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## Chicago's Last Unclaimed Indian Territory: A Possible Native American Claim Upon Billy Caldwell's Land, 50 J. Marshall L. Rev. 91 (2016)

Scott Priz

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# CHICAGO'S LAST UNCLAIMED INDIAN TERRITORY: A POSSIBLE NATIVE AMERICAN CLAIM UPON BILLY CALDWELL'S LAND

SCOTT PRIZ\*

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## I. INTRODUCTION

Here, then, is the security for the remainder of your lands. No State, no person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.<sup>1</sup>

In 1872, a Native American by the name of Pe-y-mo Caldwell stepped forward and asked the Office of Indian Affairs whether his father had any unsold land that had been left to him.<sup>2</sup> His father, a famous Chief of the Potawatomi Indians by the name of Billy Caldwell, had been granted 1600 acres of land in what is now the northwest side of Chicago by an 1829 federal treaty.<sup>3</sup> The Office of Indian Affairs replied that 160 acres had not been conveyed properly. Pe-y-mo, as Caldwell's only living son and heir, had the right to sell the land if he first had it properly surveyed and obtained permission from the President of the United States of America.<sup>4</sup>

Pe-y-mo was never able to sell the land that he had inherited.<sup>5</sup> Instead, the land was eventually sold to the Cook County Forest Preserve District in 1917 and 1922 from a land claim, which originated in 1876 from an adverse possessor of the

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1. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 661 (D. Me. 1975), quoting President Washington's speech to the Senecas in December 1790, shortly after the passage of the Non-Intercourse Act of 1790.

2. Letter from Samuel V. Niles, Attorney for Pe-y-mo, to Francis A. Walker, Commissioner of Indian Affairs (May 2, 1872), in Peter Gayford Collection at the Newberry Library, Chicago.

3. Treaty with the Chippewa, etc., U.S.–Chippewa, Ottawa, and Potawatomi, art. IV, July 29, 1829, 7 Stat. 320 [*hereinafter Treaty of Prairie du Chien*].

4. Letter from Department of the Interior, Office of Indian Affairs to Samuel Niles, (Nov. 15, 1872), in Peter Gayford Collection at the Newberry Library, Chicago.

5. PETER GAYFORD, CHIEF BILLY CALDWELL, HIS CHICAGO RIVER RESERVE, AND ONLY KNOWN SURVIVING HEIR A 21ST CENTURY BIOGRAPHY 58 (2011) (unpublished manuscript, on file at the Newberry library, Chicago, in the Peter Gayford collection).

land.<sup>6</sup> Native American land claims, however, exist under the protection of the United States government in a uniquely protected, and disruptive place in American law.<sup>7</sup> Native American land claims based on treaties are not like other property claims. Old claims on land that were extinguished by nonfederal actors have been brought, and settled, for injustices rendered upon Native Americans going back to the founding of the Republic.<sup>8</sup> Successful lawsuits can be brought by rightful claimants on account of old claims to land guaranteed and protected by the United States government.<sup>9</sup>

This comment is exploring one such claim. One hundred sixty acres on Chicago's northwest side may still have a valid Native American claim. This land was once the property of a chief of the Potawatomi Indian Tribe by the name of Billy Caldwell. His possession of the land dates back to the treaty of Prairie du Chien in 1829.<sup>10</sup> Half of the land is now owned by the Cook County Forest Preserve in their Caldwell Woods Park in Chicago,<sup>11</sup> and the other half is located part of the neighborhood of Wildwood, also in Chicago.<sup>12</sup> The 160 acres have a current value, without any improvements upon the land, of approximately five hundred million dollars.<sup>13</sup>

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6. Warranty Deed from Edwin Cole and Charlotte Cole to Forest Preserve District of Cook County (Apr. 19, 1922), in Cook County Recorder of Deeds Document Collection, Document #752068 and Warranty Deed from Fred Brummel and his wife to Forest Preserve District of Cook County (May 16, 1917), in Cook County Recorder of Deeds Document Collection, Document #6154536 [hereinafter *Deeds from Cole and Brummel*].

7. See Matthew L.M. Fletcher, Kathryn E. Fort & Dr. Nicholas J. Reo, Commentary, *Tribal Disruption and Indian Claims*, 112 MICH. L. REV. FIRST IMPRESSIONS 65, 65–72 (2014) (describing a general overview of the disruptive nature of old Native American claims).

8. See *id.* at 66 (for a list of recent Indian land settlements involving Oneida Nation, the Saginaw Chippewa Indian Tribe, and five Michigan Anishinaabe tribes).

9. See *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 663 (1974) (for the most famous example of an old, and successful Native American claim). The Oneida Indian Nation won judgment from the Supreme Court in 1974 for a claim that originated in 1795 when the State of New York extinguished the Tribe's possessory right to land in that State. *Id.* at 663–66.

10. *Treaty of Prairie du Chien*, *supra* note 3.

11. *Deeds from Cole and Brummel*, *supra* note 6.

12. The modern-day location of these 160 acres was ascertained by first determining the location of the entire 1600 acres of land that Caldwell was granted. The Library of Congress has available an 1861 plat map of Cook County that shows the location of Caldwell's reserve, along with the 160 northernmost acres that were owned, at the time by Robb Robinson. W.L. Flower and Edward Mendel, *Map of Cook County, Illinois*, in Library of Congress Geography and Map Division (1861), [www.loc.gov/item/2013593074/](http://www.loc.gov/item/2013593074/).

13. Estimating the value of vacant land is difficult, and is determined by the fair market value of the land. Bob Madden, Comment, *The Valuation of an Experience: A Study in Land Use Regulation*, 36 J. MARSHALL L. REV. 779, 790. Fair market value is "the appraised 'market value' for the property."

This comment will explore the history of these acres and the various conveyances of it that have occurred up to the present day. The comment will also include an analysis into who, if anyone, might be able to bring a claim to the land. It will then discuss the potential bases upon which such a claim might be brought, in light of recent judicial decisions and settlements with various Native American claimants. Finally, it will propose that this land, and other historical grants of land to individual Native Americans, should be reviewed by the United States Department of the Interior due to the number of such allotments, and the difficulties in tracking down proper claimants.

## II. A BRIEF HISTORY OF BILLY CALDWELL AND HIS LAND

They all had hustler's blood. And kept the old Sauganash in a hustler's uproar. They hustled the land, they hustled the Indian, they hustled by night and they hustled by day. They hustled guns and furs and peltries, grog and the blood-red whiskey-dye; they hustled with dice or a deck or a derringer. And decided the Indians were wasting every good hustler's time. Slept till noon and scolded the Indians for being lazy. Paid the Pottawattomies off in cash in the cool of the Indian evening: and had the cash back to the dime by the break of the Indian dawn.<sup>14</sup>

### A. *Billy Caldwell and the Land Granted to Him by Treaty*

If you go to the northwest side of Chicago, up near the neighborhoods of Edgebrook and Sauganash, there is a large Cook County Forest Preserve named Caldwell Woods.<sup>15</sup> These woods are

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Nathan Burdsal, Note and Comment, *Just Compensation and the Seller's Paradox*, 20 *BYU J. Pub. L.* 79, 86–87. There is, however, no comparable amount of land in Chicago that is for sale. There are empty lots for sale, but none are close to the size of the 160 acres. A brief survey of vacant lots on the Norwest side of Chicago would give an average sale price per square foot. Ten vacant lots near Caldwell Woods were reviewed on the real estate site, Redfin. [www.redfin.com/city/29470/IL/Chicago/filter/sort=hi-price,property-type=land,viewport=42.02766:41.89772:-87.72293:-87.93751](http://www.redfin.com/city/29470/IL/Chicago/filter/sort=hi-price,property-type=land,viewport=42.02766:41.89772:-87.72293:-87.93751). Ten of these vacant lots had an average sale price of \$71 per square foot. The prices vary from a low of \$23 per square foot to a high of \$283 per square foot. There are 43,560 square feet in an acre. The Calculator Site, *Square Feet - Acres Conversion*, (last accessed Feb. 9, 2017), [www.thecalculatorsite.com/conversions/area/square-feet-to-acres.php](http://www.thecalculatorsite.com/conversions/area/square-feet-to-acres.php). At \$72 per square foot, the value of 160 acres would be \$496,848,845. The value of the land clearly varies dramatically, and this should not be seen as anything more than a very rough estimate—a ballpark figure of what the land is currently worth.

14. NELSON ALGREN, *CHICAGO: CITY ON THE MAKE*, 11 (1951).

15. City of Chicago, *Chicago Habitat Directory* 35 (2005), [www.cityofchicago.org/dam/city/depts/zlup/Sustainable\\_Development/Publications/Chicago\\_Nature\\_and\\_Wildlife\\_Plan/Billy\\_Caldwell\\_and\\_Forest\\_Glen\\_Woo](http://www.cityofchicago.org/dam/city/depts/zlup/Sustainable_Development/Publications/Chicago_Nature_and_Wildlife_Plan/Billy_Caldwell_and_Forest_Glen_Woo)

named after Billy Caldwell, also known as Chief Sauganash, one of the last Chief of the Potawatomi Indians in Chicago before the tribe was removed to Iowa under the provisions of the 1833 Treaty of Chicago.<sup>16</sup> Caldwell Woods is what remains of a land grant of 1600 acres that was given to Caldwell in the Treaty of Prairie du Chien in 1829.<sup>17</sup> One hundred sixty acres of this land, however, may never have been sold by either Caldwell or his heirs, and the Cook County Forest Preserve District bought some of this land in 1917 and 1922 from a title originating from an adverse possessory action.<sup>18</sup>

Billy Caldwell was appointed as a Chief of the Potawatomi Indian Tribe in Chicago for the negotiations of their treaties with the federal government.<sup>19</sup> He was the son of a Mohawk woman and a British Colonel named William Caldwell, Sr.<sup>20</sup> He was a major figure in early Chicago history from the Fort Dearborn period to his departure with his tribe in 1835.<sup>21</sup> According to Juliet Kinzie, who wrote an influential history of early Chicago, Caldwell saved her father-in-law, John Kinzie, during the Fort Dearborn massacre.<sup>22</sup> Caldwell fought alongside Chief Tecumseh in the Tecumseh Rebellion that engulfed the Midwest and Ontario during the War of 1812, serving as a Captain in the British Indian service,<sup>23</sup> and had the first tavern of Chicago, the Sauganash Tavern, named after him.<sup>24</sup>

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ds\_Forest\_Preserve.pdf.

16. Treaty with the Chippewa, etc., Sep. 26, 1833, 7 Stat. 431 [hereinafter *Treaty of Chicago*].

17. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

18. *Deeds from Cole and Brummel*, *supra* note 6.

19. A.T. ANDREAS, HISTORY OF CHICAGO EARLIEST PERIOD TO PRESENT TIME, 108–09 (1884).

20. ANN DURKIN KEATING, RISING UP FROM INDIAN COUNTRY—THE BATTLE FOR FORT DEARBORN AND THE BIRTH OF CHICAGO 72 (2012).

21. ANDREAS, *supra* note 19, at 108.

22. JULIETTE KINZIE, WAU-BUN, THE EARLY DAY IN THE NORTHWEST 88 (1856). Kinzie's account of the Fort Dearborn massacre has been criticized heavily, and is mentioned here only to show the most dramatic telling of Caldwell from this era. Juliet Kinzie was dramatizing the story of her father in law, and helped turn John Kinzie into the founding father of Chicago. John Kinzie was not the hero that Juliet Kinzie would depict in her book. He murdered the Indian agent Jean Lalime, and may have conspired with Caldwell afterwards to escape punishment for the murder. On Kinzie's murder of Lalime, see KEATING, *supra* note 20, at 116–18. For criticism of Juliette Kinzie's account of the Fort Dearborn Massacre, see John D. Barnhart & Walter K. Jordan, *A New Letter About the Massacre at Fort Dearborn*, 41 INDIANA MAGAZINE OF HISTORY, 187–88 (1945), <http://scholarworks.iu.edu/journals/index.php/imh/article/view/7536/8785> (describing the historical inaccuracies and biases of Kinzie's account).

23. James A. Clifton, *Merchant, Soldier, Broker, Chief: A Corrected Obituary of Captain Billy Caldwell*, 71 J. OF THE ILL. STATE HISTORICAL SOCIETY 188–189 (1978).

24. ANDREAS, *supra* note 19, at 108–09.

Caldwell was also appointed Chief of the Potawatomi Indians to negotiate two federal treaties decades after the Fort Dearborn Massacre.<sup>25</sup> He had been appointed temporary chief of the Potawatomi Indians because of his relationships with the American authorities and the Potawatomi tribe.<sup>26</sup> He was appointed because he was seen as a person who could get a deal done.<sup>27</sup> In Chicago terms, he was seen as man who had clout with both the American authorities and the Potawatomi tribe.<sup>28</sup> He was signatory to two treaties with the United States government, the Treaty of Prairie du Chien in 1829, and the Treaty of Chicago in 1833.<sup>29</sup> After signing the Treaty of Chicago, he left with the Potawatomi Tribe in 1835 for their reservation in Iowa.<sup>30</sup>

In the 1829 treaty, Caldwell was granted “two and a half sections on the Chicago River, above and adjoining the line of the purchase of 1816.”<sup>31</sup> These two and a half sections amounted to 1600 acres.<sup>32</sup> This land was not given freely to Caldwell, it instead required that the land “shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the President of the United States.”<sup>33</sup> In 1833, Caldwell again was designated one of the Chiefs of the Potawatomi Indians, and signed the Treaty of Chicago in 1833.<sup>34</sup> The treaty ceded the Potawatomi territory in Illinois and southwestern Wisconsin in exchange for compensation from the United States government.<sup>35</sup> Caldwell was not granted any

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25. KEATING, *supra* note 20, at 229.

26. Clifton, *supra* note 23, at 190.

27. *Id.*

28. The most precise definition of the Chicago term “clout” was made by the newspaper columnist, Mike Royko: “Clout” means influence—usually political—with somebody who can do you some good. Mike Royko, *It Wasn't Our "Clout" She Stole, But a Counterfeit*, CHI. DAILY NEWS, Sept. 14, 1967, in ONE MORE TIME: THE BEST OF MIKE ROKYO 17 (1999).

29. ANDREAS, *supra* note 19, at 108–09. Andreas does have faults as a historian, in that he relies heavily upon the account of Juliette Kinzie when related these events. *Id.*

30. ANDREAS, *supra* note 19, at 108–09.

31. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

32. United States Department of the Interior, Land Patent to Billy Caldwell from President Martin Van Buren, (June 4, 1839) in Peter Gayford Collection, Newberry Library, Chicago.

