

"The Legacy of the Right to Control Land and Dependency" by Kerri J. Malloy

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The Legacy of the Right to Control Land and Dependency

Kerri J. Malloy

This article is part of our “200 Years of Johnson v. M’Intosh: Law, Religion, and Native American Lands” series. If you’d like to check out other articles in this series, click [here](#).

Legacy embeds the actions and inactions of those before us into the current legal, political, and social processes. Reverberating through history are the echoes of words that canonized inequity in the systemic structures of federalism in the United States. In 1823, the U.S. Supreme Court decision in *Johnson & Graham’s Lessee v. M’Intosh* infused the Doctrine of Discovery as the law of the land and as the cornerstone for federal Indian law for the next two centuries. Along with the two other chapters of the Marshall Trilogy, *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832), solidified the plenary power of the federal government over Indian tribes that remains intact today.

Johnson v. M'Intosh established the precedent that the federal government of the United States had the sole right to negotiate with and extinguish indigenous nations' title to land. Codifying the termination of Indian or aboriginal title, the right of Indigenous peoples to occupy the lands that had been their home since time immemorial, through the treaties the United States entered into with Indigenous nations starting in 1774. Chief Justice John Marshall's opinion in *Johnson v. M'Intosh* not only recognized Indian title but the inherent right of dominion of the United States over Indigenous peoples insofar as, "our whole country been granted by the crown while in the occupation of the Indians" securing the right of dominion to the ancestral lands.


[*Johnson v. M'Intosh* codified] the termination of Indian or aboriginal title, the right of Indigenous peoples to occupy the lands that had been their home since time immemorial, through the treaties the United States entered into with Indigenous nations starting in 1774.

The opinion reinforced the contractual nature of the treaties and supremacy over indigenous nations in *Lone Wolf v. Hitchcock* (1903). The Supreme Court reinforced the precedent in *Johnson v. M'Intosh*, employing the language "of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States." Standing out in the legal opinions that have shaped federal Indian law is the legacy of *Johnson v. M'Intosh* and the direct relationship between land and dependency that formed the basis of the federal trust relationship between the domestic dependent nations conjured up by Chief Justice Marshall in *Cherokee v. Georgia* and the federal government.

INDIAN LAND FOR SALE

GET A HOME
OF
YOUR OWN

EASY PAYMENTS



PERFECT TITLE

POSSESSION
WITHIN
THIRTY DAYS

FINE LANDS IN THE WEST

IRRIGATED GRAZING AGRICULTURAL
IRRIGABLE DRY FARMING

IN 1910 THE DEPARTMENT OF THE INTERIOR SOLD UNDER SEALED BIDS ALLOTTED INDIAN LAND AS FOLLOWS:

Location	Acres	Average Price per Acre	Location	Acres	Average Price per Acre
Colorado	5,211.21	\$7.27	Oklahoma	34,664.00	\$19.14
Idaho	17,013.00	24.85	Oregon	1,020.00	15.43
Kansas	1,684.50	33.45	South Dakota	120,445.00	16.53
Montana	11,034.00	9.86	Washington	4,879.00	41.37
Nebraska	5,641.00	36.65	Wisconsin	1,069.00	17.00
North Dakota	22,610.70	9.93	Wyoming	865.00	20.64

FOR THE YEAR 1911 IT IS ESTIMATED THAT 350,000 ACRES WILL BE OFFERED FOR SALE

For information as to the character of the land write for booklet, "INDIAN LANDS FOR SALE," to the Superintendent U. S. Indian School at any one of the following places:

CALIFORNIA: Eureka. COLORADO: Ignacio. IDAHO: Laywell. KANSAS: Horton, Hudson.	MINNESOTA: Gangan. MONTANA: Crow Agency. NEBRASKA: Macy, Santee, Winnebago.	NORTH DAKOTA: Fort Totten, Fort Yates. OKLAHOMA: Anadarko, Cantonment, Colony, Dawkins, Muskogee, Pawnee.	OKLAHOMA—Cont. See and Post Agency, Shawnee, Wyandotte. OREGON: Edwath Agency, Pendleton, Sunburg, Siletz.	SOUTH DAKOTA: Cheyenne Agency, Crow Creek, Crosswood, Lower Brule, Pine Ridge, Rosebud, Sisseton.	WASHINGTON: Fort Simons, Fort Spokane, Toke, Tulalip. WISCONSIN: Pine Ridge, Roseland, Soudoc.
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WALTER L. FISHER,
Secretary of the Interior.

ROBERT G. VALENTINE,
Commissioner of Indian Affairs.

United States Department of the Interior advertisement offering 'Indian Land for Sale'. [Wikimedia](#).

