

FOREWORD

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As one who attended the AALS Native American Rights Section meeting on eastern Indian land claims, I am especially pleased that this issue of the *Maine Law Review* has been prepared. Though the section meeting was interesting, time was short and many questions were left unresolved or unasked. This issue, while examining the Indian land claims themselves, also includes articles and comments on factual, jurisdictional, and policy issues which arise from the land claims.

An overview of the eastern Indian land claims from 1970 to 1979 is provided by Timothy Vollmann, an attorney with the Office of the Solicitor, United States Department of the Interior. Mr. Vollmann outlines the two earliest eastern Indian land claim cases of the Oneida Indian Tribe in New York and the Passamaquoddy Tribe in Maine. Related cases, settlement efforts, and the political issues involved in such litigation are reviewed. This article is particularly important since it forms the framework within which the eastern Indian land claims must be viewed. Resolution of legal issues involving Native Americans may be new in New England, but similar cases have been and continue to be litigated throughout the United States.

Also paramount to an understanding of these land claim suits is an article by Professor Robert Clinton and Margaret Hotopp on judicial enforcement of the federal statutes restraining alienation of Indian lands. The authors' thesis is that the federal government has exclusive authority to extinguish Indian aboriginal title to land. In section II of this article, Professor Clinton and Ms. Hotopp undertake a thorough examination of the historical and doctrinal development of federal preemption in Indian law. The theory and practice of the trust relationship between the federal government and Indians is followed by a section analyzing judicial enforcement of the federal restraint on alienation of Indian land. The elements of the cause of action arising under the Indian Trade and Intercourse Acts are then surveyed. The final section of this article is devoted to a discussion of the defenses available in tribal land claim cases.

A detailed analysis of one specific defense to eastern Indian land claims is provided in an article by James St. Clair and William Lee. As counsel in the *Mashpee* case, these authors carefully examine the standards for the requirement of tribal existence under the Nonintercourse Act. Using the *Mashpee* case as an example, the article discusses two standards: (1) proof of a separate and distinct Indian

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leadership or government, and (2) proof that the Indian tribe has not been assimilated. The practical realities of preparing this defense as well as an analysis of the *Mashpee* decisions form the nucleus of this piece.

In the next article, the Maine Indian land claims suit is subjected to an historico-legal analysis with particular emphasis on the impact of the *Passamaquoddy v. Morton* decisions. Both the Federal District Court of Maine and the First Circuit Court of Appeals found that the federal Nonintercourse Act implied a trust relationship between the federal government and the Passamaquoddy Indian tribe. The authors, attorneys John Paterson and David Roseman of the Maine Department of the Attorney General argue that the courts failed to consider relevant legislative history, contemporary Indian policy, administrative interpretation, jurisdictional history, and case law in *Passamaquoddy v. Morton*. This article is especially significant in light of the State of Maine's arguments in *State v. Dana*, an important Maine Indian criminal jurisdiction case noted later in this issue.

The first of two student pieces probes the unilateral termination of tribal status, a concept central to the First Circuit's opinion in *Mashpee Tribe v. New Seabury Corporation*. Termination by voluntary abandonment and assimilation is examined in an attempt to present a reasoned basis for preserving tribal status and maintaining federal guardianship over Indians.

State v. Dana is the subject of the second student piece. The jurisdictional implications of the phrase "Indian country" and its interpretation in the *Dana* decision are examined, and the question of criminal jurisdiction as litigated in *Dana* is fully discussed. Following this critique of the *Dana* decision, jurisdictional problems related to taxation, torts, contracts, and other civil matters are analyzed based on *Dana* and established rules of federal Indian law.

Rennard Strickland, in this issue's final article, reflects on some of the historical inconsistencies that have plagued the formulation of a rational American Indian policy. The vicissitudes of Indian policy, according to Dr. Strickland, strongly suggest the need for a resolution of the land claims litigation based on sound historico-legal obligations.

From an academic perspective, the study of Indian law presents both a fascinating and unique opportunity to uncover the nexus between the law as it should be understood today and its roots in the history of American Indian law and policy. As one contributor to this symposium has often observed, "present and future Indian law and policy cannot be understood or formulated without an understanding and appreciation of past Indian law and policy. Indian law and Indian history are the opposite sides of the same historical coin."¹ It

1. Address by Rennard Strickland, Federal Bar Association, Indian Law Section, in Phoenix, Arizona (April 5, 1979).

follows that contemporary Indian litigation, such as the eastern Indian land claims, must rely heavily on Indian law and policy as developed over the past 200 years. Felix S. Cohen, author of the most comprehensive and scholarly work on Indian law published to date, prefaced his treatise with these words:

What has made this work possible, in the final analysis, is a set of beliefs that form the intellectual equipment of a generation—a belief that our treatment of the Indian in the past is not something of which a democracy can be proud, a belief that the protection of minority rights and the substitution of reason and agreement for force and dictation represent a contribution to civilization, a belief that confusion and ignorance in fields of law are allies of despotism, a belief that it is the duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights, a belief that understanding of the law, in Indian fields as elsewhere, requires more than textual exegesis, requires appreciation of history and understanding of economic, political, social, and moral problems.²

The editors of the *Maine Law Review* carry on Felix Cohen's excellent work by publishing this symposium issue.

2. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW XXXII (1971 ed.).

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