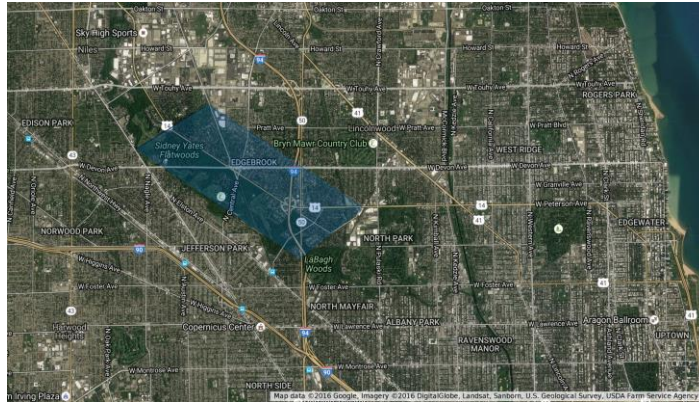
33. ANDREAS, *supra* note 19, at 108–09. This was not an uncommon in Indian treaties of the nineteenth century. The purpose was to protect the land granted to Indians from predatory deals without the permission of the federal government, as the Natives were seen as wards of the federal government to be protected against non-federal actors. *United States v. 7405.3 Acres of Land*, 97 F.2d 417, 420 (4th Cir. 1938). The Indians were see as wards of the federal government, and these restrictions upon the land see alienation were in line with the role that the federal government saw for itself in regards to tribal land. *Id.*

34. *See Treaty of Chicago*, *supra* note 16.

35. *Id.* This was the first treaty signed by a native tribe after the Indian removal act of 1830, and the Potawatomis successfully negotiated for a fair

additional land in this treaty, only an annual payment of \$400 for his lifetime,<sup>36</sup> a one-time payment of \$5000,<sup>37</sup> and a \$600 payment to Billy Caldwell's children.<sup>38</sup> Exhibit 1 shows the modern-day boundaries of the entirety of the land that was granted to Billy Caldwell in the treaty.

Exhibit 1—Boundaries of the Land that Was Granted to Billy Caldwell over Modern-Day Chicago.<sup>39</sup>



value, partially because the Potawatomi leaders, including Caldwell, stayed out of the Blackhawk rebellion of 1832. *See, e.g.*, KEATING, *supra* note 20, at 227–29. To Caldwell's credit, he did drive a hard bargain with the American negotiators, rejecting their offers for years before agreeing to be paid in hard currency, rather than paper money. GAIL HOLMES, *THE CHIEFS OF COUNCIL BLUFFS: FIVE LEADERS OF THE MISSOURI VALLEY TRIBES* 19 (2012). This hard bargaining for coin currency would benefit the Potawatomi Tribe greatly in 1837, when the financial crash of 1837 wiped out many of the nation's banks and their paper money. *Id.* *See* JACK HARPSTER, *THE RAILROAD TYCOON WHO BUILT CHICAGO, A BIOGRAPHY OF WILLIAM B. OGDEN* 76 (2009) (giving a description of the effects of the panic of 1837 on the banking industry of Chicago). Interestingly, the Potawatomi nation sued the United States in the 1970s over this treaty, alleging that the chief who signed this treaty were not the only chiefs that ruled over the Potawatomi, and that the Tribe was not a single political entity. The United States Court of claims held, however, that “the Pottawatomie nation was a single land-owning, political entity. We hold that lands ceded under the treaty of October 20, 1832, were owned and ceded by that Pottawatomie nation.” *Potawatomi Nation of Indians v. United States*, 205 Ct. Cl. 765, 779 (U.S. 1974).

36. *Treaty of Chicago*, *supra* note 16, at art. III.

37. *Id.* at art. V, Schedule A.

38. *Id.*

39. This map was created using the boundaries visible in the 1861 land plat of Cook County. Flower & Mendel, *supra* note 12. The reserve is bounded on the east by Sauganash Ave., the north by Tonty Ave., the west by N. Indian Road, the south, roughly, by N. Rogers Ave., and is bisected by Caldwell Ave.



*B. The Land that Was Conveyed and Not Conveyed by  
Caldwell*

In 1833, Caldwell began selling off the land that he had been granted in the 1829 treaty.<sup>40</sup> Caldwell utilized the assistance of a New York lawyer and financial by the name of Arthur Bronson to sell the land.<sup>41</sup> In the later indentures, it is recorded that there were seven transfers of land, dividing up the 1600 acres of land.<sup>42</sup> The sources agree on where all but 80 of the land were conveyed to. There was a conveyance of 720 acres to Arthur Bronson, 160 acres to a the infant heirs of Richard Hamilton and Diane Hamilton, 160 acres granted to a Seth Johnson, 160 acres to a Philo Carpenter, 160 acres to a Richard Hamilton, 80 acres to a Julius Kingsbury, and 80 acres to Dole and Hamilton.<sup>43</sup> The final 80 acres were transferred to a beneficiary whose identity is disagreed upon by sources. Bronson's abstract of conveyances state that these 80 acres were "perhaps to Kingsbury and Decamp,"<sup>44</sup> while the ante-fire ledger book records Francis Allyn as the owner after the heirs of Billy Caldwell.<sup>45</sup> According to a letter by Arthur Bronson in 1835, the land was worth eight to ten dollars an acre,<sup>46</sup> but Caldwell only received \$1.25 per acre.<sup>47</sup>

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40. Ante-Fire Ledger Records, Tract Book 307, Block 6, p. 29, in Property Insights collection. These are the only pre-Chicago fire property records that survive, and these hand written records are the only ledgers of property transfers in Chicago. See *Spotlight on Chicago history and the role we play in preserving it, Custodians of Chicago's fiery past*, PROPERTY INSIGHT, [www.propertyinsight.biz/news\\_insights\\_fire.asp](http://www.propertyinsight.biz/news_insights_fire.asp), (last visited Oct. 11, 2016) (describing the role that first Chicago Title and Trust and now Property Insights have had in preserving these records). These records are unavailable for reproduction, but are available to view upon request.

41. GAYFORD, *supra* note 5, at 30. Bronson was a land speculator in addition to being an attorney. HARPSTER, *supra* note 35, at 86. Bronson also, during the depression of 1837, turned to Ogden's real estate firm to manage his investments in land that Bronson purchased cheaply during the depression. *Id.*

42. Arthur Bronson, Abstract of Conveyances made by Billy Caldwell of a Certain Tract of 2 ½ Sections of Land Reserved to him by the Treaty of Prairie du Chien A.D. 1829, (June 1840), in Arthur Bronson papers in the Chicago History Museum, folder 70.

43. *Id.*

44. *Id.*

45. Ante-Fire Ledger Records, Tract Book 307, Block 6, p. 29, in Property Insights collection.

46. Letter from Arthur Bronson to Gholson Kercheval (May 10, 1835), in Arthur Bronson papers in the Chicago History Museum, folder 70.

47. Arthur Bronson, Map of Two and a Half Sections, undated, in Arthur Bronson papers in the Chicago History Museum, folder 70. This is from a map that Bronson had drawn, and has the amounts written in that Caldwell was paid. Only 1440 of the acres have values written in—the two northernmost sections do not have any values written in. *Id.* This map is shown below as Exhibit 2.

Arthur Bronson's letter says that he cannot account for the final eighty acres of land, but marks down the transfer to Kingsbury of Decamp and then to a Mr. Saltonstol.<sup>48</sup> This land transfer is marked in a different hand writing than the other transfers, and Bronson remarks that he has included these eighty acres in the abstract "in the margins, merely to show the footing for the whole 2 ½ sections of land."<sup>49</sup> These eighty acres are the northwesternmost portion of the land granted to Billy Caldwell, as reported on a map that Bronson created in 1836.<sup>50</sup> Below is the map, marked as Exhibit 2.

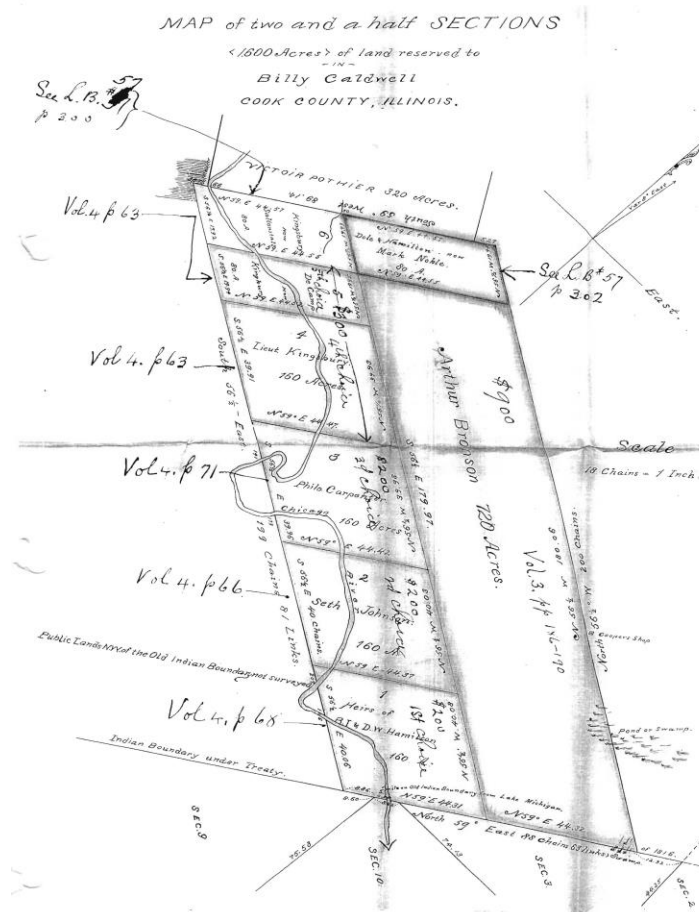
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48. Arthur Bronson, Abstract of Conveyances made by Billy Caldwell of a Certain Tract of 2 ½ Sections of Land Reserved to him by the Treaty of Prairie du Chien A.D. 1829, (June 1840), *in* Arthur Bronson papers in the Chicago History Museum, folder 70.

49. *Id.*

50. Arthur Bronson, Map of Two and a Half Sections, undated, *in* Arthur Bronson papers in the Chicago History Museum, folder 70.

## Exhibit 2—Map of Two and a Half Sections.



The Tract Book tells a different story as to this northwest portion of the land. All of the other six transfers of land are listed properly in the Tract Book.<sup>51</sup> This seventh transfer is not listed as being from Billy Caldwell. Instead, the first mention of it is a land transfer from a Francis Allyn to the heirs of Billy Caldwell, followed by an immediate transfer of the land back to Francis Allyn by the heirs of Billy Caldwell.<sup>52</sup> These transfers are signed off by John H. Kinzie, Commissioner.<sup>53</sup>

51. Ante-Fire Ledger Records, Tract Book 307, Block 6, p. 29, in Property Insights collection.

52. *Id.*

53. *Id.* John H. Kinzie is the son of John Kinzie, one of Chicago's founding fathers. MILO M. QUAIFFE, *CHECAGAU FROM INDIAN WIGWAM TO MODERN CITY 1673-1835* 103 (1933). John H. Kinzie not only became a commissioner, he

All of these conveyances, in order to be valid, needed the permission of the President of the United States in order to be valid, according to the terms of the treaty.<sup>54</sup> The permission was not granted at the time of sale, because no survey of the land had been completed when the sales were completed.<sup>55</sup> This survey was not completed until 1839.<sup>56</sup> Only after this survey was completed were the purchasers of the land able to seek the permission of the President of the United States. Without this signature, the land transfers would not be valid, and the land would remain under the ownership of Caldwell or his heirs.<sup>57</sup> In 1839, a survey of the land was completed, and a land patent issued to Billy Caldwell.<sup>58</sup>

The purchasers of the land began requesting permission from the President of the United States, through the Department of the Interior, to allow the conveyances. Arthur Bronson, who had purchased the largest tract of land, received permission from President Martin Van Buren on May 9, 1838.<sup>59</sup> Most of the other land conveyances, were granted in the early 1840s by President John Tyler.<sup>60</sup> Within the Miscellaneous Deed Books, however,

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was also an Indian agent in 1833. *Id.* He also became a land speculator during the Chicago land boom of the 1830s, and became one of Chicago's most prominent citizens till his death in 1865. *Id.* He was also married to Juliet Kinzie, author of WAU-BUN, THE EARLY DAY IN THE NORTHWEST, *supra* note 22; *id.*

54. *Treaty of Prairie du Chien*, *supra* note 3, at art. IV.

55. GAYFORD, *supra* note 5, at 31–32.

56. United States Department of the Interior, Land Patent to Billy Caldwell from President Martin Van Buren (June 4, 1839), in Arthur Bronson papers in the Chicago History Museum, folder 70.

57. This precise example was well known enough to make into a nineteenth-century law review article on a section on conditions in deeds. James P. Root, *An Abstract of Title*, THE AMERICAN L. REGISTER, 529, 540–541 (1875). Root remarks under a section titled conditions in deeds, that:

Sixteen hundred acres were ceded to one Billy Caldwell, in Cook county, upon the condition that neither he nor his heirs should sell same without the approval of the President. He did so, however, and the present owner, who is the son of the grantee of the desiring to borrow money, had his abstract brought down. It showed the treaty, but did not show that the President had given his consent, nor did the records at Washington show the fact.

*Id.* at 541.

This case was well known enough that it made it into the article as an example. Frustratingly, Root does not mention which heir did the checking, or when they did so. Root may have been mistaken that it was a son of a grantee that did the selling, as all of the land was sold by the original purchasers well before 1875. Ante-Fire Ledger Records, Tract Book 307, Block 6, p. 29–65, in Property Insights collection. I cannot ascertain from these paragraphs what particular conveyance Root is remarking upon.

58. United States Department of the Interior, Land Patent to Billy Caldwell from President Martin Van Buren, (June 4, 1839), in Peter Gayford Collection at Newberry library.

59. Miscellaneous Deeds Volume 3, United States National Archives, 189.

60. All of the land permissions for Caldwell's land are found in

there is no record of any approval of any President of the two northernmost eighty-acre land grants.<sup>61</sup>

A later report from the Department of the Interior from 1884, which will be discussed later, sheds some light on what happened with the northwesternmost eighty-acre tract.<sup>62</sup> In 1843, John H. Kinzie was appointed a special court commissioner by the Cook County Circuit Court.<sup>63</sup> Kinzie approved a chain of sale to a Mr. Decamp that was supposed to have originated from Billy Caldwell, and which was eventually assigned to Francis Allyn.<sup>64</sup> This court decision was sent to President Tyler for his approval, but Tyler declined to approve it, with the letter saying that it was declined because “the President had no authority to approve a deed for anyone except Billy Caldwell or his heirs.”<sup>65</sup> The report also stated that the eighty northeasternmost acres, which had been supposedly sold to Dole and Hamilton, never received the permission of President Tyler either.<sup>66</sup> Whether or not these conveyances were proper became a less pressing question, as Billy Caldwell died on September 6, 1841, after leaving Chicago with his tribe to Iowa.<sup>67</sup>

This type of land grant that Caldwell received was not uncommon in the era, although most treaties granted reservations to the tribes in exchange for their land that the tribes were giving to the United States.<sup>68</sup> There were over four hundred treaties between the United States and Native American tribes in the treaty making period, between 1776 and 1871.<sup>69</sup> This type of

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Miscellaneous Deeds Volume 3, United States National Archives, 186–89, and in Miscellaneous Deeds Volume 4, United States National Archives, 63–72.

61. *Id.*

62. Letter from H. M. Teller to the Commissioner of Indian Affairs (Feb. 2, 1884), Document #525487, Tract Book 225 B, 3.

63. *Id.* at 2.

