequently in the narrative legal doctrine becomes submerged by what he seems to view as larger historical forces.

Though a number of difficult issues remain unclarified in *No Duty to Retreat*, Brown's gentle, sometimes stern, humanitarian sentiment pervades a book that is a highly readable and evocative beginning to the study of a notable facet of western, and American, legal culture.

Richard Cole

Western New England College School of Law

*Native Hawaiian Rights Handbook*, edited by Melody Kapilialoha MacKenzie. Honolulu: Native Hawaiian Legal Corporation, 1991, 321 pp., \$25.00.

The sixteen essays compiled in this book purport to address the evolving rights of Native Hawaiians. Thus, chapters on Hawaiian federal trust lands, fishing, gathering, access, and burial rights are included with discussions about ways to se-

cure individual land titles and federal programs and benefits for Native Hawaiians.

Written by lawyers, the *Handbook* is nevertheless targeted for the general public. It reads in a slow and plodding style but one not difficult to understand. Unfortunately, but predictably, the arguments advanced reflect the interpretations and political proclivities of the Native Hawaiian Legal Corporation (under whose auspices the book was written), a state-funded legal agency that too often represents the state of Hawaii rather than the rights and claims of Native Hawaiians.

A few examples must suffice here. In chapter 4, "Self-Determination and Self-Governance," the state agency called the Office of Hawaiian Affairs is celebrated as being "independent from all other branches of state government," and as constituting a "measure of self-governance and autonomy" for the Hawaiian people. No mention is made of the continuing controversy surrounding the Office of Hawaiian Affairs, which is accused of bargaining away Hawaiian lands and resources with the state government, or of the bitter disagreement between the agency and truly representative Hawaiian sovereignty groups. Nor is there any discussion about the agency's dependence on state funding for its day-to-day operations, nor of its decade-long support of the reigning Democratic Party in the state of Hawaii. This is crucial, since the Democratic Party has consistently supported the taking of Hawaiian lands and waters for non-Hawaiian uses. Indeed, several agency trustees are active members of the party and often vote in accordance with party lines on development projects, Hawaiian rights, and a host of other issues that affect Native Hawaiians.

In sum, chapter 4 could have been written by the Office of Hawaiian Affairs trustees themselves. This is not surprising, given that the agency funds 90 percent of the Native Hawaiian Legal Corporation's budget.

Apart from this kind of political collusion, the *Handbook* suffers from a low-level grasp of certain hotly contested areas, such as water rights (chapter 7). Description is substituted for analysis, and a recounting of cases fills up pages without any context to render the overall meaning of these decisions. Factually incorrect information is scattered throughout, while the application of water rights is left to the reader's imagination. For farmers and other Native users of water, the chapter is useless; indeed, it seems to support non-Native users over Native users. Again, some interpretation of the law would have gone a long way toward an understanding and protection of the rights in question. But the *Handbook's* posture reaffirms the legalistic notion that rights depend on the law, not on the assertion of beneficiaries.

Some chapters, naturally, are better than others. The discussion of burial rights (chapter 13) and of the Hawaiian charitable trusts (chapter 15) contain larger contexts through which the exercise of these rights may be understood. But these fair and competent chapters stand in contrast to those on access and gathering rights, which seem to have been written by a high-school adolescent unaware of legal principles (chapters 10 and 11).

Given that so little exists for the general public on Hawaiian rights at all, the *Handbook* is occasionally helpful, but from a political perspective it is also misleading. Too much of the work reflects the prevailing ideology in Hawaii rather than the obligations and failures of the state and federal governments to protect the legal rights of the Hawaiian people. For example, there is no rendering of the many community struggles over the last twenty years that gave rise to the current contested field of rights and obligations. By neglecting this crucial framework, Native rights appear as gifts from the state and federal governments, a distortion bordering on falsehood.

Finally, although the book came out only two years ago, much of the material (and therefore the analysis) is already out of date. The general public would do well to supplement a reading of this *Handbook* with more timely works that go beyond simple legal decisions. In Hawaii, the current sovereignty movement has produced a wealth of materials on the history, socioeconomic, and legal status of the Native people. These materials include books, films, and archival work that oppose a good deal of what is contained in the *Native Hawaiian Rights Handbook*. For Native Hawaiians, a flawed catalogue of contested rights is insufficient for guiding the daily pursuance of those rights.

Hanunani-Kay Trask

University of Hawaii at Manoa, Center for Hawaiian Studies

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#### BRIEFLY NOTED

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*Historic U.S. Court Cases 1690-1990: An Encyclopedia*, by John W. Johnson. New York and London: Garland Publishing, 1992, 754 pp., \$150.00, cloth.

