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An Introduction to American Indian Land Tenure: Mapping the Legal Landscape

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This Article introduces land-related legal issues facing tribal governments and Indigenous peoples in the United States and is intended to encourage deeper and more widespread engagement on these important topics. Forced property law reforms have been used throughout history as this country's primary tool for implementing its colonial objectives, and today unique property rules continue to apply in Indian country with complex effects—and, often without significant public or scholarly attention. This Article seeks to help close this attention gap by providing an accessible introduction to important American Indian land tenure topics, including both lessons from historic uses of property reforms in federal Indian policy and more modern reservation land tenure dynamics. Additional topics include the complex relationship between property and sovereignty in Indian country, the many and varied efforts to resolve historic land and Aboriginal title claims in the United States, and a brief survey of other important land-related legal rights, including the federal duty to consult, the federal trust responsibility, off-reservation use rights, and special protections for certain places of particular importance.

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"[T]he term 'Indian land' is highly charged, carrying with it a history of takings and mistakes, with consequences both intended and unintended. Its legal reality now lies there, heaved over mother earth like a wet blanket."[1]

I. Introduction

In 2002, as a first-year law student, I spent my summer traveling across the Great Plains with Indian Probate Judge George D. Tah-bone. Judge Tah-bone wore jeans under his judicial robe, long hair in a thin braid down his back. He had a brilliant legal mind and the kindest, humblest of spirits. We drove in his rented car across vast expanses of open plains, and I sat in on federal probate hearings across many reservations—visiting the homes of the Three Affiliated Tribes of Fort Berthold, the Turtle Mountain Band of Chippewa Indians, the Standing Rock Sioux Tribe, and many others. I often heard testimony and family stories translated from complex Indigenous languages that I could not understand.

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[1] KRISTIN T. RUPPEL, UNEARTHING INDIAN LAND: LIVING WITH THE LEGACIES OF ALLOTMENT 7-8 (2008).

This experience began because I responded to a printed flyer hanging in my law school's stairwell that asked: WHO OWNS AMERICA? A few months later, I was living in the basement guest room of a generous new colleague's house in Mandan, North Dakota, and spending my summer as an extern at the Department of the Interior's Office of Hearings and Appeals (OHA) in Bismarck.[2] OHA handles the probates of property owned by American Indians in the special federal trust status, including both real property in Indian trust allotments and any money (such as lease proceeds) held in individual trust accounts.[3]

I knew nothing about federal Indian law at the start of this position. I had spent a couple of years before law school doing organizing and justice-oriented work in rural spaces of the United States, including parts of Wyoming and Wisconsin. Growing up in central Iowa, I was also already deeply attracted to the idea—although not yet fully articulated to myself—that particular places

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[2] The resulting externship was through the Land Law and Tenure Security Extern Program at the University of Wisconsin's Land Tenure Center, led by Jane Larson, Thomas Mitchell, Brenda Haskins, Jess Gilbert, and others. The program no longer exists but was a transformative experience for me and others involved. *See, e.g.*, Law Students Helping Prevent Land Loss, University of Wisconsin Land Tenure Center, UNIVERSITY OF WISCONSIN LAND TENURE CENTER (July 1, 2002), https://nelson.wisc.edu/ltc/publications/pr020701.php; Press Release, Land Tenure Center, Prestigious Fellowships Awarded to U.S. Law Students (Dec. 30, 2004), https://nelson.wisc.edu/ltc/docs/skadden_fellows.pdf.

[3] *See generally* U.S. Department of the Interior, *About the Probate Hearings Division*, https://www.doi.gov/oha/organization/phd (last visited March 5, 2019). Throughout this Article, I use "Indigenous," "Indian," and "Native" interchangeably, recognizing that individuals and tribes may have strong preferences for one versus the other or, individually, to be identified by a more specific tribal citizenship or affiliation. This Article necessarily communicates in somewhat general terms. In U.S. legal scholarship and laws, "Indian" is still used much more widely than it may be in some other contexts and is intended here only as an accurate reflection of the relevant legal terms and precedents.

can hold layers of meaning and that landscapes uniquely anchor people to identities, cultural legacies, and community. My family included farmers and maple-syrup makers, and we grew ginseng over many years under carefully constructed shade arbors. We felt rooted in place, but I knew terribly little about the people who were there first and the losses that had occurred so that I could grow up the way I did.