64. *Id.*

65. *Id.*

66. *Id.*

67. ANDREAS, *supra* note 19, at 109. In Andreas’s account, the early settlers held Caldwell in very high esteem, even going so far as to name the first tavern after Caldwell’s title, the Sauganash, meaning one who speaks English:

By the first residents and settlers of Chicago he was highly respected, and some are still surviving who esteemed it no small privilege to accompany him on a hunting excursion. The esteem in which he was generally held is well reflected in the action of Mark Beaubien, when he named his new tavern. It was suggested to Mark that he should name his house after some great man. He could think of no greater personage than Billy Caldwell and so his tavern became celebrated as the “Sauganash.”

*Id.*

68. STEPHEN L. PEVAR, *THE RIGHTS OF INDIAN TRIBES* 46 (4th ed. 2012).

69. *THE NATIVE NORTH AMERICAN ALMANAC* 464 (Duane Champagne ed., 1994).

allocation of allocation of land was uncommon, although not unheard of, in those treaties.<sup>70</sup> Individual allotments of land to Native Americans with a restriction in their alienation became more common after the General Allotment Act of 1887, also known as the Dawes Act.<sup>71</sup> The Dawes Act allowed the President of the United States to divide tribal land to individual tribal members, allowing for a twenty five year period of trust between the individual owner and the United States.<sup>72</sup> After the twenty five years, the individual could sell their land after being granted a title in fee simple, with any prior conveyance being declared “absolutely null and void.”<sup>73</sup> The effect of the Dawes Act was to reduce the amount of land owned by Native Americans tribes from nearly 150 million acres in 1887, to less than 50 million acres when the Act was repealed.<sup>74</sup>

### C. An Unexpected Son

Caldwell's death in 1841 could have ended any contemporaneous disputes involving the land that had been transferred to Caldwell from the 1829 treaty. Instead, the land began to be contested thirty years after it had been sold to the various parties, after they had in turn conveyed it to other

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70. To come to this estimate, I surveyed all Federal Treaties with Native American tribes that occurred between 1820 and 1829, which is available at <http://digital.library.okstate.edu/kappler/vol2/tocy2.htm#Y6>. Of these 52 treaties, seven treaties included allotments to individuals that had a restriction upon their alienation. In the 1821 Treaty of Chicago, there were twenty-one grants of land with a restriction its alienation. Treaty with the Ottawa, etc., U.S.–Ottawa, Chippewa, and Potawatomi Nations of Indians, art. III, Aug. 29, 1821, 7 Stat. 218. In the Treaty with the Osage, there were grants made to some missions to be sold as the President of the United States directed. Treaty with the Osage, U.S.–Osage Tribes of Indians, art. X, June 2, 1825, 7 Stat., 240. In an 1826 treaty with the Potawatomi, 76 persons were granted land with a restriction in its alienation. Treaty with the Potawatomi, U.S.–Potawatomi, art. VI & schedule of grants, Oct. 16, 1826, 7 Stat., 295. In a treaty with the Miami, there were twelve land grants with a similar restriction. Treaty with the Miami, U.S.–Miami, art. III, Oct. 23, 1826, 7 Stat., 300. An 1828 treaty with the Potawatomi in 1828 had eighteen similar grants. Treaty with the Potawatomi, U.S.–Potawatomi, art. III, Sept. 20, 1828, 7 Stat., 317. The 1829 Treaty of Prairie du Chien where Caldwell received his land had thirteen grants with a restriction in the land's alienation. Treaty of Prairie du Chien, *supra* note 3, at art. IV. Finally, an 1829 treaty with the Winnebago contained twenty-two such grants. Treaty with the Winnebago, U.S.–Nation of Winnebago Indians, art. V, Aug. 1, 1829, 7 Stat., 323.

71. General Allotment Act, ch. 119, § 5, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–334, 339, 341, 342, 348, 349, 354 (2015)).

72. PEVAR, *supra* note 68, at 9.

73. General Allotment Act, ch. 119, 24 Stat. 388. See PEVAR, *supra* note 68, at 9 (for an analysis on how this change to a private ownership of tribal land changed Native American society.)

74. PEVAR, *supra* note 68, at 9.

purchasers.<sup>75</sup> In 1872, a reported son and heir of Billy Caldwell, one Pe-y-mo Caldwell, attempted to convey the land of Billy Caldwell to a Benjamin Freeland.<sup>76</sup> Through an attorney, Samuel Niles, Pe-y-mo worked with the Indian Bureau to authenticate his claim to the land, and submitted evidence of two things: that Billy Caldwell had left no will, and that Pe-y-mo was the only surviving son of Billy Caldwell.<sup>77</sup> In the process of attempting to receive approval for this conveyance of land, the Indian Bureau concluded that 160 acres of land were never properly conveyed by Billy Caldwell.<sup>78</sup> The problem with the conveyance was that, as far as the Bureau of Indian Affairs could tell in the 1870s, two of the recorded conveyances had never received the permission of the President.<sup>79</sup> This conclusion by the Bureau matches up with what is contained in the United States National Archives today.<sup>80</sup> These were the conveyances made in the northwest section of the land, which were sold to Dole and Hamilton, and what was granted to Frances Allyn by the special court commission in 1843.<sup>81</sup> The report by the Indian Agent is shown on the next page as Exhibit 3.

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75. Ante-Fire Ledger Records, Tract Book 307, in Property Insights collection. By the time the 1870s had rolled around, none of the land remained in the hands of the original purchasers. *Id.*

76. Deed from Peymo (alias) Caldwell to Benjamin F. Freeland (Mar. 28, 1873), in Cook County Illinois Recorder of Deeds, Document # 106253, Tract Book 225 B.

77. Testimony of Paschal Pensonean (June 20, 1872) in Cook County Illinois Recorder of Deeds, Document # 106253, Tract Book 225 B.

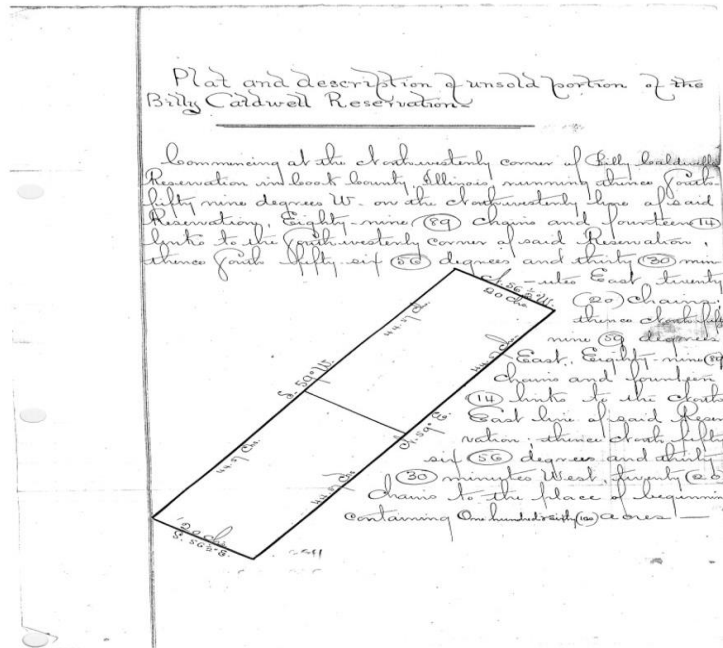
78. Plat and Description of Unsold Portion of the Billy Caldwell Reservation, Imgran (Oct. 27, 1874), in Peter Gayford collection at the Newberry Library, original in Billy Caldwell Reserve 422A Papers, U.S. National Archives, College Park, MD [hereinafter Plat and Description of Unsold Portion of Caldwell's Land].

79. *Id.*

80. Miscellaneous Deeds Volume 3, United States National Archives, 186–89, and in Miscellaneous Deeds Volume 4, United States National Archives, 63–72.

81. Plat and Description of Unsold Portion of Caldwell's Land, *supra* note 78.

Exhibit 3—Plat and Description of Unsold Portion of the Billy Caldwell Reservation.<sup>82</sup>



When Pe-y-mo stepped forward in the 1870s to attempt to sell his land, the Office of Indian Affairs concluded that two of the conveyances had not received the required permission.<sup>83</sup> The subsequent owners of the Hamilton's land agreed with the Office of Indian Affairs, as they wrote to President Grover Cleveland in 1893, sixty years after the attempted conveyance of land, asking him, under the retroactive power of approval granted in *Pickering*, to approve the sale of the land.<sup>84</sup> Pe-y-mo could then, as the only son of Billy Caldwell, convey that 160 acres of land if a proper land survey was performed, and if the permission of the President of the United States was granted.<sup>85</sup> The sale from Pe-y-mo to Freeland, however, was never completed or approved by the

82. *Id.*

83. Examination of Conveyances by Billy Caldwell, J. Owen, Indian Agent (Oct. 8, 1833), in Peter Gayford Collection in the Newberry Library, the original held in Billy Caldwell Reserve 422A Papers, U.S. National Archives, College Park, MD.

84. Letter from James A. Peterson to President Grover Cleveland (Mar. 13, 1893), in the Peter Gayford Collection at the Newberry Library. There is no record of President Cleveland, or any other subsequent President, approving the sale of the land. Interestingly, under *Pickering*, the current President, or any subsequent President, could theoretically approve this sale of land, and put an end to this claim. *Pickering v. Lomax*, 145 U.S. 310, 313 (1892).

85. See Treaty of Prairie du Chien, *supra* note 3, at art. III.



President because a proper survey of the land was never completed.<sup>86</sup>

In 1879, the possible conveyance was still being debated by the Hayes Administration, acknowledging that Pe-y-mo is the heir of Caldwell, but it was debated whether the amount of the sale was high enough.<sup>87</sup> This permission from the federal government was necessary to convey the land, and if the permission was not granted, the conveyance would be deemed to be ineffective.<sup>88</sup> Permission could be granted retroactively under *Pickering*, of course.<sup>89</sup>

In 1884, another attempt to convey the land was made by Pe-y-mo to sell the land, this time to a Mr. Beede.<sup>90</sup> The Department of the Interior rejected this possible conveyance on four grounds: (1) it first contested whether Pe-y-mo's mother had been married to Billy Caldwell at his birth, which would make Pe-y-mo ineligible to be Billy Caldwell's heir;<sup>91</sup> (2) it argued the land had been long conveyed to bona fide purchasers emanated from a constructive permission from the deed to Arthur Bronson;<sup>92</sup> (3) it further contended that Pe-y-mo was an "ignorant Indian";<sup>93</sup> and (4) it also raised the argument that the conveyance was for \$2000, while the land was worth \$20,000.<sup>94</sup>

Any potential claim by an heir to Pe-y-mo (including any modern-day claim), would need to overcome the first two arguments that that the Department of the Interior made in their

86. GAYFORD, *supra* note 5, at 54.

87. Opinion of Charles Devens—Indian Deed—Approval of, by the President, 16 U.S. Op. Atty. Gen. 325 (May 10, 1879).

88. *Pickering* 145 U.S. at 314. The Court makes it explicit that provisions in the treaty would be continue to be effective, so long as the land remained in the ownership of the grantees or their heirs:

First, the proviso in the treaty did continue by its express terms to be operative, so long as the land was owned by the grantees or their heirs, and the object of carrying this proviso into the patent was merely to apprise intending purchasers of the restrictions imposed by the treaty upon the alienation of the lands.

*Id.*

89. *Id.* at 316. In *Pickering*, President Grant approved the sale of land in 1871, 13 years after the land had been conveyed in 1858 from the heirs of an Alexander Robinson without permission. This land had been given to Alexander Robinson in the same treaty of Prairie du Chien of July 29, 1829 that had granted Caldwell his land. *Treaty of Prairie du Chien*, *supra* note 3.

90. Teller, *supra* note 62, at 2.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* It's worth noting that this ratio of the land being worth ten times what the land was worth was not too far off from the ratio that Billy Caldwell received in the land sales of 1833–34. Caldwell received \$1.25 per acre, while the land was actually, according to Arthur Bronson, worth eight to ten dollars per acre. Bronson, *supra* note 46.

1884 report. The merits of these arguments will be discussed in the next section. There is, however, no record of any President granting permission for this conveyance of land.<sup>95</sup> The permission was never granted to convey the land, and Pe-y-mo tried, unsuccessfully, to keep selling the land. The last attempt was made in 1895,<sup>96</sup> but the permission of the President was never granted, and the land was never conveyed by Pe-y-mo.<sup>97</sup> Nothing further is known about Pe-y-mo, but the subsequent sales of the land did not come from him or from any other heir of Billy Caldwell.<sup>98</sup>

#### D. Possession of the Land by Robb Robinson

Before Pe-y-mo ever tried to sell the 160 acres, it had been previously purchased and occupied from sales emanating from the Dole and Hamilton ownership,<sup>99</sup> and the Frances Allyn ownership.<sup>100</sup> By 1855, both plots of land had fallen into possession of one man, Robb Robinson.<sup>101</sup> On September 14, 1875, Robb Robinson refused to leave the land after being given notice that Benjamin Freeland intended to take possession of it.<sup>102</sup> Freeland brought suit against Robinson, attempting to evict Robinson from the land.<sup>103</sup> The court ruled for Robinson seemingly because Freeland did not hold good title to the land—although the court's reasoning is absent from the record—holding only that costs of the case were assigned to the plaintiff.<sup>104</sup> After winning the case, Freeland's land claim was revoked from the Cook County Tract

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95. GAYFORD, *supra* note 5, at 54–57.

96. Letter from H. C. Linn to D. M. Browney, (Feb. 7, 1895), *in* the Peter Gayford Collection at the Newberry Library.

97. Cook County Recorder of Deeds, Caldwell Reserve, Tract Book 225 B, Lot 4.5.6., page 7.

98. GAYFORD, *supra* note 5, at 58. The land conveyances are recorded in: Cook County Recorder of Deeds, Caldwell Reserve, Tract Book 225 B, Lot 4.5.6., pages 7–9.

99. Ante-Fire Ledger Records, Tract Book 307, Block 6, at 42, *in* Property Insights collection.

100. *Id.* at 41.

101. *Id.* at 41–42.

102. Benjamin F. Freeland v. Robb Robinson, S65292, (Cook County Superior Court, 1876). This court, of course, no longer exists, and its records are not accessible in any electronic format. It is, instead, accessible in the Cook County Court archives in the Richard J. Daley center in Chicago. Many of the facts about Pe-y-mo are listed in the affidavits taken in the case. There is disagreement about whether Pe-y-mo is a son of Billy Caldwell, or whether he was a step son that Billy Caldwell took as his son.

103. *Id.*

104. *Id.* The court's holding is writing on the cover of the pamphlet that contains the cases documents, and is nearly illegible at that. Most of the documents of this case are affidavits taken by the plaintiff's attorney, establishing that Pe-y-mo is the heir of Billy Caldwell who has the right to sell the land.

