

My Kingdom for a Casino

Walter Olson

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If you thought Jack Abramoff was suspect, look at the latest land claims filed by Indian tribes.

As everyone now knows, courtesy of Jack Abramoff, sleazy tactics abound in the fight over where and whether Indian tribes build casinos. Too bad more attention hasn't been paid to one of the worst abuses: tribes' filing of massive land-claim lawsuits against property owners, to be traded off in settlement in exchange for casino rights.

The new wave of Indian land litigation began in the Northeast but has now spread around the country. Claims by the Miami Indians spill over large portions of Illinois and Indiana. The Eastern Shawnee want 4 million mislaid acres in Ohio. New York's Onondaga, Oneida and Cayuga have claimed the land under such cities as Syracuse and Binghamton. In Colorado the Cheyenne-Arapaho managed to top that with a filing for 27 million acres including Denver. Near Allentown, Pa. the Delaware Indians failed in a bid for a tract that includes Binney & Smith's famed Crayola factory.

In virtually all these cases tribes have made clear that they would settle for a casino permit.

Occasionally one of these suits will make national news, typically when it impinges on a playground of media folks, as with last summer's claim by the Shinnecock to be the rightful owners of large tracts in the Hamptons. More often the claims drag on in obscurity--many of the upstate New York claims have been pending since the 1970s and 1980s--posing hardship to farm families and other innocents whose title to the land had rested undisturbed for 100 or even 200 years. While major disruptions to mortgage and title-insurance markets have been reported in extreme cases, many owners are convinced that the cloud on title plays a subtler role in scaring off potential buyers.

How could this have happened? Until lately Anglo-American law sought a careful balance between the goal of restoring wrongfully taken property to its rightful owners, on the one hand, and the equally valid goal of securing everyone's property against the danger that a claimant will show up some day to assert a speculative defect in title. Hence doctrines aimed at preventing old disputes from staying alive indefinitely: statutes of limitation, adverse possession, "acquiescence" in unchallenged political boundaries.

In a series of rulings over the past 30 years, however, the U.S. Supreme Court has decided that Indians are wholly different from other land claimants. Law professors have cheered: What cause is more romantic than that of dispossessed Indians? (Somehow owners of small farms in upstate New York never seem to merit the underdog label.) The rulings also constitute a stunning victory for a scrappy cadre of Legal Services lawyers; a few of these antiestablishment types have found themselves, over the arc of a career, gradually transmuted through their tribal connections into highly paid casino promoters, in a transformation worthy of a Balzac or Stendhal novel.

By now, with fortunes at stake, big law firms are lining up to help with the claim suits; among those that have assisted tribes are Philadelphia's Cozen O'Connor and New Jersey's Lowenstein Sandler. Far more disturbing is the role of the wealthy backers, including Rochester mall developer Thomas Wilmot and Detroit pizza magnate Marian Ilitch, who bankroll the would-be land grabs in exchange for a share of the resulting settlements or casino action. Financing others' litigation--"champerty"--was long illegal at common law, and you can kind of see why.

Congress, deeply entangled with Indian gambling money, isn't rushing to fix things. Last summer, in a stunning ruling of potentially broad significance, a panel of the Second Circuit Court of Appeals threw out the Cayugas' suit and suggested that the time had come to bring down the legal curtain on claims that tribes waited a century or more to press. So who's asking the Supreme Court to review and reverse that decision? The Bush Justice Department, that's who.

Before we lecture Venezuela or Russia yet again on the evils of a system in which property rights are a matter of whim, maybe we should clean up the mess we've made of them at home.

Walter Olson is a senior fellow at the Manhattan Institute. His books include *The Rule of Lawyers*.