As Judge Tah-bone and I traveled and talked, I learned a bit of federal Indian law at a time. We drank a lot of casino coffee from Styrofoam cups, and Judge Tah-bone opened a window for me into the results of the historic federal land policies that now shaped the communities and landscapes we engaged with firsthand every day. Judge Tah-bone emphasized the importance of deep, rigorous understandings of the land-based problems we were seeing before trying to engage with them, but also how important more deep engagement is.

Law school classes in the United States tend to gloss over American Indian land claims as historic relics, if they are covered at all. *Johnson v. M'Intosh*, the case from which all property titles in the United States originate, is an important story of colonial power, dispossession, and western property transitions. But the post-*Johnson* world of American Indian land tenure is just as important—both for the lived experiences of contemporary American Indian citizens and for the larger project of understanding and, hopefully, repairing the complex and often painful relationships woven through modern property law dynamics.[4]

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[4] *See* Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107 (2013).

Land-based connections are uniquely important in many Indigenous communities. The persistence of these place-based relationships are essential both socially and legally to the continuity of many aspects of Indigenous identities.[5] Yet, the history of federal Indian policy and the current rules of reservation land tenure both conspire to limit the ability of Indigenous nations to nurture and develop these relationships on Indigenous nations' own terms. The federal government tightly regulates Indigenous land tenure. Many blame the restrictiveness of this federalized property system for the intense poverty across many, but not all, Indigenous communities. American Indians suffer some of the worst housing shortages, food desert conditions, and lack of credit access in United States—despite fairly widespread landownership.

This federalized and bureaucratic land system also fundamentally constrains tribal land governance potential, and this may be even more problematic than any economic consequences. Property shapes community, culture, and society. The way Indigenous relationships to the land have been—*and still are*—regimented and in many cases even negated in the name of federal law is a deep wound that has not been repaired.

This Article is an exercise in legal cartography. Map-making has a conflicted history in Indigenous legal experiences, with maps as often being used to exclude, exploit, or confine Indigenous peoples as to buttress Indigenous efforts at self-determination and the

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[5] *See, e.g.*, KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE (1996) (studying the depth of meaning attached to particular places in Apache language and culture and asserting that ongoing connection to these "place worlds" is essential to expressions of Apache identity); *infra* Part III.B.3 (reviewing case law that often makes Indigenous land *ownership* a prerequisite to tribal *governance*).

validity of continuous land-based relationships.[6] Legal categories, like maps, also have a tendency to limit the amount of flexible imagination we can deploy by shaping what we do and do not see in the world around us.[7] And yet, some entry point for greater substantive understanding and, ultimately, more creativity and engagement on these important matters is needed. I often tell my students that our task, in entering this legal space, is to try together—methodically, carefully, and respectfully—to understand the formal and informal systems of control that are, in many cases, beyond easy or familiar demarcation.[8] There is still much I do not understand and—as an outsider to the lived experiences of Indigenous peoples—can never fully understand. But, there is important work to do. While other countries are actively seeking to reconcile historic harms to Indigenous communities and build new relationships of cooperation and respect, the United States is still woefully behind in many respects. The current challenges facing the many living Indigenous nations in the United States are largely invisible, even to the trained lawyer's eyes. This Article is a small part of a larger effort to change that.

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[6] *See* Kirsten Anker, *Aboriginal Title and Alternative Cartographies*, 11 ERASMUS L. REV. 14, 21–29 (2018).

[7] *See, e.g.*, JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 24 (1978) (describing how the "conclusory nature of legal categories" tends to produce "shared boundaries" and "conclusions that we could question but choose not to," becoming instead fundamental "premises for ordered thought and communication").

[8] *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.01, at 6 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK] (describing how field of Indian law has continued to "wrestle with questions relating to the nature of Indian property rights, the rights of individual Indians, and the power and jurisdiction of federal, tribal, and state governments in Indian country" for over 500 years).