Book 225.<sup>105</sup> Even if Robinson was not the true owner of the property because the chain of title did not properly originate from Billy Caldwell,<sup>106</sup> he was still physically possessing the land. He could be seen as an adverse possessor, squatting on a piece of land that had been given to Billy Caldwell, albeit with a restriction on its alienation.<sup>107</sup>

“Adverse possession is a doctrine that permits the involuntary transfer of title to real property to a hostile trespasser who openly occupies the property for the sufficient period of time.”<sup>108</sup> Generally speaking, in order to make good on his claim, an adverse possessor must fulfill the five required elements of adverse possession, namely that the possession be: (1) continuous; (2) hostile; (3) actual; (4) open, notorious and exclusive; and (5) that the claim of title be made throughout the limitations period (twenty years in Illinois<sup>109</sup>).<sup>110</sup> If Robinson could show that he had fulfilled the requirements of adverse possession throughout the twenty-year period of the statute of limitations, he would, ordinarily, have become the true owner of the property.<sup>111</sup> Freeland did not have good title to the land, and only the true owner of property can evict an adverse possessor like Robinson, rather than someone like Freeland, who did not own title to the land.<sup>112</sup> Robinson had a relatively better title than Freeland, and as a result, Freeland’s suit failed.<sup>113</sup> Robinson had a series of

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105. Cook County Recorder of Deeds, Caldwell Reserve, Tract Book 225 B.

106. Whether or not Robinson was the true owner of the land depends on whether you accept the analysis contained within the *Plat and Description of Unsold Portion of Caldwell’s Land* (see *supra* note 78), or the analysis contained within the Letter from H. M. Teller to the Commissioner of Indian Affairs (see *supra* note 62), as the sources come to different conclusions regarding the original purchases that led to Robinson’s purchase of the land.

107. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

108. 1 PATTON AND PALOMAR ON LAND TITLES § 226 (3d ed.).

109. 735 ILL. COMP. STAT. 5/13-101 (2016).

110. *Tapley v. Peterson*, 489 N.E.2d 1170, 1171 (Ill. App. Ct. 1986). The twenty-year limitations period and other requirements for adverse possession have been consistent in Illinois jurisprudence. *E.g.* *Turney v. Chamberlain*, 15 Ill. 271, 273 (1853); *Ambrose v. Raley*, 58 Ill. 506, 509 (1871); 735 ILL. COMP. STAT. 5/13-101.

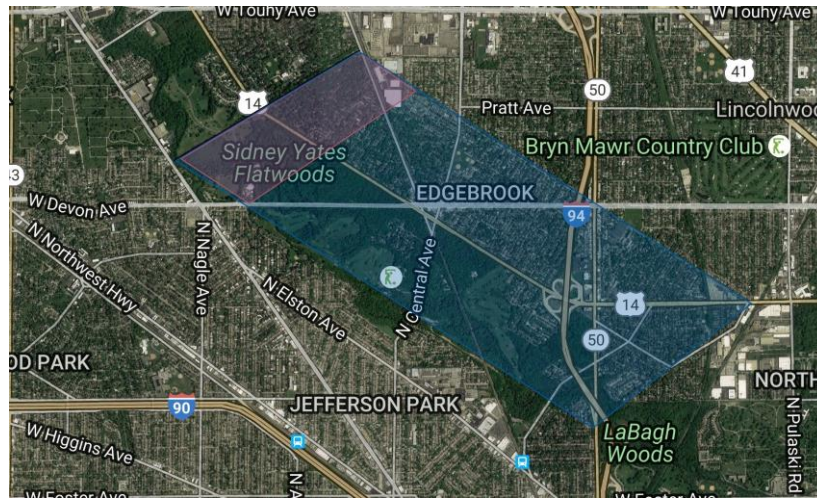
111. *Turney*, 15 Ill. at 273.

112. Robinson shows up in at least one other adverse possession case from the time. In *Robinson v. Ferguson*, 78 Ill. 538 (1875), Robinson brought a suit to adversely possess land near Caldwell’s reserve, claiming that he or his tenant had been adversely possessing the land since 1835. The Illinois Supreme Court held that the only evidence Robinson was able to provide was his own word, and that the defendants in the case held better title than Robinson. *Id.* at 548. Robinson may have been a serial adverse possessor in the area, taking advantage, perhaps, of the chaos in the land title records that existed in the wake of the Great Chicago Fire. That’s speculation, but being an adverse possessor of the land in the area was not a foreign concept to Robb W. Robinson.

113. *Benjamin F. Freeland v. Robb Robinson*, S65292, (Cook County Superior Court, 1876).

conveyances that culminated in the Cook County Forest Preserve purchasing the land in 1917 and 1922 from the Coles and from the Brummels, who had themselves purchased the land after Robinson had adversely possessed it.<sup>114</sup> Exhibit 4 is a map of where the 160 acres are today, in red, overlaying the entire land grant, which has the remaining portions of the land granted to Caldwell in blue.

Exhibit 4—The 160 Contested Acres in Modern-Day Chicago Overlaying the Original Land Grant<sup>115</sup>



### *E. Native American Protections against Adverse Possession*

It is accepted that adverse possession, like the type committed by Robb Robinson, does not apply to Indian tribal land:

Because an Indian tribe is a ward of the Government, it has been held that adverse possession does not run against an Indian tribe, even where title to the land is vested in the tribe and the tribe is incorporated under state law.<sup>116</sup>

114. Cook County Recorder of Deeds, Caldwell Reserve, Tract Book 225 B, Lot 4.5.6., pages 7–9, which culminated in the purchase from Cole and Brummel by the Cook County Forest Preserve District, in *Deeds from Cole and Brummel*, *supra* note 6.

115. The shaded area is an approximation based on Flower and Mendel, *supra* note 12, and *Plat and Description of Unsold Portion of Caldwell's Land*, *supra* note 78. A full survey, of course would need to be done to determine the actual boundaries of the land, but this is a fair approximation of the boundaries.

116. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 310 (1942). *See, e.g., 7405.3 Acres of Land*, 97 F.2d at 423 (holding that Native

As mentioned above, Pe-y-mo made attempts to sell the land as late as 1895,<sup>117</sup> even though Robinson had defeated the suit by Freeland at that time, and in spite of the twenty-year limitations period in Illinois for adverse possession.<sup>118</sup> This protection against adverse possession stems from the Trade and Intercourse Act of 1790 (also known as the Indian Non-Intercourse Act).<sup>119</sup> The principle is that a relationship of trust and protection existed between the United States and Native Americans, and that the federal government had a duty to protect Native lands from takings.<sup>120</sup> Just as real property owned by the federal government cannot be adversely possessed,<sup>121</sup> land in the possession of an Indian tribe that is under the protection of the federal government is also not subject to adverse possession.<sup>122</sup>

Had the true owner of Native American land brought suit against an adverse possessor, he would have likely been able to evict Robinson, even after the statute of limitations had run on the adverse possession claim. Individual Native American real property is protected against adverse possession if that land is granted to the Indian together with a restriction in the alienation of that land:

It is well settled that there can be no adverse possession against the federal government which can form a basis of title by estoppel, or under the statute of limitation, and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians with restrictions upon the alienation of title thereto by the Indians, so long as such restrictions upon alienation exist.<sup>123</sup>

This protection on an individual Indian's land, so long as there was a restriction in alienation, existed in case law going back to before the 1870s.<sup>124</sup> If an Indian had brought suit to evict

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American land with a restriction in its alienation could not be adversely possessed).

117. GAYFORD, *supra* note 5, at 57.

118. *Turney*, 15 Ill. at 273.

119. The statute is presently contained in 25 U.S.C. § 177 (2012).

120. *Id.*

121. RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 91.11 (2015)

122. *Id.*

123. *7405.3 Acres of Land*, 97 F.2d at 423. This case was extrapolating from the principle that an individual Indian's land could be protected, so long as there was a restriction in the alienation of the land, and expanded that protection out to tribal land in general. *Id.*

124. *See Iverson & Robinson v. Dubose*, 27 Ala. 418 (1855) (holding that adverse possession could not be applied to land owned by a Native American nor land sold until the land patent had been issued by the United States government). The Fourth Circuit in *7405.3 Acres of Land* is convinced that it is very settled law that individual Native American's land, with this restriction in its alienation, is protected from adverse possession. *7405.3 Acres of Land*, 97 F.2d at 423.

an adverse possessor from the land that was under the protection of the United States, even if the statute of limitations had run, the Native American would still be the true owner of the land.

This protection against adverse possession has also been held to apply to restricted Native American land that has been inherited by the Native American's descendants, a question addressed in the 1884 Kansas case of *McGannon v. Straightlege*.<sup>125</sup> In *McGannon*, a Native American, Pa-kan-giah had been granted a parcel of land under an 1854 treaty which had a restriction in its alienation.<sup>126</sup> Pa-kan-giah sold the land in 1859 without the required permission of the Department of the Interior, which was eventually purchased through chain of title to the defendant, Straightlege.<sup>127</sup> When Pa-kan-giah died, his wife (his only heir) executed a deed to J.G. McGannon, which was approved by the secretary of the interior.<sup>128</sup> McGannon sued to eject Straightledge, and the Kansas Supreme Court held that since the title was still "vested in the United States and an Indian—no statute of limitations could operate against such title,"<sup>129</sup> even though it had been more than twenty years the land had been improperly conveyed by Pa-kan-giah and adversely possessed by subsequent owners.<sup>130</sup>

American Indian inheritance of property is subject to the operation of federal law. If a Native American dies intestate without any heirs with ownership of land with a restriction allotment of land, the land will escheat to whatever tribe has jurisdiction over the parcel of land at the time of the allotment.<sup>131</sup> In order to escheat to the tribe, there must be no surviving descendants and family members, up to third cousins.<sup>132</sup>

The Cook County Forest Preserve District does have a defense they could raise to any potential claims by any of Caldwell's heirs. They might be considered a bona fide purchaser of the land when they purchased the land in 1917 and 1922.<sup>133</sup> A bona fide purchaser of land is a "subsequent purchaser who pays a valuable consideration for an interest in real property, without notice of an interest that a third party has in the land."<sup>134</sup> Generally, in a title dispute between the original owner and a

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125. *McGannon v. Straightlege*, 32 Kan. 524, 4 P. 1042 (1884).

126. *Id.* at 525.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* The time period for completing an adverse possession of land is of referred to as the statute of limitations for the possession.

131. 25 U.S.C. § 373a (2015).

132. 25 U.S.C. § 2206(a)(2)(B)(v).

133. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 396 (2d ed. 2007).

134. *Id.*

later bona fide purchaser, the bona fide purchaser will prevail and keep title.<sup>135</sup>

Illinois is a constructive notice state, wherein “[a] purchaser of land is not a Bona fide purchaser if he has constructive notice of an outstanding title or right in another person.”<sup>136</sup> If a purchaser of land had good reason to suspect that the land they were purchasing did not really belong to the seller, they would not be considered a bona fide purchaser, and their ownership interest in the land would not prevail over the true owner.<sup>137</sup>

There is not much case law on subsequent bona fide purchasers of protected Native American land. A Federal District Court in Kansas stated flatly that there “could be no purchaser in good faith under these proceedings” after a Native American child, by fraud, had been proclaimed dead when he was in fact alive, a falsehood which underpinned the court’s finding of a transaction of land by mistake or fraud.<sup>138</sup> When the land has not been transacted by mistake or fraud, however, a different result is likely to occur. Moreover, when significant time has passed, it can be difficult for the true owner to recover any money from the seller of a voidable title. In the nineteenth century, for example, the United States brought a suit on behalf of a Native American against the seller when their land was sold for too little without the permission of the relevant federal official.<sup>139</sup> If the United States recovered the difference between what the Native American received and what they should have received, those funds would be held in trust for the Indian or their estate.<sup>140</sup>

### F. *Obligations of the United States to Native Americans and the Oneida Cases*

Indian land is viewed as being under the protection of the United States government, and can be “extinguished only with federal consent.” Some of the fundamental principles of Anglo-American jurisprudence do not always apply when dealing with Indian claims.<sup>141</sup> There exists, as the Supreme Court has found, an undisputed trust relationship between the United States and the

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135. *Id.* at 395. The concept of a bona fide purchaser having a better claim to the land is a compromise position. The original owner maintains a cause of action against the person who sold their land, but will be unable to prevail against the honest purchaser of a title. *Id.*

136. Application of Cnty. Treasurer & Ex-Officio Cnty. Collector of Cook Cnty., 332 N.E.2d 557, 561 (Ill. App. Ct. 1975) (citations omitted).

137. SPRANKLING, *supra* note 133, at 395.

138. Laughton v. Nadeau, 75 F. 789, 791 (C.C.D. Kan. 1896).

139. United States v. Debell, 227 F. 760 (8th Cir. 1915).

140. *Id.*

141. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW, 41 (1987).

Indian people.<sup>142</sup> This trust relationship creates a fiduciary duty that is bound by federal law, regulations, and the common law.<sup>143</sup>

General trust law, and the duties that it creates, help govern what responsibilities the federal government has towards lands in its trust: “The trustee must take and keep control of a trust property, preserve it, enforce claims which constitute a part of it, defend it from attack, make it productive and keep account of what he does.”<sup>144</sup> The duty of the trustee is to exercise such a reasonable duty of care over the property as the trustee would exercise when dealing with their own property.<sup>145</sup> If a breach of trust can be established, restitution is an option upon which the wronged party can avail themselves. The trustee has an obligation to not allow property under their trust to be sold by them:

Thus, if the trustee is under a duty to retain trust property, and wrongfully sells it, the beneficiary at his option will be allowed the charge the trustee with the value of the property at the of the sale, with interest thereafter, or with the value of the time of suit with income that would have accrued if the property had been retained, or for the actual proceeds of the sale.<sup>146</sup>

The Supreme Court has held that a higher standard of care exists when dealing with Native American land.<sup>147</sup> The case law has suggested that the federal government, in regards to Native American land held under its trust is to “be judged by the most exacting fiduciary standards.”<sup>148</sup>

The Supreme Court, in a series of cases involving the involving the Oneida Tribe in New York, has established the modern case law on old Native American land claims. In their first *Oneida* case, the Court ruled, in a revolutionary decision, that very old land claims by Native American tribes could be brought in federal court.<sup>149</sup> The Court ruled that a 1795 agreement with the

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142. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324 (2011).

143. *Id.* at 2235.

144. AUGUSTUS PEABODY LORING, *A TRUSTEE'S HANDBOOK*, 5TH EDITION, 4–5 (1940).

145. *Id.* at 83.

146. *Id.* at 249. This is an example that is given as a breach of the trust, and in this case, the land would have been taken rather than sold directly by the trustee. Restitution for the taken land, however, is available for a specific breach of trust. *Id.*

147. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The actual history of bringing claims before the United States has not been as easy as that sentence would suggest. In the *Oneida* cases that will be discussed shortly, both the Federal and state courts originally denied jurisdiction over the claims. See GEORGE C SHATTUCK, *THE ONEIDA LAND CLAIMS: A LEGAL HISTORY* (1991) (giving a firsthand account of attempting to get the claim a door in court).

148. *Seminole Nation*, 316 U.S. at 286.

149. *Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985).