This second volume in the publisher's series *American Law and Society* is not an encyclopedia in the sense of an alphabetically arranged compendium of court cases deemed historic by scholars, but a sweeping treatment of the subject in the manner of the *International Encyclopedia of the Social Sciences*. Some

eighty scholars contributed one hundred and seventy-one essays on major legal issues across the breadth of American history. The book is divided into six parts: crime and criminal law; governmental organization, power, and procedure; economics and the law; race and gender; civil liberties; and law in critical periods of American history. As might be expected, the section on economics is the largest, with forty-six essays—seven more than the second-largest, civil liberties. Each section begins with an introduction explaining its rationale with a synopsis of the cases covered. Legal citations are included for those interested in reading the cases, and a brief selected bibliography concludes each essay.

The general reader will find this a valuable introduction to the significance of law in American society. The legal specialist will refer to it time and again for a quick review of the cases presented, regardless of whether he or she agrees with the essayists' conclusions. All will find this an important addition to the legal-history reference shelf.

*The Magruder Murders: Coping With Violence on the Idaho Frontier*, by Julia Conway Welch. Helena, Mont.: SkyHouse Publishers, 1991, 164 pp., illustrations, notes, bibliography, index, \$9.95, paper.

In October 1863, Lloyd Magruder, a frontier politician and entrepreneur, made a handsome profit from selling supplies to miners in Virginia City. Laden with more than ten thousand dollars' worth of gold dust, he and eight companions then set off for home in Elk City, Idaho Territory, over the Bitterroot Mountains. Four of the group brutally murdered Magruder and the others, stole the gold, and fled to San Francisco. Julia Conway Welch has meticulously pieced together the story of the murderers' capture, trial, and execution. The gruesomeness of the crimes underscores their atypicality, even on the frontier; despite the book's subtitle, this is not so much an attempt to understand how people on the frontier coped with violence as it is an effort to set the record straight about the first trial and legal hanging in Idaho Territory. More careful editing would have caught the narrative's redundancies, but the author deserves credit for sorting out fact from fiction in this oft-told tale.

*Under Western Skies: Nature and History in the American West*, by Donald Worster. New York and Oxford: Oxford University Press, 1992, 292 pp., notes, index, \$27.50, cloth.

In eleven essays that are at times compelling and always interesting, the environmental historian Donald Worster explores how Americans have attempted to alter and control the western landscape. The often disastrous results, he argues, should serve as profound lessons to guide the development of new attitudes toward the land. Four of the essays explicate the views of the "new western historians," of whom Worster is a leading member. Western legal historians will be interested in his defense of regional studies and his thoughts on environmental adaptation. An essay on the Lakota's claims to the Black Hills and another on the *Exxon Valdez* oil spill in Alaska provide important background to significant legal questions.

To be sure, this collection is about humans and Nature in the West, not about people and the law. But because attitudes and beliefs are codified into law, and because Worster articulates bold challenges to those attitudes and beliefs, policymakers as well as legal historians should seriously consider his recurring plea to develop "a new kind of creative imagination for the future" in the West.





## 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.

*Arizona Law Review* 34 (Fall 1992). Special issue, "Environmental Criminal Law."

Baade, Hans W., "Roman Law in the Water, Mineral and Public Land Law of the Southwestern United States," *American Journal of Comparative Law* 40:4 (Fall 1992).

Balleck, Barry J., "When the Ends Justify the Means: Thomas Jefferson and the Louisiana Purchase," *Presidential Studies Quarterly* 22 (Fall 1992).

*BC Studies* 95 (Autumn 1992). Special issue, "Anthropology and History in the Courts."

Biggs, Gretchen G., "Is There Indian Country in Alaska? Forty-Four Million Acres in Legal Limbo," *University of Colorado Law Review* 64:3 (1993).

Binder, Frederick Moore, "James Buchanan: Jacksonian Expansionist," *Historian* 55 (Autumn 1992).

Bonds, Russell S., "*First Covenant Church v. City of Seattle*: The Washington Supreme Court Fortifies the Free Exercise of Rights of Religious Landmarks Against Historic Preservation Restrictions," *Georgia Law Review* 27:2 (Winter 1993).

Cao, Thao Van, "The Development and Implementation of the 1980 Arizona Groundwater Management Act," *Essays in Economic and Business History* 10 (1992), 225-39.

Chemerinsky, Erwin, "History, Tradition, the Supreme Court, and the First Amendment," *Hastings Law Journal* 44:4 (April 1993).

Collier, Charles W., "Interdisciplinary Legal Scholarship in Search of a Paradigm," *Duke Law Journal* 42:4 (February 1993).

Creel, Von Russell, "Socialists in the House: The Oklahoma Experience, Part Two," *Chronicle of Oklahoma* 70 (Fall 1992).