Part II summarizes the history of vacillating federal policies related to Indigenous land claims and land tenure. After the initial claim of title via discovery in *Johnson*, the U.S. government used many more forced federal property law reforms for colonial ends. Modern tribal governments and American Indian landowners live with the legacies of these federal interventions, and many modern legal institutions cannot be explained except as consequences of these shifting land experiments through history. Part III describes current land tenure statuses in modern reservation territories and highlights some of the core challenges, including complex checkerboard patterns of ownership and jurisdiction within reservation boundaries and the many economic and non-economic costs of the trust status.

In Part IV, this Article turns to a wider exploration of the novel and complex ways property and sovereignty are intertwined in federal Indian law.[9] Although U.S. law clearly recognizes the retained and inherent sovereignty of tribal governments as governments, tribal jurisdiction is still often determined in an *ad hoc* and fact-intensive way. Tribes, states, and the federal government all exercise different and often overlapping authorities within reservation territories, and specific jurisdictional disputes often turn on who owns the property and in what tenure form. This Part also

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[9] The difference between sovereignty and property is a critical, fundamental one—that has, in turn, been the subject of significant theorizing and discussion in the literature. *See, e.g.*, Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) [hereinafter Singer, *Sovereignty and Property*]. For a to-the-point synopsis, Professor Richard Monette provides this bottom line: "[I]ndividuals own title to property; sovereigns hold dominion over territory." Richard A. Monette, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 35 (1995).

explores the rules for defining the boundaries of Indian country, including the exterior limits of reservation territories, and surveys the evolving significance of this territorial designation.

Then, in Part V, the Article covers Indigenous land claims and the ways the federal government has tried—and often failed—to provide redress for the historic takings of Indigenous lands. Finally, Part VI addresses other Indigenous rights that are related to land but exist outside traditional property ownership, including the federal trust responsibility, the duty to consult, off-reservation use rights, and other special legal protections for certain sacred spaces. Finally, the Article concludes with a brief reflection on why these Indigenous property issues matter—not only for Indigenous citizens themselves and the future of tribal self-determination but, more broadly, for all U.S. citizens and all scholars of property and related fields. While this short introduction only begins to survey these critical issues, my fundamental hope is that more conversation on the relevant scholarly issues of Indigenous-led institutional design, land-based governance, property system change, sustainability and resilience, pluralism in property forms and purposes, and land-based reconciliation is on the horizon.

II. Historic Evolution of Indigenous Property Rights

It is impossible to fully understand modern Indigenous property dynamics in the United States without some appreciation for their historical evolution. This claim is, in part, a recognition of the fact that no one would create the current legal landscape for Indigenous property rights if writing new legal rules from a blank slate. Instead, many current reservation realities, including the modern land tenure

system, are the unforeseen consequences of a history of frequently shifting federal policy choices. In U.S. encounters with Native nations, the U.S. government repeatedly used property law as its tool of choice to justify, and implement, its various policy choices.[10] These reforms included creating new property law justifications for the original acquisition of Indigenous lands for non-Indian settlement. Later, after a series of treaties and other land cessions and exchanges, further rounds of federal property law reforms reached into what had been promised as "reservations" of preserved territories for exclusive tribal self-governance and further changed and manipulated internal land tenure dynamics, often for explicitly assimilationist ends.

This Part provides a brief overview of these significant, shifting Indian policy periods, with a focus on the real property reforms deployed in each period. This history of federal actions begins with discovery and then implementation of reservation policies, removal, forced allotment, reorganized self-governance, termination, and now self-determination.[11] In reality, these policy periods were never this neatly categorized or perfectly ordered. Contradictory positions

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[10] As others have observed, the process of U.S. colonialism "was accomplished by singular attachment to the formalities of law." COHEN'S HANDBOOK, *supra* note 8, § 1.01 (internal quotation omitted).