State of New York was invalid because it did not get the required congressional approval.<sup>150</sup>

The State of New York raised a statute of limitations defense in *Oneida II*, along with other defenses, but the Court did not apply state statute of limitations to the Indian claims.<sup>151</sup> The Court instead held that a tribe may bring a lawsuit to recover land many decades, or a few centuries, if the land was sold without the federal government's consent.<sup>152</sup> There is a desire in federal policy to protect Native Americans from having their land taken by disadvantageous conveyances.<sup>153</sup> The opinion in *Lykins v. McGrath*<sup>154</sup> gives some guidance as to why these restrictions were put in place on the grants to individual Native Americans and tribes:

What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restriction he would have had the full power of alienation the same as any holder of a fee simple title. The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should in fact receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein.<sup>155</sup>

This case law has established that there is a duty to prevent Native Americans from being taken advantage of. As we will see later in this comment, when an injustice has occurred against Native Americans land holdings, Congress has sometimes stepped in to negotiate a way to redress the wrongs that have been committed, no matter how long ago the wrongs occurred.<sup>156</sup>

In *City of Sherrill v. Oneida Indian Nation*, the Supreme Court, however, recently put additional restrictions on how a tribe may assert its possessory rights to lands that were taken from it

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150. *Id.* at 235.

151. *Id.*

152. *Id.* at 235–236.

153. COHEN, *supra* note 116, at 221.

154. *Lykins v. McGrath*, 184 U.S. 169, 171–72 (1902). This is another case where a Native American sold their land with a restriction in alienation to a bona fide purchaser without the permission of the required member of the federal government, in this case the secretary of the interior. The Court ruled that although the grantee had died before the secretary of the interior could grant his permission, although the land had been granted, the permission of the secretary was applied retroactively. When the heirs of the grantee filed suit against the bona fide purchaser of the land. In this case, much different than Billy Caldwell's land, the permission was granted by the relevant federal official. *Id.* at 173.

155. *Id.*

156. See WILKINSON, *supra* note 141, at 37–41 (describing protections against encroachment generally for Native American land).

when many decades have passed.<sup>157</sup> The court asserted that the long passage of time precluded the Oneida Indian Nation from reasserting their sovereignty over land they had purchased, and that the defense of laches stopped the Oneidas from reasserting their sovereign control over their property.<sup>158</sup> The Federal Court of Appeals for the Second Circuit went further than the Supreme Court, holding that a suit by an Indian tribe for trespass damages would be barred under *Sherrill*, because trespass damages are based on a possessory right.<sup>159</sup>

### G. Other Causes of Action in Native American Land Claims

Besides suing for ownership rights to the land and for trespass damages, there have been a few other important bases for lawsuits to recover value for old land claims. The Sioux were able to recover damages for their territory in the Black Hills that had been taken in 1877,<sup>160</sup> using the takings clause of the Fifth Amendment as the basis for recovering damages.<sup>161</sup> After the first *Oneida* case, the Passamaquoddy Indian Tribe was able to successfully bring a lawsuit against the United States government for a breach of its duty as a trustee of Native American land.<sup>162</sup> In this case, the State of Massachusetts, the predecessor to the State of Maine, negotiated with the Passamaquoddy Tribe in 1794 to have the Tribe cede all its land, in violation of the Indian Non-Intercourse Act.<sup>163</sup>

While court decisions have not always been in favor of old claims, settlements have been reached in other cases resolving similarly old claims. For example, in 1998, a claim to land originating from the 1833 Treaty of Chicago, given to a Native American named Shab-ey-nay and his tribe, was brought through

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157. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

158. *Id.* at 217.

159. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 278 (2d Cir. 2005), *cert. denied*.

160. *Sioux Nation of Indians v. United States*, 220 Ct. Cl. 442, 445 (U.S. 1979). This case was initially filed with the Indian Claims Commission, which has since been abolished. The Tribe had sued because the agreement of 1868 was shown to be invalid because not a high enough percentage of the Sioux Tribe had approved. The Tribe then moved, under the Fifth Amendment's taking clause, for just compensation for the land taken by the United States government. The United States Court of Claims would award the Tribe value for the land taken, which the United States Supreme Court would uphold that decision. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). The Sioux's further unsuccessful litigation, to obtain not just damages but the actual land will be discussed later in this paper.

161. *Sioux Nation of Indians*, 220 Ct. Cl. at 446.

162. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975).

163. *Id.* at 652.

the Department of the Interior to DeKalb County, Illinois.<sup>164</sup> Eventually, with the help and support of the then-Speaker of the House of Representatives, a settlement was reached, wherein the Potawatomi Tribe was allowed to purchase the land, and open a bingo center upon it.<sup>165</sup>

The Obama Administration also recently settled a class action lawsuit brought by Native American representatives to settle mismanagement of Indian land claim trusts.<sup>166</sup> The suit was brought against the United States government for a breach in its duty as trustee to the land payments, after decades of mismanagement by the Department of the Interior.<sup>167</sup>

These are some of the recent settlements and lawsuits that Native American tribes have brought. A claim brought by a potential heir to Billy Caldwell's land would have to apply the particulars of their claim to the existing case law and history.

### III. HOW A CLAIM WOULD BE BROUGHT

"If we ever owned the land we own it still, for we never sold it."<sup>168</sup>

#### A. *Would Any Potential Heirs Be Able to Bring a Claim for the Unsold Land of Billy Caldwell?*

Whether a claim could be successfully brought depends largely upon whether the Indian Bureau in the 1870s was correct in their assertion that Billy Caldwell had not sold the 160 acres of land.<sup>169</sup> It also depends on whether the adverse possession by Robb

164. Letter from John G. Leshy, Department of the Interior to Dennis Hastert Speaker of the United States House of Representatives and Governor George Ryan, (Jan. 18, 2001), <http://dekalbcounty.org/PBPN/ADI011801.pdf>.

165. Letter from Dennis Hastert, Speaker of the United States House of Representatives to Ray Brockman, DeKalb County Administrator, (July 26, 2006), <http://dekalbcounty.org/PBPN/LCDH0706.pdf>; 25 U.S.C. § 465 (2012); Intergovernmental Agreement between DeKalb County Government and the Prairie Band Potawatomi Nation, Feb. 20, 2008, <http://dekalbcounty.org/PBPN/agreement.pdf>.

166. The litigation was brought eventually in the case of *Cobell v. Salazar*, 387 U.S. App. D.C. 339, 573 F.3d 808 (2009). After the Appeals Court's ruling, a settlement was reached for \$3.4 billion. Patrick Reis, *Obama Admin Strikes \$3.4B Deal in Indian Trust Lawsuit*, N.Y. TIMES, Dec. 8, 2009, [www.nytimes.com/gwire/2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-l-92369.html](http://www.nytimes.com/gwire/2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-l-92369.html).

167. See *Cobell v. Norton*, 240 F.3d 1081, 1089 (D.C. Cir. 2001) (giving an account of the mismanagement of the government's early attempts at reform).

168. Hinmatóowyalahq'it, or Chief Joseph Young, *An Indian's Views of Indian Affairs*, 128 NORTH AMERICAN REV., 419 (1879), <http://ebooks.library.cornell.edu/cgi/t/text/pageviewer-idx?c=nora;cc=nora;rgn=full%20text;idno=nora01284;didno=nora01284;view=image;seq=0420;node=no-ra0128-4%3A7>.

169. *Plat and Description of Unsold Portion of Caldwell's Land*, *supra* note

Robinson was a valid taking of the land. Billy Caldwell did sell most the land that he was granted in the 1829 treaty,<sup>170</sup> and the Office of Indian Affairs did, in their first review of the land claim by Pe-y-mo, list that the unsold portion of the land was 160 acres.<sup>171</sup>

If the Office of Indian Affairs was correct in its report in 1874, the adverse possession by Robb Robinson would not be valid.<sup>172</sup> This land grant is the type protected by the 1790 treaty.<sup>173</sup> In addition, case law has repeatedly confirmed that this land is immune from the type of adverse possession that Robinson performed upon the Indian Reserve.<sup>174</sup> This land existed under the protection of the United States,<sup>175</sup> and the property right could only be extinguished by either the rightful owner selling the land with the permission of the President of the United States of America,<sup>176</sup> or by a federal action.<sup>177</sup> Under common law, real property rights can never be abandoned, they can only be extinguished, transferred, or taken through adverse possession.<sup>178</sup>

The chain of title that ended with the Cook County Forest Preserve District began with the Robinson claim upon the land.<sup>179</sup> The Forest Preserve District purchasing the land, and using it for

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170. Memorandum of conveyances by Billy Caldwell, Feb. 11, 1873, in Peter Gayford collection at the Newberry Library, original at Billy Caldwell Reserve 422A Papers, U.S. National Archives, College Park, MD.

171. Deed from Peymo (alias) Caldwell to Benjamin F. Freeland (Mar. 28, 1873), in Cook County Illinois Recorder of Deeds, Document # 106253, Tract Book 225 B.

172. *7405.3 Acres of Land*, 97 F.2d at 423; see also COHEN, *supra* note 116, at 310 (discussing the inapplicability of adverse possession).

173. *Plat and Description of Unsold Portion of Caldwell's Land*, *supra* note 78.

174. *7405.3 Acres of Land*, 97 F.2d at 417, 423 (4th Cir. 1938).

175. *Id.*

176. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

177. See WILKINSON *supra* note 141, at 37–41 (on the general hesitation of courts to allow anything less than federal action to extinguish tribal rights to land). This branch of judicial thought reach its apex in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). The facts are not entirely similar to a potential claim from Caldwell's land, as it was only seeking the right to occupancy rather than ownership or compensation, but it does stand for enforcing promises from another century.

178. Lior Jacob Strahilevitz, *The Right to Abandon*, JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 455, 34 (2009). This paper puts forward a strong case that abandonment should be recognized as a concept in real property, as it is in personal property, as well, but it is not a currently recognized concept for real property. Real property can be taken through adverse possession, but it cannot be abandoned. The immunity to adverse possession is what powers these Native American claims. In most other instances, when an entity has been occupying the land for a century, they will become the true owner of the land.

179. 225b Cook County Recorder of Deeds, Caldwell Reserve, Tract Book 225 B, Lot 4.5.6., page 7.

nearly a century would not extinguish the claim of any heirs of Billy Caldwell.<sup>180</sup> Their adverse possession of the land would not be valid for the same reasons as why Robb Robinson's adverse possession was not valid,<sup>181</sup> and their purchase of the land would not extinguish the claim of the heirs of Billy Caldwell.<sup>182</sup> "[T]he Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or as sometimes expressed, as sacred as the fee of the United States in the same lands."<sup>183</sup> As this land could not be taken from the United States, so too could it not be taken from the heirs of Billy Caldwell.<sup>184</sup>

As discussed earlier, some of Billy Caldwell's relatives were not Native Americans. His purported son, Pe-y-mo, dissolved his ties with the Kickapoo Tribe in 1870, and became an American citizen.<sup>185</sup> Billy Caldwell also had British-Canadian half-siblings, who had brought a claim to his land in the 1855,<sup>186</sup> and whose descendants might still be able to put a claim upon the land.<sup>187</sup> Whether the protections granted against adverse possession to this type of land grant also apply to non-Native Americans who have come into the land via intestate inheritance would be new case law. If the protections were broken, however, it would make any claim difficult to pursue, as Robinson would have successfully adversely possessed the land when the statute of limitations had run.<sup>188</sup>

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180. See *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240–245 (1985), (holding that statute of limitations defenses do not apply to land claims brought by Native American tribes).

181. *7405.3 Acres of Land*, 97 F.2d at 423.

182. See *Iverson & Robinson v. Dubose*, 27 Ala. 418 (1855); *in accord* with *Ladiga v. Roland*, 43 U.S. (2 How.) 581 (1844).

183. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903); *see also* *Johnson v. McIntosh*, (1823) 8 Wheat. 543, 574, and *Beecher v. Wetherby*, (1877) 95 U.S. 517, 525. *Lone Wolf* stood for the proposition that Congress, and Congress alone, could abrogate or violate an Indian treaty, as a later federal law made by Congress was equal in authority to the federal treaty that Congress was violating. Although cases like *Lone Wolf* have been justly criticized for allowing later Congressional actions to go against the prior treaties that they had made. That caveat aside, these cases also stand for the principle that only Congress can choose to negate a grant of land made in a federal treaty. PEVAR, *supra* note 68, at 50.

184. *Id.*

185. Testimony of J.A.S. Thomas, recorded in document #106253, p. 106 in Tract Book 225 B, at the Cook County Recorder of Deeds. Thomas is a representative of the District Court of Kansas, and there is no testimony given to impeach him.

186. GAYFORD, *supra* note 5, at 49–50.

187. This would flow from Billy Caldwell dying intestate, and not having any children alive at his death to inherit his property. In that case, it would flow to any siblings Caldwell might have had, in this, his half-siblings though this father. 25 U.S.C. § 2206(a)(2)(B)(i)–(iv) (2012).

188. Under the requirements for adverse possession under *Turney*, 15 Ill. at 273.

Other tribes have brought older claims for land that was taken, whether by federal action or by other actors. The Sioux Nation successfully brought a suit, beginning in 1956, to overturn an 1877 Congressional action<sup>189</sup> that had removed the Black Hills from the Sioux Tribe without the required amount of support from the Tribe.<sup>190</sup> The Black Hills' land had been taken by the United States, and given to prospectors after gold had been found there.<sup>191</sup> The time lapse did not bar the Sioux Tribe from seeking damages in the case.<sup>192</sup> In the earlier *Oneida* case, where the land had been taken back in 1795 without federal permission, the tribal claim upon the land was allowed to proceed.<sup>193</sup>

This claim, however, would be originating not out of a tribal claim, but a claim made by an individual Native American's land claim that had a restriction in its alienation.<sup>194</sup> This type of land grant by treaty, like land grants to tribes as a whole, is under the protection of the federal government.<sup>195</sup> The shield against adverse possession stems from that relationship of the United States.<sup>196</sup> If that protection that tribal lands are granted allows to them to bring these very old claims, then a similar shelter to Billy Caldwell's heirs should allow them to bring a claim as well.<sup>197</sup>

### *B. Were Subsequent Purchasers Bona Fide Purchasers?*

Subsequent purchasers of the land might be able to bring a defense to any claim by the heirs of Billy Caldwell to gain ownership of the land—they would likely claim<sup>198</sup> that they were bona fide purchasers of the disputed 160 acres. The claim to being a bona fide purchaser would be superior even to a claim, brought in equity, by the United States on behalf of those under its protection, like any heirs of Billy Caldwell.<sup>199</sup> To be able to claim

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189. 15 Stat. 635, commonly referred to as the treaty of Fort Laramie or the Sioux Treaty of 1868.

190. See *Sioux Nation of Indians*, 220 Ct. Cl. at 445; *United States v. Sioux Nation of Indians*, 448 U.S. at 371; see also *supra* text accompanying note 160.

191. PEVAR, *supra* note 68, at 49.

192. *Id.* at 50.

193. *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 670 (1974).

194. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

195. *7405.3 Acres of Land*, 97 F.2d at 423.

