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Listening to All the Voices, Old and New: The Evolution of Land Ownership in the Modern West

LISTENING TO ALL THE VOICES, OLD AND NEW: THE EVOLUTION OF LAND OWNERSHIP IN THE MODERN WEST

CHARLES WILKINSON[†]

In the gray of a crisp desert dawn six years ago, I drove east out of Furnace Creek, having completed my work in Death Valley. It had been an intense two days. I was mediating negotiations between the Park Service and the Timbisha Shoshone Tribe. The Shoshone settlement in Furnace Creek, old adobes and battered trailers, signaled them as the squatters that they were under the law. These residents, by 12,000 years the oldest society in the valley, wanted parkland from a government that never gave away parkland.

The tensions lifted during the two days of talks. John Reynolds, the Park Service regional director, was a good man, open-minded. Pauline Estevez, the tribal chair in her seventies, tough and traditional, held a well-warranted suspicion but she listened and grew guardedly optimistic. Maybe these federal people would be different. There was no resolution—that would take many more meetings—but it was a good start.

I had seen Death Valley during this trip, but only at a distance for both negotiating sessions had gone late, and it was then a quick dinner and off to bed. Over the years, I had gotten out on the land in the west and south Mojave, but this was my first trip to this part of the desert. On this day, I had time before getting on my plane in Las Vegas and set out early so I could see some country.

During the talks, Pauline had made many statements about the land, about how when she was a girl the people wintered on the valley floor and moved into the high country during the summers. She was precise, the way Indian people are, about the particulars of places, animals, and vegetation. One place she mentioned was Ash Meadows. Her family loved it there. The water, the rabbits, the mesquite beans.

So I decided to stop off at Ash Meadows. I knew of it through a Supreme Court case that curtailed groundwater pumping in the area. That interested me because I've come to think of lawsuits over public lands as much in terms of place as law, and I like to visit those places.

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Even more basically, though, Pauline had moved me and I wanted to know more about her life.

I turned left onto the Ash Meadows dirt road, then took a right toward Jackrabbit Spring. I had no idea what to expect from this parched landscape. Probably a burbling up of water and a slim outlet trickle. I parked, walked over, and—like many before me, all the way back to Pauline's oldest ancestors—I stood stunned, without words. Way out here in the scrub desert, the spring rose into a pool ten to twenty feet across, six to eight feet deep, pure, clear beyond the saying, the low mesquite, ash, and grass on the banks, the pupfish and dace finning down below. No words.

I alluded to a Supreme Court case at Ash Meadows. This was *Cappaert v. United States*, handed down in 1976.¹ Although it made history for all of Ash Meadows, the opinion dealt only with Devil's Hole, a pool lodged deep in a rock formation. In 1952, President Truman issued a proclamation making Devil's Hole and the land surrounding it, just forty acres, a separate part of Death Valley National Monument, twenty road miles to the west. Truman did this in those pre-ESA days to protect the rare desert pupfish living in Devil's Hole. The case arose because the Cappaert farm, established in 1968, began pumping large amounts of groundwater for irrigation. This lowered the level of Devil's Hole, which was connected to the aquifer. The Supreme Court held that the Truman proclamation impliedly reserved sufficient water to protect the pupfish. Specifically, the Court ruled that the Cappaert operation could continue to pump, but that it could not draw the pool down below a shelf where the fish spawned.

The decision protected Jackrabbit Spring because all the thirty pools, springs, and seeps in the ecologically rich Ash Meadows area are hydrologically connected, all proof that Ash Meadows is the main discharge point of a vast aquifer stretching some 100 miles to the northeast. In time, if it had not been prevented, the high level of pumping would have taken out all of these magical desert oases.

Major land management decisions followed. Congress made Ash Meadows a 23,000-acre national wildlife refuge in 1984² and upgraded Death Valley, including Devil's Hole, to national park status in 1994.³ The Cappaert operation could continue to pump, but at a reduced level.

The law gave protection to Ash Meadows because American values evolved. For over a century, westerners saw water as a commodity, raw

1. 426 U.S. 128 (1976).

2. See United States Fish and Wildlife Service, Ash Meadows National Wildlife Refuge, <http://www.fws.gov/desertcomplex/ashmeadows/index.htm> (last visited April 3, 2006).

3. See 16 U.S.C. § 410aaa-1 (1994).

material for agriculture, mining, industry, and power production. We still want water to be used in those ways, but now we see other things in water—recreation, fishing, beauty, and, in this case, desert magic. Increasingly, extractive water users have to account for those other values, with the result that their property rights change.

To be sure, property rights in water retain plenty of vitality. Cappaert, for example, began pumping in 1968, after the Devil's Hole proclamation, so the Court could employ the reserved rights doctrine to find, effectively, that federal pupfish protection was a valid preexisting use. My guess, though, is that legal protection would in time have come to these pools even without the prior Truman proclamation, whether through the Endangered Species Act, some form of nuisance action by the park or the refuge, or a buyout. And so the law cramped Cappaert's property rights due to new values personified by scientists, citizens such as myself who simply love those pools, and, although Indian law was never directly involved, Native people such as Pauline Estevez, whose culture flourished at those pools.