[11] This Article focuses exclusively on Native land rights. More recently, scholars have also focused on how this history reveals a broader pattern of involuntarily expropriating Native resources to non-Native owners—a pattern that currently extends to cultural appropriation claims involving, most notably, American Indian mascots. *See, e.g.*, Angela Riley & Kristen Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016); Rebecca Tsosie, *Indigenous Identity, Cultural Harm, and the Politics of Cultural Production: A Commentary on Riley and Carpenter's "Owning Red,"* 94 TEX. L. REV. SEE ALSO 250 (2016) (arguing "controversy over the use of Native images in American cultural production is the final battleground in the centuries long conflict between Native peoples and the European colonizers").

were expressed throughout history, but these broad policy periods reflect the primary policy purposes—as reflected through laws and regulations—of their time. This history is brief and only intended as an introduction to these important realities.[12]

A. Early Discovery and Conversion to Indian Title

Prior to contact with Europeans, the Indigenous nations of this continent operated in multiple political and cultural groups, each with their own institutions and systems for managing and allocating land and other natural resource rights within their respective territories.[13] The resulting Indigenous land tenure systems varied significantly but, in general, reflected differences in tribal cultures and the demands of diverse physical landscapes as adapted over long periods.[14] European settlers, asserting a bold colonial power,

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[12] An excellent source for a more comprehensive history is contained in both volumes of FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984).

[13] *See* Hadley Louise Friedland, Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada 17 n.16 (2016) (unpublished Ph.D. dissertation, University of Alberta) (on file with author) ("Prior to European contact … Indigenous peoples lived here, in this place, in groups, for thousands of years. We know that when groups of human beings live together, they must have ways to manage themselves and all their affairs. Therefore ... at some point, and for a very long time, all Indigenous peoples had self-complete systems of social order."); *see generally* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001) (describing multiple various Indigenous property systems in detail).

14 *E.g.*, Bobroff, *supra* note 13, at 1571-73; David Orr, *Slow Knowledge*, 101 CONSERVATION BIOLOGY 699, 700 (1996) ("[E]very human culture that has artfully adapted itself to the challenges and opportunities of a particular landscape has done so by the patient and painstaking accumulation of knowledge over many generations....").

largely sought to wipe away these diverse Indigenous land tenure systems and deployed an array of legal justifications to do so.

Upon arrival, Europeans claimed sovereign rights to the whole of this continent by virtue of their "discovery" of North America.[15] Much of this claim relied on international law principles and assumptions of European and Christian superiority over Indigenous inhabitants. [16] European charters and patents from European monarchs, however, really only made sense to secure territorial discovery claims as against other European powers. This new territory was already physically occupied by Native nations.[17] In practice, then, settlers largely sought to secure land rights by purchasing them from the original Indigenous owners.[18] Of course, many of the methods used to induce Indian land cessions "ensured little more than a façade of legality" and were unbalanced and unscrupulous, but nonetheless, purchase was the preferred route of land acquisition.[19]

Much of the colonial conflict involved disputes among European powers about who had what rights to which parts of the newly claimed territory and, even within any European territory, conflict over who had the right to negotiate specific purchases of Indian lands—the European monarchs through treaties, the colonial

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[15] COHEN'S HANDBOOK, *supra* note 8, § 1.02, at 8-23; *see also* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (Oxford Univ. Press 1990).

[16] COHEN'S HANDBOOK, note 8, § 1.02[1], at 8-15 (also describing how individual Indians were "condemned to a clearly inferior status" by Europeans, even as these same Europeans depended on Indigenous inhabitants for assistance).

[17] *See, e.g.*, Felix Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 40 (1947).

[18] *E.g.*, STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 10-29 (2005) (detailing evolution of pragmatic practice of purchasing Native property claims). COHEN'S HANDBOOK, *supra* note 8, § 1.02[1], at 8-17.