196. *Id.*

197. WILKINSON, *supra* note 141, at 41. Wilkinson notes that there has been, at least in regards to claims seeking damages, extensive rulings that would normally bar claims as old as one to these eighty acres of land. Seeking more than damages is more difficult, as we shall see, but most of the usual time bar defenses simply would not apply to a suit brought by a valid claimant on this land. *Id.*

198. This was the claim that was successfully made by the subsequent purchaser in *Debell. Debell*, 227 F. at 763.

199. "The title of a bona fide purchaser of land subsequent to the issue of the patent is superior to the equitable claim of the United States to avoid it for

the protection of being a bona fide purchaser, the County would have to show that it was a subsequent purchaser of the land who exchanged valuable consideration without notice of an interest that a third party would have in the land.<sup>200</sup> In Illinois, they would need to establish that they had not received constructive notice in order to be considered a bona fide purchaser.<sup>201</sup>

The County could argue that it was not on notice that this land might have belonged to an heir of Billy Caldwell. If they had checked the land tracts with the Cook County Clerk, they would see that the 160 acres of land belonged to the owners that they had purchased it from.<sup>202</sup> They would also find that the titles that they were purchasing, via condemnation, had originated from Robinson.<sup>203</sup> They would find there had been a lawsuit originating from Freeland, but that it had been dismissed because Freeland did not own genuine title to the land.<sup>204</sup> The County would argue that they had no reason to suspect that the titles that they were purchasing were not valid. The prior purchasers of the land would claim the same thing—they had purchased the land with no good reason to believe that the sellers were not the actual sellers, and even if an heir of Caldwell were to bring a claim, they would have superior title to the land to the claimant,<sup>205</sup> or the United States.<sup>206</sup>

A claimant, on the other hand, could argue that all of the subsequent purchasers of the 160 acres should have been on notice that there was another owner with an interest in the land.<sup>207</sup> If the subsequent purchasers would have searched the county records, they would have found the lawsuit filed against Robinson by Freeland.<sup>208</sup> If the purchasers would have found the documents

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fraud or error of law in the issue of it.” *Debell*, 227 F. at 763. See also *United States v. Detroit Timber & Lumber Co.*, 131 F. 668, 677 (8th Cir. Ark. 1904) and *Wright-Blodgett Co. v. United States*, 236 U.S. 397, 402–403 (1915).

200. SPRANKLING, *supra* note 133, at 396, 400.

201. Application of Cnty. Treasurer & Ex-Officio Cnty. Collector of Cook Cnty., 332 N.E.2d 557, 561 (1975).

202. 225b Cook County Recorder of Deeds, Caldwell Reserve, Tract Book 225 B, Lot 4.5.6., page 7.

203. *Id.*

204. As his adverse possession would have failed under *7405.3 Acres of Land* 97 F.2d at 417.

205. See *Wilson v. Wall*, 73 U.S. 83, 91 (1867), (holding that a subsequent purchaser of Native American land would not be on constructive notice if they did not know the terms of a treaty affected land that they had purchased that could have invalidated their purchase).

206. *Debell* 227 F. at 763.

207. See *Pickering*, 145 U.S. at 30–31, (accepting that constructive notice would be given to a subsequent purchaser if there was on file an approval of the President for a similar land transfer). This would be a similar argument, only that a review of the land transfer documents in the Office of Indian Affairs would reveal that permission had not been granted on this land. *Plat and Description of Unsold Portion of Caldwell’s Land*, *supra* note 78.

208. *Benjamin F. Freeland v. Robb Robinson*, S65292, (Cook County

relating to that lawsuit, they would have found testimony given that there was a possible son of Billy Caldwell who had tried and failed to sell the land.<sup>209</sup> The Tract Books themselves are marked “Caldwell’s Reserve.”<sup>210</sup> This should have put them on notice that there was a possible claim upon the land from a Native American, and they could have requested the documentation from the Indian Bureau. They would have found that the Indian Bureau had concluded that there were eighty acres of land that Billy Caldwell had not sold.<sup>211</sup> Any possible heir could claim, reasonably, that any possible buyer of these eighty acres of land could have and should have known that in the late nineteenth century that there was another possible claimant upon the land.<sup>212</sup>

They could bolster their arguments by pointing to the Cook County Forest Preserve’s own history of their purchases of the Indian land, and compare it to the history of how they purchased similar Native American land, the land of Chief Robinson. Alexander Robinson had been granted two sections of land in the same treaty as Billy Caldwell,<sup>213</sup> and with the same restrictions in its alienation as Caldwell was given.<sup>214</sup> In its early history of itself, the Forest Preserve District describes the two land purchases that would create some the earliest large forest preserve tracts, the land that would become Caldwell Woods and Robinson Woods on the northwest side of Chicago.<sup>215</sup> The Forest Preserve District writes that Cook County “came into possession of big tracts which passed onto their children and have come into the hands of the Forest Preserve District. We refer to Billy Caldwell and Alexander Robinson.”<sup>216</sup>

Most of Robinson’s land was purchased by Cook County in condemnation procedures, although the daughter of Chief

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Superior Court, 1876).

209. *Id.* The trial documents that are available are, admittedly, a little confusing without the context of knowing that Freeland had tried to buy the land from Pe-y-mo. All that the Answer to complaint states is that Freeland is not the actual owner of the land, and the rest of the documentation is relating to Pe-y-mo’s relations to Billy Caldwell. That said, it would have led any purchaser them down the path of finding out about Pe-y-mo and his claim to the lands.

210. 225b Cook County Recorder of Deeds, Caldwell Reserve, Tract Book 225 B, Lot 4.5.6., page 7.

211. *Plat and Description of Unsold Portion of Caldwell’s Land*, *supra* note 78.

212. GAYFORD, *supra* note 5, at 50–57. Pe-y-mo tried, repeatedly to sell the land, and was unable to do so, for various reasons. But a paper trail was created, preserved in the National Archives, in the Billy Caldwell Reserve 422A Papers.

213. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

214. *Id.*

215. COOK COUNTY (ILL.). BOARD OF FOREST PRESERVE COMMISSIONERS, THE FOREST PRESERVES OF COOK COUNTY, OWNED BY THE FOREST PRESERVE DISTRICT OF COOK COUNTY IN THE STATE OF ILLINOIS 20–22, 104–106 (1918).

216. *Id.* at 20.



Robinson was allowed to live on the land until her death.<sup>217</sup> Although both Robinson's and Caldwell's land were purchased through condemnation proceedings, Cook County knew, when it purchased the land, that there were heirs living on Robinson's land that might have a claim upon the land. In Caldwell's land case, there is just a reference that the land passed to the children,<sup>218</sup> but there is no mention of how the county actually purchased the land.<sup>219</sup> All of this evidence points to the conclusion that Cook County should have been on notice that there was another potential owner, even after Pe-y-mo died in the 1890s.

### *C. Was Permission Constructively Granted for the Sale of the 160 Acres?*

The 1884 decision by the Department of the Interior raises a point that needs to be addressed by any potential heirs: were the two conveyances of the northernmost 160 acres of land approved, constructively, by President Van Buren when he approved the conveyance of 720 acres to Arthur Bronson?<sup>220</sup> The Department of the Interior's argument is that since President Van Buren's permission to this particular conveyance was granted in 1838, after all of the land had been sold in 1833 and 1834, Van Buren must have been approving *all* the sales of the 1600 acres of land.<sup>221</sup>

This argument does not hold up scrutiny, however. Exhibit 5 shows the pages from the Miscellaneous Deeds Book where President Van Buren actually approved the sales.<sup>222</sup> The details of the individual conveyance are listed, with the amount of land

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217. *Id.* at 81. The Indian homestead at Robinson Woods would remain until a fire destroyed the house in 1955, and the County condemned and purchased the property. A brief history of the Robinson family history on the land can be found at <https://chicagohistorytoday.wordpress.com/2015/02/04/chicago-robinson-family-burial-ground/>. The Robinson land, which has been given to his children, was actually at the center of the *Pickering*, as it was the children's sale of the land that was retroactively approved by President Grant in 1871. *Pickering*, 145 U.S. at 313. The land grant of Alexander Robinson is not completely at rest, as descendants of Chief Robinson five years ago began pursuing a claim against Cook County for the return of the land that has been purchased by Cook County. [www.suffredin.org/news/newsitem.asp?newsitemid=4128](http://www.suffredin.org/news/newsitem.asp?newsitemid=4128) The Difference between the possible Robinson suit for recovery and a claim made by Caldwell's heirs is that all of the land was sold by Robinson's children and approved, retroactively, by the President. The Robinson's family claim is based upon Robinson's will being invalid, and their lawsuit remains unresolved.

218. COOK COUNTY (ILL.). BOARD OF FOREST PRESERVE COMMISSIONERS, *supra* note 215, at 20.

219. *Id.*

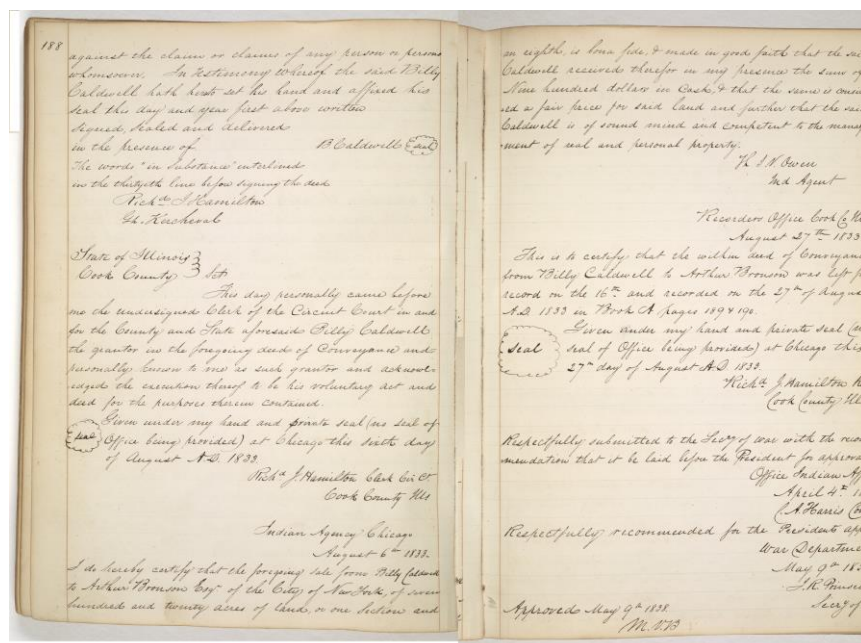
220. Teller, *supra* note 62, at 3–4.

221. *Id.* at 4.

222. Miscellaneous Deeds Volume 3, United States National Archives, 188–189.

being sold, and the amount that it was purchased for, signed and sealed by Billy Caldwell.<sup>223</sup> That individual purchase is then approved by the Clerk of the Circuit Court of Cook County, the Indian agent, the Office of Indian Affairs, the War Department, and then the President of the United States.<sup>224</sup> There is no mention of the other conveyances.<sup>225</sup> Exhibit 5 shows an example of the approval process that other conveyances by Caldwell undertook.

Exhibit 5—The Approval of Arthur Bronson's Land Purchase<sup>226</sup>



These same procedures were followed for the subsequent approvals of land that occurred during the Tyler Administration. The land that was sold to the heirs of Richard Hamilton,<sup>227</sup> to Seth Johnson,<sup>228</sup> to Philo Carpenter,<sup>229</sup> and to Lieutenant Kingsbury<sup>230</sup> all followed the same procedure as the land conveyance to Arthur Bronson. Had the permission for Arthur Bronson's purchase been

223. *Id.* at 188.

224. *Id.* at 188–189.

225. *Id.*

226. *Id.*

227. Miscellaneous Deeds Volume 4, United States National Archives, 69–70.

228. *Id.* at 67.

229. *Id.* at 71–72.

230. *Id.* at 62–64.

enough, there would have been no need to get the subsequent permissions that occurred in the 1840s. Moreover, for the northwesternmost eighty acres, there is no record of the deed in pre-fire land records,<sup>231</sup> and the court decision approving Frances Allyn's ownership of the land was rejected by President Tyler in 1843.<sup>232</sup>

There, additionally, is no record of a constructive permission of the President to a land granted by treaty.<sup>233</sup> In *Pickering*, Chief Robinson had divided his land between his three children, one of whom sold the land to the without the permission of the President.<sup>234</sup> The approval was granted in 1871, which is after the conveyance had occurred, but there is no discussion of whether the other land conveyances involved with Robinson's land had some form of constructive permission granted.<sup>235</sup> Instead, the Court concerns itself solely with that particular sale of land.<sup>236</sup> That is how these kinds of sales, and the question of whether permission was granted, should be analyzed—whether each particular conveyance of land had the necessary permission. Martin Van Buren, in 1838, did not approve any additional land sales; he only approved the sale of 720 acres of land for \$900 to Arthur Bronson.<sup>237</sup> All of the other sales required individual permission, and the constructive permission that the Department of the Interior conjures up in 1884 is unsupported in nineteenth-century case law.

#### D. Who Would Be Able to Bring the Claim?

Assuming that a claim is able to be brought for these unsold eighty acres of land, it must be ascertained who might be able to bring a claim for this land. There are four possible sources of a line that could bring a claim: (1) any living heirs of Pe-y-mo; (2) the Kickapoo Indian Tribe, of whom Pe-y-mo was a member; (3) the Potawatomi Indian Tribe; and (4) other relatives of Billy Caldwell,

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231. Ante-Fire Ledger Records, Tract Book 307, Block 6, p. 29, in Property Insights collection.

232. Teller, *supra* note 62, at 2.

233. CENTURY DIGEST, CENTURY EDITION OF THE AMERICAN DIGEST: B A COMPLETE DIGEST OF ALL REPORTED AMERICAN CASES FROM THE EARLIEST TIMES TO 1896, 209–211 (1897). This is the section of the digest on Native American sales that require the permission of a legislature, a court, or officer. It covers court cases springing out of the same treaty that granted land to Caldwell's land, *Pickering v. Lomax*, wherein a portion of the land was sold by Chief Robinson. *Id.*

234. *Pickering*, 145 U.S. at 313.

235. *Id.*

236. *Id.*

237. Miscellaneous Deeds Volume 3, United States National Archives, 188–189.

particularly those in the line of his half-siblings through his British father, William C. Caldwell.<sup>238</sup>

The claim of Pe-y-mo must first be examined. Billy Caldwell died, as far as anyone knows, without a will.<sup>239</sup> In Freeland's lawsuit against Robinson, there is a substantial amount of testimony establishing Pe-y-mo as the son as Billy Caldwell, but none stating that his claim to the land is through a will.<sup>240</sup> His claim comes instead through intestate inheritance.<sup>241</sup> Under the relevant federal law handling intestate property distribution, any living spouses shall receive one-third of the property, and any remaining property would be left to his eligible heirs.<sup>242</sup> At the time of Billy Caldwell's death, he was survived by a wife, Saqua LeGrand,<sup>243</sup> who was probably the mother of Pe-y-mo, and who died in the 1840s.<sup>244</sup> If Pe-y-mo was the only surviving child of Billy Caldwell, he would get the other two-thirds of the property.<sup>245</sup> Moreover, if he was the son of Saqua LeGrand and Billy Caldwell, and if Saqua LeGrand also died intestate, he would then inherit the remaining third of the property.<sup>246</sup>

If Pe-y-mo also died intestate, and there were no other eligible heirs,<sup>247</sup> his property would then go to "to the Indian tribe with jurisdiction over the interests in trust or restricted lands."<sup>248</sup> Pe-y-mo belonged to the Kickapoo Tribe,<sup>249</sup> and if he had no natural heirs, the land might escheat to either the Kickapoo Tribe or the Potawatomi Tribe, depending on what tribe the Department of the Interior ruled had jurisdiction over the land.<sup>250</sup> In 1870, he dissolved his ties with the Kickapoo Tribe, and became a United

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238. GAYFORD, *supra* note 5, at 41.