It should not surprise us that these property rights changed because of new societal values. James Ely, in his history of American property rights, has written that "Americans, in J. Willard Hurst's phrase, preferred 'property in motion or at risk rather than property secure and at rest.' As a consequence, legislators and courts often compelled existing property arrangements to give way to new economic ventures and changed circumstances."⁴ Joseph Sax has written extensively on how water and land rights are dynamic and often change over time.⁵ We certainly see it in modern times. Clean water and air legislation have demanded extraordinary retooling in industry. The Endangered Species Act has altered development practices on rivers, private lands, and especially on public lands. Landlords must change their practices to comply with laws protecting tenants and requiring that their buildings must be handicapped accessible. More and more private facilities are coming under no smoking laws. America's greatness is due in no small part to the stability it guarantees to private property, but it is a measured stability that must sometimes be calibrated to account for important societal interests.

The context is even more dynamic on the public lands where, except for the dwindling chance of a fee patent for a proved-up hardrock

4. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 6 (Oxford University Press 2d ed, 1998) (quoting JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 24 (1956)).

5. See, e.g., Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 *STAN. L. REV.* 1433, 1447-49 (1993); Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 *ENVTL. L.* 473 (1989).

mining claim,⁶ land rights are grounded in leases and permits, not ownership. When the national forest timber cut plummets, as it has since the late 1980s, the companies have little or no legal recourse. If the Forest Service or BLM reduces animal unit months, ranchers are bound by contracts that allow stock reductions. As with alterations of private rights, the individuals or companies may suffer real burdens. The community impacts can be even greater. When a timber mill shuts down, the town may be grievously wounded. In a related situation, whole communities can suffer when commercial fishing is reduced to protect endangered salmon or to fulfill Indian treaty rights.

It is true that throughout history time has made certain trades and businesses obsolete, and they go into decline or extinction. We need, however, to appreciate the inequities. Those jolting changes affect some individuals disproportionately, and many loggers, ranchers, and commercial fishers have been neither amused nor comforted by the fact that their communities have rebounded in the recreation economy, for which they have no interest or training.

Yet currents of change in the modern West, bottomed in powerful cultural, scientific, emotional, and often economic forces, have caused the public and the law to view the land in new ways. Take the western deserts, where many extractive enterprises have been made to adjust or give way entirely to new conceptions of what deserts are.

Jackrabbit Spring is just one of many miracles of the hot and dry Mojave. Other springs. Pauline's Shoshone people. Other tribes. The blue and gold carpet on Death Valley's floor in some spring seasons. The Panamints. The tortoises, so ancient. The fallen-down cabins that someone somehow survived in. The Joshua trees. The rises and sets of the sun. The space. The hard work it takes to know the desert. The tart taste of wildness. The time the Mojave gives you to think.⁷

The desert has always been that way. It has always been that way for the Shoshone. But it has not always been that way for us.

For us, "desert" was long a pejorative term. In *The Grapes of Wrath*, John Steinbeck conjured images of the Valley of the Shadow of Death for the hapless Joads crossing the terrifying Mojave. Frank Norris ended his novel, *McTeague*, to evoke ultimate despair, in Death Valley with McTeague handcuffed to a dead man. Without a key. In the summer.

6. See Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 103-332, § 112, 108 Stat. 2499, 2519 (1995) (moratorium on patenting of mining claims).

7. For a comprehensive look at the Mohave Desert, see generally DAVID DARLINGTON, *THE MOJAVE: A PORTRAIT OF THE DEFINITIVE AMERICAN DESERT* (1996).

Non-Indians first came in numbers to the Mojave in the 1850s, spillovers from the great rush in the Sierra. The miners picked over an amazingly large part of the Mojave's vast and difficult terrain, taking out everything from gold to borax to gravel. But they were there for business, not living, and they moved on to more appealing locales when the deposits played out.

World War II and the Big Buildup that followed changed everything, just as it did all across the Southwest, which has boomed more than four times over, from eight million people to more than thirty-two million, since the war.⁸ Level, wide-open expanses of desert land for military installations were big draws. But mark it down that our societal disdain for deserts was also critical to our decision to locate so much military might there. The Mojave was a useless place, a lifeless place, a wasteland, the most logical ground to bomb, grind down with heavy vehicles, and dump. That's what it was, a dump.

The Big Buildup after World War II brought large-scale permanent population to the Mojave. At its far eastern edge, an urban behemoth was born in Las Vegas. The citizens of Las Vegas and the other expanding population centers liked the desert just fine—so long as it came fully equipped with air conditioning, Kentucky bluegrass lawns, golf courses, public water fountains, and opportunities for swimming—for which Jackrabbit Spring over on Ash Meadows did not qualify. So our disdain for the desert has been accompanied by a related attitude, our refusal to acknowledge what a desert *is*—and first on the list is that a desert is a place without much water.

