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Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory. By Christian W. McMillen.

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myth because it enables them to justify the appropriation of the land on the grounds that it is in need of management.

In chapter 10, Madonna Moss describes Tlingit horticulture in Southeast Alaska, the northernmost portion of the Northwest Coast. Moss characterizes the Tlingits' precontact management of indigenous plants as a system of selective harvesting. The exception was tobacco, which was grown prior to European contact using the horticultural management techniques of seeding, weeding, and fertilizing. She proposes that it was their expertise with tobacco that enabled these people to raise the horticultural crops introduced in the eighteenth century successfully.

In the final case study, Douglas Deur describes the creation and maintenance of estuarine gardens by indigenous communities. *Keeping it Living* is a shining example of scientific reevaluation and concentrated inquiry of a long-held perspective, and it is as necessary as it is exemplary.

Laurie Osher and Peter A. Leach  
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**Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory.**

By Christian W. McMillen. New Haven, CT and London: Yale University Press, 2007. 304 pages. \$38.00 cloth.

Litigation involving Indian claims in the modern era often revolves around the complex and expensive reports prepared by ethnohistorians, historians, anthropologists, and other experts. Any claim involving the meaning of a treaty provision or whether a tribe qualifies for gaming on lands acquired after 1988 or even whether a tribe should be federally recognized will involve this battle of experts. Tribal victories in the Sioux Nation's Black Hills land claim, Pacific Northwest and Great Lakes treaty fishing rights, and eastern land claims would have been unobtainable without careful expert testimony. One original model for this form of tribal litigation is depicted in University of Virginia professor Christian W. McMillen's excellent study, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory*.

Professor McMillen details the famous Indian land claim case *United States v. Santa Fe Pacific Railroad Co.*, decided in 1941 by the Supreme Court, from its origins in a military order that recognized a Havasupai Nation boundary line that was about one-third of the nation's traditional territory in 1881, confirmed by President Chester Arthur's Executive Order on 4 January 1883. But, like many western reservations, railroad monopolies convinced Congress to open up the reservation boundaries to their interests. In early 1883, the Atchison, Topeka, and Santa Fe Pacific Railroad laid claim to the best water source on the reservation, Peach Springs, located on what became Route 66, leading to the conflict that consumed the Havasupai Indians for the next several decades.

The Havasupai Reservation rests on lands that border a portion of the Grand Canyon's southern edge in northern Arizona. Much of the land appears

to be hardscrabble dirt, but two major springs dot the reservation—Peach Springs and Pine Springs. McMillen documents how the Havasupai people's oral histories and stories provide evidence that this parcel of land includes lands they have occupied since their beginnings. The stories of their neighboring tribal communities—Mohave, Yuma, Yavapai, and Apache people—corroborate their claim. As the book demonstrates, oral histories did not persuade policy makers in the late nineteenth and early twentieth centuries. Nor were policy makers able to understand that Indian people could survive and even farm on lands that appeared to western eyes to be barren desert. They assumed any Indians living there were mere wanderers.

The story of the near dispossession of the Havasupai lands at the hands of a national railroad company supported by Senator Carl Hayden from Arizona is a familiar story in Indian Country, but this one concluded better than most. McMillen shows the duplicity of the US Departments of Interior and Justice—often working at cross-purposes with each other, the railroad, and the Indians. The government-appointed attorney representing the Havasupai Nation's interests in the early twentieth century did little preparation even as trial dates approached, all the while negotiating the diminishment of the portions of his client's reservation that included Peach Springs. The vignette detailing Senator Burton Wheeler's 1931 visit to Truxton Canyon is compelling. Later to cosponsor the Indian Reorganization Act, and the Senate Subcommittee on Indian Affairs, Senator Wheeler expressed disdain for the very notion that the Havasupai people could survive, calling on the myth of the vanishing Indian to discount their claims. Wheeler lectured Havasupai elders that their history was irrelevant and asserted that their claim to the Peach Springs land and their reservation in general was weak. The railroad's presence in much of the reservation made that portion of Havasupai land all but uninhabitable. The Interior Solicitor, the Department of Justice, Senator Wheeler, and others asserted that the lack of Havasupai residency in this portion of the reservation indicated that they had abandoned the lands. Government lawyers often relied on false reports or statements made out of context in concluding that the Havasupai had abandoned the entire reservation. As McMillen demonstrates, many "facts" driving policy relating to the Havasupai people were based on myths of the disappearing Indian, the uncivilized Indian, and the wandering Indian. White policy makers voiced their view in public statements and policy positions that the Havasupai were not worth saving or otherwise had no true claim to their own lands.