239. GAYFORD, *supra* note 5, at 49.

240. Testimony of J. Elihu Osborn and testimony of Edwin Wheeler, Benjamin F. Freeland v. Robb Robinson, S65292.

241. 25 U.S.C. § 2206(a)(2)(A)(i), (B)(i) (2012).

242. 25 U.S.C. § 2206(a)(2)(A)(i), (B)(i).

243. GAYFORD, *supra* note 5, at 50.

244. *Id.*

245. 25 U.S.C. § 2206(a)(2)(A)(i).

246. *Id.*; 25 U.S.C. § 2206(a)(2)(B)(i).

247. There is no evidence of any children of Pe-y-mo, or any evidence that he did not have any children. GAYFORD, *supra* note 5, at 58. Any attempt to bring a claim for this land would have to go through probate court to determine who the rightful heirs are.

248. 25 U.S.C. § 2206(a)(2)(B)(v).

249. Testimony of J.A.S. Thomas, recorded in document #106253, p. 106 in Tract Book 225 B, at the Cook County Recorder of Deeds.

250. For a similar case of multiple tribes claiming escheated land, *see* Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1458 (9th Cir. 1994). It is beyond the scope of this paper to determine which tribe would be judged as having jurisdiction in this case.

States citizen.<sup>251</sup> If the land did pass to Pe-y-mo, it is unknown whether Pe-y-mo had any surviving heirs.<sup>252</sup>

However, even if Pe-y-mo died without any children, surviving widow, or surviving siblings, the land might still pass onto more distant relatives, like his first cousins.<sup>253</sup> Billy Caldwell had nine half-siblings through his British father, William Caldwell, seven of whom survived to adulthood.<sup>254</sup> If Pe-y-mo had no children, the descendants of Billy Caldwell's half siblings would be able to bring a claim upon the land.

Pe-y-mo's descent from Billy Caldwell was not uncontested, however. There were affidavits given during Freeland's lawsuit that Pe-y-mo was not the son of Billy Caldwell, but something akin to a stepson.<sup>255</sup> Pe-y-mo, although accepted by the Office of Indian Affairs, might not have been able to receive the land through intestacy if he was not Caldwell's son.<sup>256</sup> Whether Pe-y-mo was in fact the legitimate son of Billy Caldwell would not matter unless Pe-y-mo had a wife of children of his own that the land would pass to. If he did not, the interest in the land would pass directly to Billy Caldwell's siblings, through whatever surviving line might have issued from them.<sup>257</sup> It is therefore most likely that the various, and perhaps numerous, descendants of Billy Caldwell's half-siblings would have the best to claim to the land.

### *E. What Kind of a Cause of Action Could an Heir of Caldwell Bring?*

There have been several different types of lawsuits brought by Native Americans to recover land or recover value for land that was taken from them. The success, or lack thereof, of these prior lawsuits can guide what type of suit an heir could potentially bring.

#### *1. Could a Claimant File Suit to Recover the Land Itself or for Trespass Damages?*

If a valid claimant were to file suit to try and gain ownership of the 160 acres, the ownership transfer might be considered too disruptive to be allowed to go forward. Under the concepts put forward in *Sherrill*, the ownership of the land, particularly under

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251. Testimony of J.A.S. Thomas, recorded in document #106253, p. 106 in Tract Book 225 B, at the Cook County Recorder of Deeds.

252. GAYFORD, *supra* note 5, at 50.

253. 25 U.S.C. § 2206(a)(2)(A)(i).

254. GAYFORD, *supra* note 5, at 5.

255. Testimony of W. Y. Tasse, *Benjamin F. Freeland v. Robb Robinson*, S65292.

256. 25 U.S.C. § 2206(a)(2)(A)(i).

257. *Id.*

tribal ownership, might be too disruptive to be allowed to go forward under tribal sovereignty.<sup>258</sup> The Court held that:

However, the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.<sup>259</sup>

These same concerns might doom any attempts to bring Caldwell's land under tribal sovereignty, at least through litigation. This ruling is limited to situations in which a tribe is attempting to reestablish its authority after decades of ownership by non-Indians.<sup>260</sup> This might be seen as particularly disruptive, in light of the Potawatomi Tribe's intended usage of the land that they recently purchased in DeKalb County. Specifically, the Potawatomi Tribe has been trying to build a bingo center in that land,<sup>261</sup> and it seems, given the location, that there is a strong possibility that a tribe might try to build a casino if the land was put under their authority.<sup>262</sup> The City of Chicago has been attempting to get permission to build its own casino for some time.<sup>263</sup>

It would almost definitely be seen as too disruptive, if the claim was filed for possession of the land itself under *Sherrill*, considering that the land was last occupied by a Native American

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258. In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Oneida Indian Nation was attempted to reassert tribal authority over 300,000 acres of land in upstate New York that had been wrongly taken from the Indian Nation. The Oneida nation, with funds that had been received in the *Oneida I and II* lawsuits, purchased the land and attempted to immunize itself from paying property taxes to the City of Sherrill. The Court held that giving the Oneida Indian Nation sovereignty over the land they had purchased could not be allowed.

259. *City of Sherrill*, 544 U.S. 197 at 221.

260. PEVAR, *supra* note 68, at 22.

261. Rhonda Gillespie, *DeKalb County Board to consider Potawatomi bingo resolution*, DAILY CHRONICLE, Aug. 17, 2015, [www.daily-chronicle.com/2015/08/14/dekalb-county-board-to-consider-potawatomi-bingo-resolution/aj4u0s/](http://www.daily-chronicle.com/2015/08/14/dekalb-county-board-to-consider-potawatomi-bingo-resolution/aj4u0s/) and Dennis Whittlesey, Letter to Jeffrey Nelson at the National Indian Gaming Commission (Oct. 1, 2007), <http://dekalbcounty.org/PBPN/SAO100107.pdf>. The attempts to build a bingo center in DeKalb have been stalled for years, as the Potawatomi Tribe has been trying to work with federal authorities and the Illinois gaming commission to get the authority.

262. See PEVAR, *supra* note 68, at 275–289 (on the history of Indian gaming). “Indian gaming has been the single most important catalyst for the economic advancement of Indian Tribes, their reservations, and their surrounding communities.” *Id.* at 275.

263. Natasha Korecki, *Chicago Casino Bill Could Finally Surface in Illinois Senate Committee*, CHI. SUN-TIMES, May 28, 2015, <http://chicago.suntimes.com/chicago-politics/7/71/643228/casino-bill-surface-illinois-senate-committee>.

in 1841.<sup>264</sup> If a claimant pursued a trespass claim, it is very likely to fail in the same way that *Cayuga Nation* was dismissed by the U.S. Court of Appeals for the Second Circuit. The Supreme Court did not grant certiorari to review the Second Circuit's decision, and the Circuit Court's logic that trespass damages have to be based on possessing the land would likely be mirrored in a decision in the Seventh Circuit.

2. *Could a Claimant Pursue a Claim under the Takings Clause?*

The Sioux's Nation's attempts to reclaim property rights have run into similar concerns. Although the Sioux Tribe was successful in recovering money damages for the land that was taken, the Tribe was unsuccessful in a later lawsuit to recover the Black Hills themselves.<sup>265</sup> The money awarded in the earlier judgment has never been taken from the trust, as the Tribe has continued to pursue unsuccessful litigation in a bid to recover the Black Hills themselves.<sup>266</sup>

The difference between the Black Hills litigation and a claim by Billy Caldwell's heirs is that the government did not take the land from Caldwell or his heirs directly. They instead purchased the land from subsequent, possible bona fide purchasers of the land.<sup>267</sup> The Cook County Forest Preserve District has been using the land since they purchased it, but the taking was done by Robb Robinson, not the county.<sup>268</sup>

3. *Could a Lawsuit Based on a Failure in the Fiduciary Duty of the United States Allow a Claimant to Recover the Value of Land?*

A failure in the fiduciary duty of the United States was not the cause of action that was litigated and defeated in *Sherrill*.<sup>269</sup> If

264. The last time a Native American occupied the land was in 1839, before Billy Caldwell left with his tribe. GAYFORD, *supra* note 5, at 44.

265. *Sioux Tribe of Indians v. United States*, 862 F.2d 275 (Fed. Cir. 1988). The litigation appeals a decision of the United States Claims Court, which had refused to allow a motion to vacate the previous decision awarded money for the taken land, upholding the claims court decision that "it is not for this Court to say whether the Congress of the United States will ever decide to return some or all of the Sioux land." *Id.* at 279, quoting *Sioux Tribe of Indians v. United States*, 14 Cl. Ct. 94, 105 (Cl. Ct. 1987).

266. PEVAR, *supra* note 68, at 50–51.

267. *Deeds from Cole and Brummel*, *supra* note 6.

268. COOK COUNTY (ILL.). BOARD OF FOREST PRESERVE COMMISSIONERS, *supra* note 215, at 104–106. The land sales of the land are recorded in Cook County Recorder of Deeds, Caldwell Reserve, Tract Book 225 B, Lot 4.5.6., pages 7–9.

269. "In sum, the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in

the United States could be shown to have violated its fiduciary duty, as the trustee to the lands that it put under its protection under the federal treaty, an heir might be able to recover value for the land. Native American lawsuits that have a cause of action accruing after August 13, 1946 would be brought under the Indian Tucker Act,<sup>270</sup> but older claims would have to rely on the general jurisdictional allowance for federal courts.<sup>271</sup> In order to win a lawsuit against the United States, an heir would have to show that the Government “must have had a duty to the plaintiff and must have had a duty to the plaintiff and must have breached that duty by committing a wrongful or negligent act that caused [the damage].”<sup>272</sup>

This cause of action would be combining the logic of *Debell* and the settlement in *Narragansett*. In *Debell*, United States recovered the difference of what a Native American had received for his land that had a similar restriction in its alienation.<sup>273</sup> In the *Narragansett* litigation, the Narragansett Tribe alleged that the United States had failed in its fiduciary duty when it allowed a state to remove them from their land.<sup>274</sup>

A claimant could pursue similar logic in this claim. The United States knew in the 1870s that an heir was attempting to sell the Billy Caldwell's land.<sup>275</sup> The Bureau of Indian Affairs completed a study finding that 160 acres of land had not been sold, and, as a trustee, prevented Pe-y-mo from selling the land.<sup>276</sup> The United States knew that there was an active claim upon this land that was under its protection. But the Bureau did not stop this same land from being sold repeatedly between 1876 and the 1922 between third parties, and even allowed the Cook County Forest Preserve District from purchasing the land.

The land that was given to Billy Caldwell, together with the restriction in its alienation, established that land claim as a ward of the United States.<sup>277</sup> The United States failed in its duty, as the trustee of this land claim, to protect it both from Robb Robinson's adverse possession, and from the subsequent purchase by the Cook County Forest Preserve District. The United States is held to

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Oneida II.” *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221, (2005).

270. 28 U.S.C. § 1505 (2012).

271. 28 U.S.C. § 1331 (2012). See *Oneida Indian Nation*, 414 U.S. at 663 (holding that jurisdiction for an Indian tribe was granted in federal courts under both 28 U.S.C. § 1331 and 28 U.S.C. § 1362).

272. *Menominee Indian Tribe v. United States*, 39 Fed. Cl. 441, 458 (1997).

273. *Debell*, 227 F. at 771.

274. *Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976).

275. 16 Op. Atty Gen. 325 (1879), 1879 U.S. AG LEXIS 50.

276. *Plat and Description of Unsold Portion of Caldwell's Land*, *supra* note 78.

277. See *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922) (describing a restricted allotment of land being considered as a ward of the United States).



the highest fiduciary standards in its management of Native land that has been placed into its trust,<sup>278</sup> and restitution should be available to an heir for a breach in that trust.<sup>279</sup> Therefore, as the United States failed in its duty, a claimant could sue for the value of the land, as the Narragansett's did.<sup>280</sup>

All in all, bringing a lawsuit over this land would have a difficult road to travel. First, a claimant or claimants with standing would have to be found to bring a lawsuit. Given the history of the Caldwell family, that might be very difficult to do, particularly because there might be a multitude of family members and the possibility of multiple Native American tribes all attempting to get some value for the land that was given to Billy Caldwell. Instead of an individual suit, perhaps a more comprehensive settlement should be reached for heirs of Caldwell and grantees of land like him.

#### IV. THE UNITED STATES DEPARTMENT OF THE INTERIOR SHOULD UNDERTAKE A STUDY TO ASCERTAIN WHETHER HEIRS TO INDIVIDUAL ALLOTMENTS HAVE CLAIMS

“The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two people in existence.”<sup>281</sup> The United States has recognized its position as the protector of Native American land rights throughout its history.<sup>282</sup> When a wrong has been committed against a Native American who has been placed under the protection of the United States, and a valid cause of action exists, the United States is under a duty, as a trustee, to right that wrong within the limitations set forth by Federal law and the Supreme Court.<sup>283</sup> Billy Caldwell, and the other signatories to the treaty, put these land grants under the protection of the United States of America, in exchange for the restriction in their alienation.<sup>284</sup>

The United States set itself up as the trustee of that Native land, and if it was taken unjustly, it is up to the United States, as the trustee, to make whole any claim brought by a rightful heir.<sup>285</sup> The United States should have to fulfill its duties as a trustee, and fulfill the promise that it should “be judged by the most exacting

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278. *Seminole Nation*, 316 U.S. at 297.

279. LORING, *supra* note 144, at 249.

280. *Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp.*, 418 F. Supp. 798 (D.R.I. 1976).

281. *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831).

282. *Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp.*, 418 F. Supp. 798 at 810 (D.R.I. 1976).

283. *Jicarilla Apache Nation*, 131 S. Ct. at 2324.

284. *Ewert*, 259 U.S. at 138.

285. *See Narragansett Tribe of Indians*, 418 F. Supp. at 798 (describing a similar type of suit).

fiduciary standards.<sup>286</sup> To do so, it must be willing to make whole any parties that have been harmed by the breach in its responsibilities.<sup>287</sup> There were numerous individuals granted land with restrictions in its alienation under federal treaties.<sup>288</sup> Some of these, like Billy Caldwell's, may have been conveyed without proper authorization from federal authorities. Much more land was individually allotted after the Dawes Act was passed, resulting in over one hundred million acres of land being lost to Native American tribes.<sup>289</sup> There is likely a whole class of damaged heirs of Native Americans, whose land had been placed in the trust of the United States, and whose land might have been improperly conveyed.<sup>290</sup>

A potential claimant could work with the Department of the Interior's Indian Affairs sub-department, as the Potawatomi Tribe did in their purchase of the land in DeKalb.<sup>291</sup> But an individual might also contact the Department of the Interior for help in settling any potential claims they might have.<sup>292</sup> Instead of having to go through the expense and trouble of bringing a lawsuit, the Department of the Interior could reach a settlement with any claimants.<sup>293</sup>

In determining how this could happen on a larger scale, it would be useful to first analyze how an individual claim might be resolved. Examining Billy Caldwell's claim and its potential resolution lends one such example.