To be sure, there have always been people, in addition to the Indians, who understood what the Mojave is and loved it with all their hearts and souls. Mary Austin, wrote *The Land of Little Rain*, her book-song to Owens Valley. Joseph Wood Krutch was another.⁹ Wallace Stegner helped broaden us: "You have to get over the color green; you have to quit associating beauty with gardens and lawns; you have to get used to an inhuman scale."¹⁰ And, at least as fundamentally, thousands of impassioned rockhounds, botanists, artists, hikers, and plain citizens knew and respected this dry, white-hot, rocky, scratchy ground.

But it may be that a person irreverent, iconoclastic, and bombastic in the extreme—wild-eyed and fire-breathing doesn't begin to describe him—was the one who most caused us as a society to take a better and

8. See CHARLES WILKINSON, *FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST* xii (1999).

9. See generally JOSEPH WOOD KRUTCH, *THE DESERT YEAR* (1952); JOSEPH WOOD KRUTCH, *THE VOICE OF THE DESERT, A NATURALIST'S INTERPRETATION* (1955).

10. WALLACE STEGNER, *WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS* 45 (1992).

longer look at the deserts, to open our minds and try to understand. And that would be, of course, one Edward Paul Abbey. He dealt mostly with the Colorado Plateau desert but he also knew and wrote about the Sonoran and Mojave deserts—and composed the final chapters of his masterpiece, *Desert Solitaire*, in Ash Meadows.

At its core, *Desert Solitaire* is about teaching. Abbey instructs us about what the desert is and the profound impacts it can have on us. But much of the desert is counterintuitive. You have to spend time at it, work at it, get down on your hands and knees. He gave us *particularity*, vivid descriptions of desert plants, animals, minerals, air, and land formations. Consider this, one of his many descriptions of rocks:

The various forms of chalcedony, for example, are strewn liberally over the dismal clay hills along Salt Creek. Here you will find tiny crystals of garnet embedded in a matrix of mica schist—almandite or 'common garnet.' Fragments of quartzite are everywhere, some containing pure quartz crystals. You might find a geode: a lump of sandstone the size and shape of an ostrich egg, or sometimes much larger; slice it through with a diamond wheel and you may find inside a glittering treasure trove of crystals. A treasure not in money but in beauty.¹¹

And this about midday, after a long passage where Abbey explains that everything—lizards, spiders, red ants, birds, flowers, coyotes, *everything*—shuts down in the heat of noon.

Noontime here is like a drug. The light is psychedelic, the dry electric air narcotic. To me the desert is stimulating, exciting, exacting; I feel no temptation to sleep or to relax into occult dreams but rather, an opposite effect which sharpens and heightens vision, touch, hearing, taste and smell. Each stone, each plant, each grain of sand exists in and for itself with a clarity that is undimmed by any suggestion of a different realm. *Claritas, integritas, veritas*. Only the sunlight holds things together. Noon is the crucial hour: the desert reveals itself nakedly and cruelly, with no meaning but its own existence.¹²

By the 1980s, Abbey, and the deserts that so inflamed his passions, had literally millions of readers. But whatever the specific influence Abbey or anyone else may have had, it is certain that by the 1980s the public's affection for the natural qualities of the desert had risen noticeably and it had grown intense.

Another desert resident had a story to tell in the 1980s and it too gripped the public. An enormously successful animal, in substantially its present form since the late Paleozoic, the desert tortoise found its stability, its staying power—the work of 200 million years—thrown into crisis

11. EDWARD ABBEY, *DESERT SOLITAIRE: A SEASON IN THE WILDERNESS* 61 (1968).

12. *Id.* at 135.

in the click of a moment. Research scientists explained the reasons. Out of affection, we had collected too many tortoises. Much worse, we had debilitated their habitat: our ORV wheels, tank treads, and cattle hooves crushed desert wildflowers, pads of the prickly pear, cactus flowers, and grasses that these grazing animals need. Our garbage attracted ravens that in turn fed on turtle eggs. Our civilization inadvertently introduced upper respiratory infections that ravaged the tortoise population.¹³

This crisis—the tortoise is now a listed species, over the cries of several industries, Las Vegas and other growing cities—had a powerful impact on the public. These little animals, stolid and silent as the desert itself, gave us a vivid and compelling reason to protect the Mojave. The country was finally ready to take action on behalf of the desert.

The historic California Desert Protection Act of 1994 marked the nation's first comprehensive national statement on the worth of deserts and the necessity of preserving the naturalness, remoteness, and wildness of these once-scorned lands. In it, over the objections of the mining industry, Congress elevated Joshua Tree and Death Valley to national park status. It set aside more than seven million desert acres as wilderness, most of it in the Mojave. The California Desert Protection Act is by any standard one of our grandest national statements in favor of the land. We had finally heeded Stegner's call to get over the color green.