[19] COHEN'S HANDBOOK, *supra* note 8, § 1.02[1], at 15.

governments themselves, or individual colonists on a property-by-property basis. After the French and Indian War in 1754, the British government sought to further centralize Indian land acquisition. The Royal Proclamation of 1763, for example, decried past "Frauds and Abuses" in the purchase of Indian lands and reserved all lands west of Appalachia for the Indians, forbidding any colonists from settling there.[20] The Royal Proclamation further provided that only the Crown could purchase lands from Indigenous nations, and settlers were only allowed to acquire lands, in turn, from the Crown.[21]

After the American Revolution, the U.S. government, in its infancy, largely adopted these British precedents and recognized Indians as the original owners of the land. During the constitutional convention of 1787, the Continental Congress passed the Northwest Ordinance, which promised that the "utmost good faith shall always be observed towards the Indians" and that "their land and property shall never be taken from them without their consent."[22] The new U.S. Congress also passed the first Trade and Intercourse Act in 1790, which is still in force in its substance today and secures an exclusive federal role in Indigenous land acquisitions.[23] This Act recognizes

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[20] A Proclamation by the King, Oct. 7, 1763, in 1 DOCUMENTS LEGISLATIVE AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES IN RELATION TO THE PUBLIC LANDS, FROM THE FIRST SESSION OF THE FIRST CONGRESS TO THE FIRST SESSION OF THE TWENTY-THIRD CONGRESS: MARCH 4, 1789 TO JUNE 15, 1834, at 30–31 (Walter Lowrie ed., Washington, printed by Duff Green 1834).

[21] *Id.*

[22] An Act to Provide for the Government of the Territory Northwest of the River Ohio, Ch.8, 1 Stat. 50, 51 n.(a) (1789). For more background on the relationship between property and sovereignty in early America, see Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 640-41 (2018).

[23] An Act to Regulate Trade and Intercourse with the Indian Tribes, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138 (July 22, 1790) [hereinafter Non-Intercourse Act]. This carved out an exclusive role for the federal government in managing Indian land

that, while Indians may hold valid property rights in lands, they are precluded from having any transfer of those rights recognized in U.S. law without the approval of the federal government.

Despite federal law forbidding private purchases of Indian lands, numerous private purchases were attempted.[24] In 1823, the Supreme Court, in a decision by Chief Justice John Marshall, authoritatively rejected the validity of these private purchases of Native lands—at least for purposes of recognizing that purchase in U.S. courts—in the seminal case of *Johnson v. M'Intosh*.[25] In *Johnson*, the Court condoned the fundamental colonial magic act: Discovery of this country by the Christian, "civilized" explorers of Europe did—by virtue of settlers' own law and international law principles—bestow underlying title to the discoverer.[26] As opposed to other European powers, the new United States had exclusive rights to claim these new lands.[27]

But, *Johnson* is also important because, despite its racist and colonial language, it does recognize that discovery did not extinguish all Native property rights.[28] Rather, whatever property rights the Indigenous peoples of this country had prior to contact with Europeans persisted as (and were transformed into) "Indian title" rights for purposes of U.S. law. Indian title is a specific right of occupancy that can only be extinguished by federal purchase or

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transactions that persists, in very similar ways, to this day. *See* 25 U.S.C. § 177 (2012) (current codification of Non-Intercourse Act).

[24] *See, e.g.*, Ablavsky, *supra* note 22, at 117-18; BANNER, *supra* note 18, at 100-11.

[25] 21 U.S. (8 Wheat.) 543, 592 (1823).

[26] Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALBANY GOV'T L. REV. 1, 15 (2017); *see also* Kenneth H. Bobroff, *Indian Law in Property:* Johnson v. M'Intosh *and Beyond*, 37 TULSA L. REV. 521 (2001).

[27] Angela R. Riley, *The History of Native American Lands and the Supreme Court*, 38 J. SUP. CT. HIST. 369, 372 (2013).

[28] Singer, *Indian Title, supra* note 26, at 20.

federal conquest.[29] Thus, *Johnson* recognizes both a U.S. claim to sovereignty by virtue of a cohesive underlying "title" across all discovered territory and a persistent Indian right of occupancy (what is now called Indian title).[30] This new property framework fundamentally limited some aspects of Indigenous property rights—namely, Indian title could only be transferred to the federal government and transfers to other individuals without federal approval would not be recognized in U.S. courts—but Indigenous rights to use, possess, occupy, and govern subject to this restraint within their unceded lands were not lost.