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286. *Seminole Nation* 316 U.S. at 297.

287. See *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (holding that when the United States had mismanaged a trust fund, and that the United States was liable, with interest for the damages that had accrued because of its mismanagement).

288. See *supra* text accompanying note 70 (for a discussion on the frequency of these types of allotments of land in federal treaties).

289. PEVAR, *supra* note 68, at 9. *Debell* is an example of this type of allotment, and the potential for Native Americans to have those allotments improperly conveyed away from them. *Debell*, 227 F. at 762. The Native American, Pehinji was involved in a fraudulent transaction involving an Indian agent, who convinced the Secretary of the Interior to approve the conveyance. *Id.*

290. See *supra* text accompanying note 70 (for a discussion on the frequency of these types of allotments of land in federal treaties). *Iverson*, 7405.3 *Acres*, and *Debell* are all examples of litigation springing out of an improper conveyance. *Iverson*, 27 Ala. at 422; 7405.3 *Acres*, 97 F.2d at 421, and *Debell*, 227 F. at 762.

291. Letter from John G. Lesly, Department of the Interior to Dennis Hastert Speaker of the United States House of Representatives and Governor George Ryan, (Jan. 18, 2001), <http://dekalbcounty.org/PBPN/ADI011801.pdf>.

292. *Id.*

293. Not all lawsuits have had happy endings, as the *Black Hills* litigation has shown.

*A. The Conclusions of the Bureau of Indian Affairs in 1874 Must Be Verified*

In order to ascertain whether there is a valid claim for any possible heirs of Billy Caldwell, the conclusions of the Bureau of Indian Affairs must first be verified.<sup>294</sup> If Caldwell had sold all of the 1600 acres of land that he had been granted in the 1829 Treaty,<sup>295</sup> there would not be any property to have been passed down to potential heirs. All of the land would have been sold back in the 1830s,<sup>296</sup> and any discussion of unsold land has to first begin by verifying that there is some unsold land.<sup>297</sup> Pe-y-mo may have been trying to sell the land of his supposed father that may no longer have been his to sell, even if he was the only son of Billy Caldwell who gained Caldwell's property through intestate inheritance.<sup>298</sup>

This same procedure should be used for other individual allotments through federal treaties. The Department of the Interior had a file on Billy Caldwell's land—similar documentation should be reviewed for the other individual allotments. If the land was not conveyed properly, then the Department of the Interior would be responsible for trying to track down who might have a claim.

*B. The Family Lines of the Various Possible Heirs Must Be Tracked Down*

If it can be verified, through the documents held at Fort Meade, that Billy Caldwell did not sell all of the land allotted to him through the Federal Treaty of Prairie du Chien, it must be determined who might have a claim upon the land. As previously discussed, there are several different possible claimants to any land.<sup>299</sup> A genealogical study should be undertaken to see if Pe-y-mo had any children of his own, if there are any other unknown children of Billy Caldwell, if there are still descendants of Billy Caldwell's Canadian half-siblings, or if the land might have escheated to an Indian tribe, be it Potawatomi or Kickapoo. This is not a land grant to a tribe that can be tracked down with relative ease, but a land grant to a single person. Billy Caldwell is

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294. *Plat and Description of Unsold Portion of Caldwell's Land*, *supra* note 78.

295. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

296. Examination of Conveyances by Billy Caldwell, Oct. 26, 1874, a copy of which is held in the Peter Gayford Collection in the Newberry Library, the original held in Billy Caldwell Reserve 422A Papers, U.S. National Archives, College Park, MD.

297. *Id.*

298. 25 U.S.C. § 2206(a)(2)(B)(i).

299. *Id.*

the source of any possible claim, but that claim might have flowed in several different directions. A claimant must be found before standing can be established to bring any claim.<sup>300</sup> Without a claimant, be they an individual or a Native American tribe, this potential claim cannot be pursued.

The Potawatomi Tribe, as a potential heir of Billy Caldwell, might be the party best positioned to undertake the search for the party or parties able to bring a claim.<sup>301</sup> The Kickapoo Tribe might also be well positioned and incentivized to trace any possible descendants through Pe-y-mo, the probable son of Billy Caldwell.<sup>302</sup> If any lawsuit were to be brought, a thorough examination of the records would have to be undertaken first to find a claimant with standing. The second step in pursuing this potential claim is finding who those parties are.

This second step might be the most difficult part for the Department of the Interior in tracking down land grants from the nineteenth century. With Billy Caldwell, who was a famous treaty signer, there was a possible son in Pe-y-mo. But there is no record of Pe-y-mo having any children,<sup>303</sup> and the difficulties of tracking down facts after the passage of time may plague any study on the various land allotments.

### *C. The Claimants Should Seek to Recover the Value of the Land*

Once an heir is found, the next question follows: what type of suit should they bring to get some kind of value out of their claim?

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300. To establish standing, a suit bringer must have an injury in fact with is concrete and particularized, have casual connection between the injury and the conduct complained of, and it must be likely that the injury would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). For the purposes of this claim, a potential claimant would have to be someone whose property rights, and the value of the land, had been taken from them without compensation, along the line of *Yankton Sioux Tribe*. See *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357. Generally, parties may only attempt to vindicate their own rights, rather than the rights of others. *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 290 (2008) (for a discussion on when third party standing can be invoked). In deciding whether to grant third party standing, the Supreme Court inquires into whether “the party asserting the right has a ‘close’ relationship with the person who possesses the right,” and “whether there is a ‘hindrance’ to the possessor’s ability to protect his own interests.” *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). In Native American land claims, the United States, as the trustee of the Native Americans, has often brought the suits on the Native Americans behalf, using third party standing. See, e.g., *Idaho v. United States*, 533 U.S. 262 (2001); *United States v. Minnesota*, 270 U.S. 181 (1926).

301. 25 U.S.C. § 2206(a)(2)(B)(v).

302. *Id.*

303. GAYFORD, *supra* note 5, at 58.

Would it be proper to seek the land, or should they seek monetary damages for it?

1. *Re-Establishing Tribal Sovereignty Would Be Improper*

If an heir did bring a claim to either the Department of the Interior or file a suit, they would have to make sure that the basis of their suit was not barred by *Sherill* and its successor rulings. Any suit to recover the land and/or re-establish tribal sovereignty over the 160 acres is barred by *Sherill*.<sup>304</sup> The heir would have some protections in place. The heir might very well be the true owner of the land, whose claim was protected against adverse possession.<sup>305</sup> The subsequent purchasers of the land might not be seen as bona fide purchasers of the land, and therefore may not be the true owners of it.<sup>306</sup> However, the current owners of the land would be able to deploy the defense of laches to any possessory claim to the land.<sup>307</sup>

If the claimants brought a suit for trespass damages, they would, as well, likely be barred from any recovery. Trespass damages are based on a possessory right, and it flows naturally from *Sherrill* that any action based upon a possessory right, like trespass damages, would be barred by equitable defenses.<sup>308</sup> As such, any lawsuit brought by an heir of Billy Caldwell seeking trespass damages or ownership of the land would very likely be dismissed, and a different claim of action would have to be developed to recover any value for the land that was taken.

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304. *City of Sherrill*, 544 U.S. at 221.

305. *7405.3 Acres of Land*, 97 F.2d at 423.

306. *See* *Laughton v. Nadeau*, 75 F. 789, 794 (C.C.D. Kan. 1896) (holding that the subsequent purchasers would probably not be considered to be bona fide purchasers, but if a suit were brought today, there would be better defenses available to the Cook County Forest Preserve District to preserve their ownership of the land).

307. “Finally, this Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands.” *City of Sherrill*, 544 U.S. at 219; *see also* *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926), (holding that when an injustice led to Native lands being held by innumerable other parties, the Natives were due just compensation for the land that had been unjustly taken from them.) Although, of course, this land is not owned by numerous private hands, so much as one public owner, a court, as discussed above, is very likely, when interpreting *Sherrill* to use the defense of laches to bar a change in ownership.

308. *See* *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 278 (2d Cir. 2005) *cert. denied*; *see also* *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 278 (2d Cir. 2005) and *Onondaga Nation v. New York*, 500 F. App’x 87 (2d Cir. 2012) *cert. denied* for the subsequent cases denying this type of damages.

2. *A Claimant Might Be Able to Recover the Value under the Takings Clause*

If a claimant brought a suit under a theory of compensation arising out of the Takings Clause of the Fifth Amendment of the Constitution,<sup>309</sup> they would be seeking value for the land that was taken by a party like the Cook County Forest Preserve District, who purchased the 160 acres from previous purchasers.<sup>310</sup> This cause of action would rely on the precedent set by *United States v. Sioux Nation of Indians*.<sup>311</sup> As discussed above, however, the facts pertaining to Caldwell's land are different enough from that case, and from most Takings Clause jurisprudence, that sustaining that cause of action might be difficult.

For example, in *Sioux Nation*, the Sioux Tribe's land had been unjustly taken directly by the federal government.<sup>312</sup> Billy Caldwell's land was first taken by an adverse possessor, then sold to other parties, and eventually sold to the Cook County Forest Preserve District as a subsequent purchaser for good value.<sup>313</sup> Most taking clause actions deal with direct takings by the federal government, rather than downriver possessions by a government body. These differences make using the takings clause as the tool for a lawsuit unlikely to succeed, except in case where the federal government has possession of the land.

3. *A Suit Based on the United States Failing in Its Role as a Trustee Is the Most Likely to Succeed*

The final possible cause of action discussed in this paper is one brought against the federal government in its failure as trustee of the land that was given to Billy Caldwell under its protection in the Treaty of Prairie du Chien.<sup>314</sup> This cause of action is in accord with the ruling in the settlement of *Cobell v. Salazar*, wherein the United States government stepped in to right the wrongs emanating from their mismanagement of a century-old system of land trusts.<sup>315</sup> The United States erred in their management of those land trusts, and paid the beneficiaries of that trust 1.4 billion dollars.<sup>316</sup> It would also be in accordance with

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309. U.S. CONST. amend. V.

310. *Deeds from Cole and Brummel*, *supra* note 6.

311. *United States*, 448 U.S. at 409. As discussed above, the United States extinguished the Sioux's land rights without first getting the required percentage of Sioux approval. Although a breach of the trust relationship could, perhaps, have been established, it was not the cause of action that the Sioux brought their suit. *See also supra* text accompanying note 160.

312. *Id.* at 374.

313. *Deeds from Cole and Brummel*, *supra* note 6.

314. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

315. *Cobell*, 387 U.S. App. D.C. at 341.

316. *Id.*

*Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, where aboriginal title had been violated by the State of Maine, and the United States government settled with the tribes to make them whole because they had been under a trust relationship with the United States government.

A suit for privately held land, alleging a breach of that trust for land that was under the protection of the United States, would be making new case in modern Native American land claims. It is, however, in the spirit of the notion that the United States will maintain its promises, no matter how old, to Native Americans that have been harmed while under its protection.<sup>317</sup> Given the relatively recent Supreme Court decision in *Sherill*,<sup>318</sup> a different cause of action will need to be brought, instead of one based solely on possessory rights. The most likely cause of action that would achieve a recovered value for the stolen land would be based in trust law. This cause of action would allege that the United States did not protect the land of Billy Caldwell that had been placed under its care when the restriction in its alienation was placed into the terms of the federal 1829 Prairie du Chien Treaty.<sup>319</sup> If the United States is going to be held to the highest fiduciary standards in regards to Native land, as the Supreme Court has suggested,<sup>320</sup> an heir should be able to hold the United States to those standards.

The Department of the Interior could halt any of these lawsuits by stepping in, performing a study, and settling on a class action basis, as it did in *Cobell*.<sup>321</sup> This would not only avoid the cost of widespread litigation, but it would also right a historical wrong. This comment is proposing that the Department of the Interior undertake a study to see if all of the land given to Native Americans in the treaty period with restrictions on alienation were properly conveyed. This would not be as taxing a study as examining all of the protected conveyances made after the Dawes Act was passed. Instead, it would be limited to those hundreds of conveyances made in the treaty period, to ensure that the United States lived up to its promises as the trustee and protector of these lands.

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317. Whether or not the United States has always lives up to this promise, or that it has been seen to do so, is another matter. Had the United States fulfilled its promises of protecting these Native Americans lands, there would be no need for cases like *Sherrill* or the *Oneida* cases. Nor would there be any need for any legal action by the heirs of Billy Caldwell.

318. *Sherrill*, 544 U.S. at 197.

319. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

320. *Seminole Nation*, 316 U.S. at 297.

321. *Reis*, *supra* note 166.

## V. CONCLUSION

If the Bureau of Indian Affairs was correct in the 1870s that Billy Caldwell did not sell 160 acres of land,<sup>322</sup> there is a claim to be made for those acres on the northwest side of Chicago that is currently held by the Cook County Forest Preserve District. A claimant would have to be found—either by tracing the line of Billy Caldwell and his family's descendants, or through the Native American tribe that would have jurisdiction over that land. Any claimants would have to choose their cause of action very carefully in the wake of *Sherrill*,<sup>323</sup> given the Supreme Court re-opening many equitable defenses that *Oneida II* seemed to have barred from being used against old Native American land claims.<sup>324</sup>

It is possible that the land was not properly conveyed in a number of these claims, and the heirs to such land might be able to bring successful claims against the United States. If the Department of the Interior performed a study investigating such claims, and redressed additional claims, it would be making right an old wrong. Giving value for the improperly conveyed land to Caldwell's heirs would be fulfilling the promises of trust made in the 1829 Prairie du Chien Treaty.<sup>325</sup> This land was given to Billy Caldwell in exchange for the territory that became much of the Midwest.<sup>326</sup> The city could not have risen from the prairie had Caldwell not been able to bring his tribe to the negotiating table, and sign a treaty that gave most of the Midwest to the United States.

The economic benefit of the treaty of Prairie du Chien is immeasurable. It is likely that some of the land given in exchange for that section of our country was taken unjustly by private actors, and then sold to Cook County. It is right that the United States live up to its promises to Billy Caldwell, and other Native Americans to whom it gave its sacred word. If an heir should bring a claim for fair compensation for that land that was taken while under the protection of the United States, it is within the scope of its legal and moral duties to make the heir whole, and fulfill its promises to not only the last Chief of the Potawatomi of Chicago, but all Native Americans who received these promises from the United States of America.

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322. *Plat and Description of Unsold Portion of Caldwell's Land*, *supra* note 78.

323. See Jennifer R. Sunderlin, note, *One Nation, Indivisible: American Indian County in the wake of City of Sherrill v. Oneida Indian Nation*, 70 ALB. L. REV. 1563 (2007) (discussing settlements that have occurred in the wake of *Sherrill* regarding old Native American land claims).

324. *Sherrill*, 544 U.S. at 197.

325. *Treaty of Prairie du Chien*, *supra* note 3, at art. III.

326. *Id.* at art. I.