We also heard another call. Under Pauline Estevez' leadership the Department of the Interior extended federal recognition to the Timbisha Shoshone Tribe. Congress granted the Park Service authority to grant temporary closures of traditional Timbisha areas for tribal ceremonies,¹⁴ and the national legislature created a Timbisha reservation consisting of 300 acres within Death Valley and several thousand acres of BLM land adjacent to the park.¹⁵

Sometimes, as in this desert, the law alters ownerships by responding to new voices, other times by hearing the oldest voices.

In the West, when land is at issue, culture can be every bit as real as any timber sale, open-pit mine, or ski area. On the Colorado Plateau, especially in southern Utah, rural Mormon communities hold a powerful sense of ownership over the public as well as private lands. To them, they settled a harsh and unforgiving land six or seven generations ago—they farmed and ranched, kept the peace with the tribes, and made stable,

13. For a detailed study on the impacts human activities have on the desert tortoise, see generally WILLIAM I. BOARMAN, U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, THREATS TO DESERT TORTOISE POPULATIONS: A CRITICAL REVIEW OF THE LITERATURE (2002), <http://www.werc.usgs.gov/sandiego/pdfs/tortoisethreats.pdf>.

14. See 16 U.S.C. § 410aaa-75(a) (1994).

15. See Timbisha Shoshone Homeland Act, Pub. L. No. 106-423 114 Stat. 1875 (2000).

close-knit communities—and that long possession makes it Mormon country, their country. Theirs is a culture of tradition and they resist, and often rail against, outsiders and their ideas about the land.

The Kane and Two Mile ranches encompass 830,000 acres—about 1300 square miles—on the remote North Rim of the Grand Canyon, geographically within Arizona but, because of the deep gorge, more easily reached from Utah. The two ranches have base property, owned in fee, for ranch houses, corrals, barns, and such, but most of the land is held in BLM and Forest Service grazing leases. Local ranchers have grazed the area with their cattle for generations.¹⁶

Conservationists see this landscape differently. The Paria Plateau, which comprises most of the Vermilion Cliffs National Monument, and the stately ponderosa pine stands of the lifted Kaibab Plateau lie within the ranches. The terrain of canyons and rises makes for extremes: elevations range from 3,000 to 9,000 feet. Worked over though it has been, the ground still holds native grasses and other plants. The Kaibab Plateau is home to the largest goshawk population in the Southwest and one of the greatest mule deer herds in the country. The ranch is the site of the condor release and the big birds, once nearly extinct, now work the thermals from the Vermilion Cliffs south to the Grand Canyon.¹⁷ There may be another reintroduction before long: Remote and blessed with the tasty and abundant supply of Kaibab mule deer, the ranches may soon become wolf country.¹⁸

In September 2005, the Grand Canyon Trust (I am a board member) in cooperation with the Conservation Fund completed the purchase of the Kane and Two Mile ranches. The transaction was done at arms-length with the previous owner. Even before the purchase was final, the Trust, as the managing partner, was deep into a cutting-edge scientific assessment that will lay the foundation for an ambitious wholesale land restoration effort.¹⁹

The Trust has its frustrations. The Taylor Grazing Act and other federal laws make no allowance for true conservation use. As long as land is classified for grazing, the permit-holder must run serious amounts of cattle. So the Trust has no choice but to keep some cows on the land until the agencies or Congress change the classification.

16. See Grand Canyon Trust, Kane and Two Mile Ranch Background, <http://www.grandcanyontrust.org/programs/kane/background.php> (last visited Apr. 6, 2006).

17. See Grand Canyon Trust, Vermilion Cliffs National Monument, <http://grandcanyontrust.org/programs/landscapes/vermilion.php> (last visited Apr. 6, 2006).

18. See Robert M. Ferris et al., *Places for Wolves: A Blueprint for Restoration and Long-Term Recovery in the Lower 48 States* (Dec. 1999), available at www.defenders.org/pubs (follow "Wildlife Publications" hyperlink; then follow hyperlink to article title).

19. See Grand Canyon Trust, *supra* note 16.

Local Mormons, forty miles away in Kanab, Utah, are fuming. Mike Noel, a Republican representative in the Utah legislature, has fought the Trust's grazing purchases on the Arizona Strip and in the Grand Staircase-Escalante National Monument because, as he puts it, the conservationists want it "locked up for the recreational pleasure of the elite."²⁰ But he also argues on cultural grounds: that taking land out of grazing will eventually leave communities without a critical mass of ranchers—basically, that at some point John Deere and other businesses will pull out. Then all will be lost. "Most of the herds are very small," Noel argues. "Those 25 to 30 cows are what make the difference between being able to really provide for the family that extra little thing. They can buy a pickup truck or send a kid to college or on a Mormon mission."²¹

It is hard to dispute Noel's point. Retirement of grazing leases mark a change in ownership, from the ranching community to the conservation community. It may be that in time a loss of culture will follow. Nonetheless, the tipping point Noel and others fear is still far away. The BLM ardently supports the Mormon ranching culture. The Trust's purchases pose less of a threat than the difficult economic climate that affects the profit margin of all ranches and is forcing some ranchers off the land. Ultimately, it is unreasonable to expect that an ownership in public land will last forever. Today there need to be places on the Colorado Plateau for nonprofits to engage in progressive restoration programs. One would guess that the future holds a diminished but still active Mormon grazing culture will continue on, along with a gradually expanding conservation ownership.