Enter ethnohistory. Much of *Making Indian Law's* narrative revolves around Fred Mahone, the Chilocco Indian School-educated Havasupai activist who documented the history of the Havasupai people's occupation of their lands for centuries. Mahone's "amateur" work served as the foundation for the legal and political case put forth by John Collier, first as an Indian Rights Association advocate and then as the commissioner of Indian Affairs under Interior Secretary Harold Ickes. As an advocate, Collier had ridiculed the plan championed by New Mexico Governor Herbert Hagerman to diminish the reservation in favor of the railroad. As Indian Affairs commissioner, he stated the federal position to be that the railroad's presence

on the reservation was illegal. Collier's new legal team—Nathan Margold, Richard Hannah, and Felix Cohen—worked to bring the Havasupai claims to federal court and intended to win, unlike previous federal and government-appointed attorneys working on the matter. Margold's 150-page opinion as Interior solicitor restored Indian title as a viable property interest, recognized oral histories as important evidence, and highlighted previously ignored anthropological studies. Hannah's research into the army and other federal documents provided massive proof that the Havasupai people had occupied the land for centuries, but the federal district court dismissed the complaint filed by the government without opinion. The district court judge eventually did issue a short opinion ignoring all of Hannah's research, and the Ninth Circuit affirmed. McMillen asserts, correctly it appears, that federal judges of the day tended to rely on the "lawyer's history" of pan-Indian affairs, ignoring historical evidence specific to tribal communities.

After convincing the US Supreme Court to grant certiorari, Cohen's monumental brief iterated the dispute's entire history among the Havasupai people, the federal government, and the railroad as support for the legal claim that Indian tribes retain inherent property rights to land, even without an affirmative grant from the government. This was nothing more than the statement of law made by Chief Justice Marshall in *Johnson v. M'Intosh*, but 120 years of federal policy ignoring that rule had done a great deal of damage. Cohen's brilliant argument resurrected powerful notions of inherent tribal sovereignty. Justice Douglas's short opinion for a unanimous court in *United States v. Santa Fe Pacific Railroad Co.* reaffirmed the *Johnson* rule of aboriginal title and ordered a trial to determine whether the Havasupai people had occupied their lands. In 1947, the railroad gave up their claims and settled the case in the Havasupai Nation's favor. The litigation's impact—and the supreme court precedent it set—went beyond the United States. The courts of Canada and Australia relied on the decision and were forced to decide questions of aboriginal title by the activism of indigenous people. But in the United States, the next cases brought by the Margold and Cohen legal team—Alaskan Native land claims—ended badly in the notorious *Tee-Hit-Ton Indians v. United States*, with Justice Reed again relying on what "every schoolboy knows" instead of historical and legal fact.

Professor McMillen's book brings to mind the excellent and award-winning study *Violence over the Land: Indians and Empires in the Early American West* by Ned Blackhawk, as well as Fay Cohen's *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights*. Blackhawk and McMillen both offer powerful ethnohistories of Southwest Indian peoples, studies that can turn the tide in cases like the *Santa Fe Pacific Railroad* and *United States v. Washington*. *Making Indian Law* is to be commended for reminding modern Indian studies and legal scholars that Indian law once depended on judges taking "judicial notice" of stereotyped and racist versions of American Indian history.

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