The treaties negotiated between indigenous nations and the United States established the borders of reserved lands and prescribed how the sovereigns would interact. In *United States v. Winans* (1905), the Supreme Court recognized that the treaties were not only a reservation of lands and rights of indigenous nations but, at their core, the treaties were real estate contracts. Though the entirety of "Indian Country" was not secured through treaties. In the case of the Pueblos peoples, lands had been guaranteed to the communities through Spanish land grants. It would take the Supreme Court to affirm the plenary power of Congress to recognize such grants and dependency of indigenous nations – affirming a trust responsibility between the United States and indigenous nations until such time as extinguished by Congress. In *United States v. Sandoval* (1913), the court held that the Pueblo peoples were an "inferior people...requiring special consideration and protection like other Indian communities." *Johnson v. McIntosh's* legacy looms heavily in the Supreme Court's application of stare decisis as it develops federal Indian law around the concept of land and dependency.

The intertwining of land and dependency is at odds with the American Dream— dream predicated on upward mobility, the self-made person, and home ownership. For most Americans, achieving the promised prosperity of the American Dream is directly connected

to homeownership. Making that dream reality has relied on the United States' ability to legitimize its claims to lands under indigenous nations' stewardship since time immemorial. That legitimacy has been secured by the continual affirmation of the Doctrine of Discovery as enshrined in *Johnson v. M'Intosh* by the Supreme Court for the last two centuries. Not confined to the pages of majority and dissenting opinions, the core concept of *Johnson v. M'Intosh* is deeply ingrained in the land tenure of Indigenous nations.

Indigenous nations hold approximately 56 million acres of land in the United States. However, unlike the landownership in fee means by which most individuals own land, the title to these lands is held by the Department of the Interior in trust for the benefit of individual Indigenous nations and people. The trust title extends to the natural resources within those lands, requiring Indigenous nations to be granted authorization from the federal government to develop those resources. Indigenous nations depend on the United States to reap the economic benefits of the lands reserved for them in treaties or conferred through congressional acts. The specter of the Doctrine of Discovery has been replicated in the trust relationship in that it is the United States who holds title to the land and Indigenous nations have the right to occupy the land until that right is extinguished.

The precarity of lands held in trust for Indigenous nations has played out multiple times since the Supreme Court's decision in *Johnson v. M'Intosh*. In 1887, the Dawes Act was passed by Congress. The act authorized the Department of Interior to break up reservations into parcels to be held in trust for individual indigenous people. The unallotted lands were declared surplus and made available for settlement by non-indigenous people. Indigenous people were encouraged to go into farming, and adopt non-Indigenous ways, so they would gradually be assimilated into the dominant culture. The Dawes Act was meant to end the trust relationship and extinguish what Indian title to the land remained. Those efforts ended with the passage of the Indian Reorganization Act of 1934.

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Responding to the Meriam Report, which documented the poverty, lack of adequate education and healthcare, and erosion of Indigenous land holdings resulting from the Dawes Act in Indian Country, Congress passed the Indian Reorganization Act. The act intended to stop the continued erosion of Indigenous land holdings, provide for tribal self-government, and have the Department of Interior acquire additional lands to be placed in trust to expand and establish new reservations. The reprieve of the Indian Reorganization Act was short-lived.

Efforts to further eliminate the trust relationship and erode Indigenous land holdings came in the Termination Era (1953-1968). Embodied in House Resolution No. 108 (1953). Congress moved to end the trust relationship with tribes, break up indigenous communities and end the federal government's role in indigenous affairs. The Urban Indian Relocation Program

encouraged indigenous people to move from their reservations to urban centers to receive vocational and higher education. The program's intent was that those relocated would prosper and not return to the reservation. To erode tribal self-governance, Congress enacted Public Law 280, which gave specific states criminal jurisdiction on reservation lands. The cornerstone of the termination era was the end of federal recognition of the sovereignty of indigenous nations and the liquidation of tribal land holdings. Reminiscent of the Dawes Act, reservations were divided into individual parcels to be held in fee with the surplus lands being sold. President Richard Nixon ended the Termination Era in 1970. Since that time, indigenous nations have received and have been working towards reinstating federal recognition of their sovereignty. *Johnson v. M'Intosh* did not set in motion the efforts to dispossess indigenous nations of their homelands. It did codify the process for how it would happen. The efforts of the United States to extinguish Indian title to the land have played out in the judicial, legislative, and executive branches for over two hundred years. Built on the Roman Catholic promulgations of popes in the fifteenth century and then embedded into the legal framework of the United States, the legal fiction of the Doctrine of Discovery has rendered indigenous land holdings precarious and subject to the political whims of the day. A cornerstone of federal Indian law, *Johnson v. M'Intosh* established the precedent that indigenous nations could not manage their lands and internal affairs that pervade the development of federal Indian law—two centuries after Chief Justice John Marshall penned the first opinion in the canon of federal Indian law, the legacy of the right to control land and hold dominion over indigenous nations lives on.

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