But what of cultures that have been dispossessed of their historical land tenure, not by changed economic and legal circumstances, but by raw force and fraud?

Hispanics first crossed what is now the international border to settle in the Rio Grande watershed in the late 1500s and gradually moved north. One of the last places to be settled was the valley of the Rio Chama, a northern New Mexico tributary of the Rio Grande. The tight, remote Chama valley is bounded by the soaring Sangre de Cristo Range to the east, the wild San Juans to the north, and lower mountains on the west. The valley is fiercely proud of its Hispanic heritage. Rio Arriba County remains more than 70% Hispanic.²²

20. *Land for Them and No One Else*, LIBERTY MATTERS NEWS SERVICE, Dec. 7, 2005, http://www.libertymatters.org/newsservice/2005/newsservice12_07_05.htm.

21. Felicity Barringer, *A Strategy to Restore Western Grasslands Meets With Local Resistance*, N.Y. TIMES, Dec. 1, 2005, at A24, available at 2005 WLNR 19319817.

22. See U.S. ARMY CORPS OF ENGINEERS, RECONNAISSANCE REPORT: RIO CHAMA - ABIQUIU DAM TO ESPANOLA, NEW MEXICO 2-1 to 2-2 (1996).

Some settlers came to Abiquiu in the 1750s. The population grew slowly but sporadically. Spain and then Mexico promoted settlement of the upper Rio Grande and issued land grants, small ones to prominent individuals and much larger ones, up to one million acres, for communities, with large blocks of common land. When the United States obtained New Mexico and most of the Southwest from Mexico in 1848, it agreed in the Treaty of Guadalupe Hidalgo that the individual and community land grants would be "inviolably respected."²³

Mexico issued the Tierra Amarilla community land grant in 1832. This protected the rights of the people already settled there and assured land to those others moving in. The Tierra Amarilla was central to their way of life, providing hunting and gathering, grazing for their sheep, water, wood for construction and heating, and the solace of full access to the rising flanks and high country of the Sangres.²⁴

The United States may have promised to "inviolably respect" the land grants but the speculators loathed the treaty provision. This was the era of Manifest Destiny; to them, the future lay with Americans not the Hispanics, whom they looked down on, and far too much land was locked up in the Mexican and Spanish grants, especially the community grants. Disputes arose over the legality and interpretation of the grants. Until 1891, when Congress established the Court of Private Land Claims, Congress itself confirmed grants—and the sale of the grants. In 1860, Congress approved the Tierra Amarilla as a private—not community—grant and declared Manuel Martinez as the original owner in spite of the fact that Martinez plainly was the petitioner for a community, not a private, grant. This just happened to suit the interests of Thomas Catron, the head of the corrupt Santa Fe Ring, who had already been buying up the interests of the Martinez family. By 1881, Catron was able to obtain an Interior Department patent to the entire Tierra Amarilla grant. Numerous other New Mexico land grants had similarly sordid histories.

The people of the Chama valley never forgot the treachery. This was their land. The whole mix of history and culture boiled up in 1967. The charismatic Reies Tijerina had researched the history and the law, and formed the Alianza Federal de Mercedes (Federal Alliance of Land Grants) to bring justice to the land. The effort culminated in a dramatic, armed takeover of the country courthouse in Tierra Amarilla, a front-page, top-of-the-broadcast conflict that drew 350 national guardsmen, tanks, and helicopters. Two county lawmen were shot and others beaten

23. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. 8, Feb. 2, 1848, 9 Stat. 922.

24. See MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 121-22 (1994).

before the courthouse raid dissipated as the raiders disappeared into the night. Tijerina was later tried but acquitted.²⁵

Some of the land fraudulently taken has gone into private hands but much is now in national forest ownership. In the Chama valley, the Forest Service seems to do reasonably well in responding to the needs of the Hispanics, many of whom depend on a subsistence lifestyle. The agency responds with flexibility in managing grazing and allows extensive firewood gathering, which amounts to several million board feet a year.²⁶

Not long ago, I was looking at a Forest Service historical exhibit in the Chama valley. The ranger, an Hispanic, came up and we talked. I told him that I liked the exhibit but wondered why it didn't include the courthouse raid, such a prominent part of the valley's history. He paused and then said, "We've talked about that. But it's just too emotional."