Deloria, Vine, Jr., "Secularism, Civil Religion, and the Religious Freedom of American Indians," *American Indian Culture and Research Journal* 16:2 (1992), 9-20.

Earl, Phillip I., "Murder at the Jewel House: The Logan-Barieau Case Controversy," *Nevada Historical Society Quarterly* 35 (Fall 1992).

Escobar, Edward J., "The Dialectics of Repression: The Los Angeles Police Department and the Chicano Movement, 1968-1971," *Journal of American History* 79:4 (March 1993), 1483-1514.

Haycox, Stephen W., "The Politics of Environment: Cecil Andrus and the Alaska Lands Act," *Idaho Yesterdays* 36 (Fall 1992).

Hill, Rick, "Beyond Repatriation," *History News* 48:2 (March/April 1993).

"Hollywood and the First Amendment," *Constitution* 4 (Fall 1992), 17-18.

Hughes, L. Patrick, "Working within the System: Lyndon Johnson and Tom Miller, 1937-1939," *Southwestern Historical Quarterly* 96 (October 1992).

Johnson, James H., Jr., "The Fire This Time: The Genesis of the Los Angeles Rebellion of 1992," *North Carolina Law Review* 71:5 (June 1993).

Landsman, Stephan, "The Civil Jury in America: Scenes from an Unappreciated History," *Hastings Law Journal* 44:3 (March 1993).

Macklem, Patrick, "Distributing Sovereignty: Indian Nations and Equality of Peoples," *Stanford Law Review* 45:5 (May 1993).

Madden, Ryan, "The Forgotten People: The Relocation and

Internment of Aleuts during World War II," *American Indian Culture and Research Journal* 16:4 (1992), 55-76.

McConnell, W.H., "Peter G. Makaroff, Q.C.: Canada's First Doukhobor Lawyer," *Saskatchewan History* 44 (Autumn 1992).

McEvoy, Arthur E., "Science, Culture, and Politics in U.S. Natural Resources Management," *Journal of the History of Biology* 25 (Fall 1992), 469-86.

Miller, Char, "The Greening of Gifford Pinchot," *Environmental History Review* 16 (Fall 1992), 1-20.

Mitcham, Chad James, "Citizens and Indians: Atlin, British Columbia, and Juneau, Alaska," *British Columbia Historical News* 25 (Winter 1991/1992), 7-10.

Paulsen, James W., "Remember the Alamo[ny]! The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law," *Law and Contemporary Problems* 56:2 (Spring 1993).

Peregoy, Robert M., "Nebraska's Landmark Repatriation Law: A Study of Cross-Cultural Conflict and Resolution," *American Indian Culture and Research Journal* 16:2 (1992), 139-95.

Potts, James B., "Frontier Solons: Nebraska's Territorial Law-makers, 1854-1867," *Great Plains Quarterly* 12 (Fall 1992), 269-85.

Raskin, Jamin B., "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," *University of Pennsylvania Law Review* 141:4 (April 1993).

Rothman, Hal K., "The End of Federal Hegemony: The Wilderness Act and Federal Land Management on the Pajarito Plateau, 1955-1980," *Environmental History Review* 16 (Summer 1992), 41-60.

Rusco, Elmer R., "Historic Change in Western Shoshone County: The Establishment of the Western Shoshone National Council and Traditionalist Land Claims," *Indian Quarterly* 16 (Summer 1992), 337-60.

Stiftel, Bruce, and Neil G. Sipe, "Mediation of Environmental

Enforcement: Overcoming Inertia," *Journal of Dispute Resolution* 2 (1992), 303-34.

Tollefson, Kenneth D., "The Political Survival of Landless Puget Sound Indians," *American Indian Quarterly* 16 (Spring 1992), 213-36.

Van West, Carroll, and Lynda Bourque Moss, "The New Dialogue about Western History," *History News* 48:2 (March/April 1993).

Wallwork, Nicholas J., and Alice S. Wallwork, "Protecting Public Funds: A History of Enforcement of the Arizona Constitution's Prohibition Against Improper Private Benefit from Public Funds," *Arizona State Law Journal* 25:2 (Summer 1993).

Wilson, Roy R., "Cooperation and Conflict in a Federal-Municipal Watershed: A Case Study of Portland, Oregon," *Environmental History Review* 16 (Fall 1992).

Wolcher, Louis E., "The Many Meanings of 'Wherefore' in Legal History," *Washington Law Review* 68:3 (July 1993).

Wooster, Robert, "'The Whole Company Have Done It': The U.S. Army and the Fort Davis Murder of 1860," *Journal of the West* 32:2 (April 1993), 19-28.

Compiled with the assistance of Helen Peterson.

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