And, while history should be told right, one can see his point. The courthouse raid hovers over the valley every bit as much as the high peaks of the Sangres. There's a bulletin board along Highway 64 that won't go away. Its bold letters proclaim, "TIERRA O MUERTE." Land or death. Flyers announcing the same slogan sprout on bulletin boards and trees around the county. In 1988, Bill Richardson, then Congressman for northern New Mexico, introduced a bill to create a presidential commission to study the land grants and make recommendations.²⁷ The people won't let the issue die, and similar proposals have been put forth since, including a bill by Congressman Tom Udall in 2002. Those bills have not passed, but something like them should. Right now the ownership is not just and it ought to be addressed.²⁸

Having mentioned the relationship of Pauline Estevez and the Timbisha Shoshone to Jackrabbit Spring, I want to return to the tie between Indian people and the land. The Indian tenure is the oldest and most profound of the cultures of ownership on the western landscape. The Indian world view is critical because of its centrality to Indian life and also because it can be so useful to the majority society.

25. See Robert V. Urias, *The Tierra Amarilla Grant, Reies Tijerina, and the Courthouse Raid*, 16 CHICANO-LATINO L. REV. 141, 149-50 (1995).

26. See Carol Raish, *Historic Land Use and Grazing Patterns in Northern New Mexico*, in U.S. DEPT. OF AGRICULTURE, GENERAL TECHNICAL REPORT RM-GTR-272, DESIRED FUTURE CONDITIONS FOR SOUTHWESTERN RIPARIAN ECOSYSTEMS: BRINGING INTERESTS AND CONCERNS TOGETHER 189, 193-95 (1995).

27. Roberto Rodriguez and Patrisia Gonzales, *149 Years Later, Justice Still Elusive*, DALLAS MORNING NEWS, Feb. 3, 1997, at 11A.

28. See Phillip B. Gonzales, *Struggle for Survival: The Hispanic Land Grants of New Mexico, 1848-2001*, 77 AGRIC. HIST. 293, 323 (2003) ("Future work should seek to square the community land grant with an expanded notion of the native reservation and group land rights. . . . The land-grant issue is sure to grow to prominence in the political discourse of the Southwest.").

Last September, I went out to Oregon to participate in the Tenth Annual Run to the Rogue, 263 miles in all, from the town of Siletz, south down the coast and then up the Rogue River to its junction with the Illinois River.²⁹ It's a relay, and I did two legs of three and five miles. It's a great community event for the Siletz Tribe—hundreds of people take part in various ways, running or walking, organizing, staffing the many needs during the three days, or just spectating at various points along the way. So it is fun.

At the same time, a solemn mission permeates the run. The Siletz is a confederated tribe of twenty-six ethnological tribes from western Oregon. In the mid-1850s, the military marched or shipped by jam-packed ocean vessels some 2000 Native people up to the town of Siletz, on the central coast about twelve miles inland from Newport. The history of the Siletz Tribe is—except for the thousands of years before Europeans and the past two generations—mostly sad beyond the saying. It includes disease, wars, unratified treaties, broken treaties, the forced marches, forced assimilation, allotment, termination, and the loss of every last acre of land of the magnificent 1.2 million-acre treaty reservation that encompassed nearly 100 miles of the Oregon coast.³⁰

This annual run is held to return to the Rogue River country of southern Oregon, from which most ancestors of the modern tribes were forced out after the Rogue River wars that resulted in a casualty level among the highest of all the United States-Indian conflicts. The destination point for the run is White Oak Flat, where the 1855 treaty, never ratified and never honored, was signed. The Siletz people were very precise about the mission of the Run to the Rogue: to commemorate, not celebrate, the treaty. And to remember—and to remind themselves never to forget—the treaty, the march, the ancestors, and the land.

The three days, with people making their ways down in motor vehicles, were slow-moving and easy, with time for hikes and exploring and talking. The coast country is rugged, mostly rocky beaches and cliffs with the land all chopped up by creeks and rivers, with one or several villages in virtually every valley. Their aboriginal life was prosperous. They had the salmon, shellfish, seals, and sea lions. The thick, green, moist forests gave deer meat, cedar for canoes, and spruce roots for elegant baskets.

I heard many stories. Big Stump, the much-weathered redwood stump, right out in the middle of the beach, the center of the world for the Alsea, Siuslaw, Lower Umpqua, Coos, and Lower Coquille tribes. The forty-mile-long beach, broad with sand dunes from Heceta Head to

29. For information regarding the Run to the Rogue, see Confederated Tribes of Siletz Indians, Run to the Rogue, http://ctsi.nsn.us/run_to_the_rogue.html (last visited Apr. 10, 2006).

30. See generally STEPHEN DOW BECKHAM, *THE INDIANS OF WESTERN OREGON: THIS LAND WAS THEIRS* (1977).

Coos Bay and a national seashore today, that every bit as much as the winter rivers and high cliffs, made the march north so brutal. Cape Perpetua, rising straight up from the waves, where, one man told me, the ancestors built amazing trails into the sheer sides. Battle Rock, near Port Orford, the massive formation where a rogue captain fired his cannon into a cluster of local Natives in 1851, killing seventeen.³¹ The open, inviting Sixes River valley. "I never lived in Sixes but my people came from there and I've heard so many stories," one woman told me. "Whenever I come over that rise, I just feel something in my whole body. It's home to me."

The Illinois River empties into the Rogue about twenty-five miles inland. On that last leg of the run, young male and female runners chewed up the early-morning miles, proudly bearing the ceremonial staff—myrtlewood from the Rogue country, embroidered with ribbons and eagle feathers—as they headed up the Rogue, place of so many good years and then the wars. A light rain came in and mist rose up from the Rogue, the white playing off against the thick green that comes down to the banks. Between one hundred fifty and two hundred people waited at White Oak Flat, a level meadow up above the Illinois River.

When the last runner broke into view, he was greeted with smiles and gestures of satisfaction rather than noise. After passing the staff to an elder, he and the other tribespeople walked down a rocky jeep trail, talking quietly, to a wide, rocky beach on the edge of the surging Illinois River. A return to a place that once was theirs, a place to shake your head in wonder at the beauty, a place to break your heart. A commemoration, not a celebration.

The group formed a circle. There was no dancing. The formal dances are done deep into the night in the traditional, cedar-slab dance house back in Siletz and a social dance would be done later, after the salmon dinner. After a prayer, the tribal chair welcomed everyone. Some of the elders spoke briefly, honoring the ancestors and talking about how this big-river, big-tree country would always be home. Then the group lapsed into a long silence, awash in thoughts of the ancestors and the land.

In a sense, The Run to the Rogue is notable for its ordinariness. Yes, the run has an element of ceremony. It's an event to mark on the calendar. Yet it also is commonplace, unremarkable in its simple logic. The Rogue River country still holds a place in the daily lives of Siletz people. That land, and all the stories about it, are part of the community.

31. See NATHAN DOUTHIT, *UNCERTAIN ENCOUNTERS: INDIANS AND WHITES AT PEACE AND WAR IN SOUTHERN OREGON 1820s to 1860s* 116-17 (2002).

Going to White Oak Flat may be a lot farther away, but going there is as normal and obvious as visiting grandmother across town.

Though much has been written and said about the connection between Native people and the land, it saddens me that that relationship is not broadly accepted. For many Americans, the Indian world view is romantic, past tense if it ever existed at all. Yet the land is and always has been distinctively central to, and pervasive in, Native American spirituality and culture. That is not true of Christianity. I accept the view that Mormonism, especially in the early time, includes an environmental ethic. But it does not come close to the primacy of land in Indian religion. I accept the view that many Americans share the love of the land that we find in Abbey's best and most tactile writing. But that attitude does not play nearly the role in American culture that the land plays in Native culture. True, the land relationship has been beaten out of some Indian people, and traditional ways have been joined by Anglo attitudes for most Indians, but the tie to the land remains strong. Just spend time in Indian country. It is a difference of kind, not degree.

Eminent scholars, practical people driven by data and not remotely apologists, while acknowledging that tribes and individual Native have sometimes overharvested and otherwise erred, have dug down to the undeniable core truth of the organic way that the land is interwoven with the Native way of life. They emphasize the particularity of the relationship and its ramifications. Eugene Hunn writes that

[T]he fact that Native Americans have occupied every cranny of the continent for at least 10,000 years, and have maintained the rich diversity and high productivity of American landscapes throughout the millennia, must be understood as a consequence of the sophisticated systems of Traditional Environmental Knowledge developed and passed down the generations by all Native American tribes. . . . Thus we recognize in the knowledge systems of Native American people an alert intelligence and an aesthetic sense for connection that we admire in the scientists and poets of all cultures. We need not choose sides in this debate, but marvel equally at the wealth of human diversity and at our common humanity.³²

Vine Deloria, Jr., who has explored Native spirituality and the connection to place to a depth perhaps greater than anyone, explained that "Indian tribes combine history and geography so that they have a 'sacred geography,' that is to say, every location within their original homeland has a multitude of stories that recount the migrations, revelations, and particular historical incidents that cumulatively produced the tribe in its current condition."³³ Keith Basso, who has given us such penetrating

32. Eugene S. Hunn, *Knowledge Systems, in A COMPANION TO THE ANTHROPOLOGY OF AMERICAN INDIANS* 148, 150 (Thomas Biolsi ed., 2004).

33. VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 122 (1992).

and compelling writing on Western Apache stories and place names based on exhaustive field work, speaks to how the Apaches, the names, and the places have become one. “[I]nsofar as this kind of incorporation occurs—insofar as places and place names provide Apache people with symbolic reference points for the moral imagination and its practical bearing on the actualities of their lives—the landscape in which the people dwell can be said to dwell in them. . . . Inhabitants of their landscape, the Western Apache are thus inhabited by it as well, and in the timeless depth of that abiding reciprocity, the people and their landscape are virtually as one.”³⁴

All tribes have suffered to some degree the trauma of being forcibly severed from their land. The original treaties, and the even more confiscatory ones that usually followed, began that progression. The discredited allotment policy, which hit the Siletz and most other tribes, took 90 million acres, an area the size Colorado and Washington combined.³⁵ Most people in Washington, DC in the 1880s could not foresee the costs of allotment but one person—the person who knew more about Indian people than any non-Indian in the country—did see what was coming with complete clarity. That was the storied John Wesley Powell, much admired by me and many westerners, who, in the darkest episode of his career, wholeheartedly supported and pushed allotment precisely because he knew about the particularity and about how only by forcing Indians off the land could the radical reformers achieve “civilization,” that is, wholesale assimilation of Indians, including the elimination of their reservations. Powell wrote this cynical, treacherous letter to Senator Henry Teller that showed exactly how dear the land is to Indian people:

The Indian religion is localized. Every spring, creek and river, every valley, hill and mountain as well as the trees that grow upon the soil are made sacred by the inherited traditions of their religion. These are all homes of their gods. When an Indian clan or tribe gives up its land it not only surrenders its home as understood by civilized people but its gods are abandoned and all its religion connected therewith, and connected with the worship of ancestors buried in the soil; that is, everything most sacred to Indian society is yielded up.³⁶

Powell then concluded: “Such a removal of the Indians is the first step to be taken in their civilization. . . .”³⁷ When a powerful nation

34. KEITH H. BASSO, *WESTERN APACHE LANGUAGE AND CULTURE: ESSAYS IN LINGUISTIC ANTHROPOLOGY* 171 (1990).

35. See ALVIN M JOSEPHY, JR., *NOW THAT THE BUFFALO'S GONE: A STUDY OF TODAY'S AMERICAN INDIANS* 132 (1982).

36. DONALD WORSTER, *A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL* 270 (2001) (quoting letter from John W. Powell to Senator Henry Teller (Feb., 1880) (File 3751) (Powell Papers, National Anthropological Archives)).

37. *Id.*

eliminates land ownership of an essentially defenseless minority and acts with that kind of malice, it throws a long shadow across the future.

While an understanding of history and the Indian world view should spur us to recognize greater tribal rights in the public lands, the majority society can benefit from an understanding of the way Native people conceive of the natural world. We in the West desperately need to rethink our relationship to the natural world. The region's population has shot from seventeen million people in 1945³⁸ to nearly sixty million since World War II.³⁹ We had towns or small cities then. Now, along the Front Range, the Wasatch Front, the Valley of the Sun, Southern Nevada, Southern California, the Bay Area, and Puget Sound, we have metropolises or megalopolises. Now you can even feel it on the Western Slope, northwest Wyoming, and the Last Best Place. You see it, in addition to the subdivisions, in species loss. The Endangered Species Act has nearly become a western statute. How could we have allowed that here, in this place?

The Indian world view holds the most sophisticated connection between our species and the natural world of any body of thought I know. The particularity. The holism. The connectedness. The respect. The love. The ceremonies.

The following are the words of Billy Frank, Jr., the celebrated Nisqually fisherman and statesman from Washington state, but he would be the first to say that they are the words of all Indian people, of all the ancestors. Cannot these words tell us things, give us direction, suggest ethical standards, even beyond the words of John Muir, Mary Austin, Rachel Carson, Wallace Stegner, Terry Tempest Williams, and Edward Abbey?

"When I was a boy," Billy told me once, "I used to go up in the national forest and lay down under those big fir trees and just watch the ants work in those big ant piles under those fir trees. Some of those piles were three or four feet tall. Now most of those trees have been logged off. You don't see many of those ant piles any more."⁴⁰ Months later, he returned to the subject and how it fit his philosophy. Remember those ant piles I told you about? "We talk about state sovereignty and tribal

38. See U.S. Census Bureau, *Statistical Abstract of the United States: 1957*, at 10 tbl.7 (1958).

39. Compare U.S. Census Bureau, *Statistical Abstract of the United States: 1996*, at 28 tbl.27 (1996) (estimating the population in the 11 western states at 55.8 million for the year 1995) with U.S. Census Bureau, *Current Population Reports: Population Projections of the United States by Age, Sex, Race, and Hispanic Origin 1995-2050*, at 6 (1996) (estimating the addition of more than 25 million people in the national population during the decade of the 1990s and reporting that the West has the highest growth rates in the country).

40. Interview with Billy Frank, Jr., celebrated Nisqually fisherman and statesman from Washington state, in Olympia, Wash. (1998).

sovereignty but those ant communities under the big fir trees are sovereign, too. We've got to find a way to protect *their* sovereignty."⁴¹

On another occasion, he took it a step further. "It used to be, when I was a little boy, that we could see the stars at night. Now it's much harder to see them, with all the lights from all the cities and towns. Some nights you can't see the stars at all. That's wrong. Those stars are sovereign. They have a right to be seen."⁴²

"I don't believe in magic. I believe in the sun and the stars, the water, the tides, the floods, the owls, the hawks flying, the river running, the wind talking. They're measurements. They tell us how healthy things are. How healthy we are. Because we and they are the same. That's what I believe in."⁴³

41. CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 101 (2000).

42. *Id.*

43. *Id.*