Johnson's endorsement of the superior position of the federal title holder, and the accompanying federal restraint on alienation over Indian lands, had many lasting effects. This bifurcated ownership framework (title with the federal government but occupancy rights with the Indigenous owners) is at the root of the modern federal trust status for many Indian-owned lands. On Indian trust lands today, a similar title bifurcation remains, with the federal government acting as trustee and title holder for the benefit of the Indian owner or occupant.[31] This trust framework, in turn, helped create the pervasive federal supervisory role over Indians' use and

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[29] *Johnson*, 21 U.S. at 592.

[30] Singer, *Indian Title*, *supra* note 26, at 21; *see also* Milner S. Ball, *Constitution, Court, Tribes*, 12 AM. B. FOUND. RES. J. 1 (1987). In the original thirteen states, the underlying title or "fee" interest in the property may be claimed by the state, but in all cases, it is only the federal government that can preempt or alienate the tribal or Indian title interests. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); *see also* COHEN'S HANDBOOK, *supra* note 8, § 15.04[2], at 999-1004 (describing original colonies' original right to title but subject to exclusively federal preemption right).

[31] *E.g.*, Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 767 (2011).

management of their occupied lands, which defines the federal land-management bureaucracy on reservations today.[32] All of these developments are discussed further in later sections, but before these events could occur, the federal government had to exercise its exclusive purchasing power as recognized in *Johnson* and actually acquire more Indian lands for non-Indian settlement. This process occurred mostly through policies of treaty-based land cession negotiations, reservation containment, and eventually outright removal, which are all discussed in the following section.

B. Treaties and Removal (1789-1871)

After *Johnson*, the federal government was clearly and strategically positioned as the exclusive purchaser of Indian lands. As such, the federal government had a superior bargaining position in its quest to acquire more Indian lands and as cheaply as possible.[33] In the next phase of colonial settlement, the federal government pursued acquisition of remaining Indian title claims and, contemporaneously, the movement of Indian nations to progressively smaller portions of their former territories or to other lands in new parts of the country.

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[32] *See infra* Part III.A.1 & III.B.1, 4.

[33] Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000) (arguing federal objective was to reduce purchase price for Indian title by creating a monopsony with only a single available land buyer). For more history on the *Johnson* opinion, see also Riley, *supra* note 27, at 370-72; LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005); BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: JOHNSON V. M'INTOSH AND THE HISTORY OF NATIVE LAND RIGHTS (2012).

Many of these initial Indian reservations were created through treaty negotiations that modeled real estate transactions.[34] Although "conquest" was recognized as one way by which the federal government could acquire Indian lands, the "purchase" option was much more pragmatic. Typically, tribes ceded or sold large swaths of their retained Indian title to the federal government but maintained exclusive "reservations" of a remaining portion of territorial domain.[35] These treaty negotiations were not always voluntary or fair, but the treaty tradition itself was based on a fundamental recognition of Indian nations as pre-existing sovereigns with legitimate claims to property and territory.[36] Treaties were executed between governments.

The resulting tribal reservations were specifically conceived of as residual territories in which tribes, as governments, retained critical inherent rights of sovereignty over their own lands and their own people. In *Worcester v. Georgia,* another of the foundational cases from the Marshall Court, the Supreme Court explicitly recognized that U.S. laws and acts in their entirety "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and

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[34] Cohen, *supra* note 17, at 34-36 (describing Indian treaties and land cessions as effectively a series of giant real estate transactions); *see also* COHEN HANDBOOK, *supra* note 8, § 1.03[1], at 23-30 (describing treaty tradition).

[35] Cohen, *supra* note 17, at 36 ("Today we can say that from the Atlantic to the Pacific our national public domain consists, with rare exceptions, of lands that we have bought from the Indians."); *see also* COHEN HANDBOOK, *supra* note 8, § 3.04[2][a], -[2][c][ii], at 185, 190-93 (emphasizing treaty purposes of reserving separate Indian territories).

[36] Treaties, fundamentally, "must be understood as grants of rights *from* Indian people who *reserve all rights not granted.*" COHEN HANDBOOK, *supra* note 8, § 1.03[1], at 24 (emphasis added).

having a right to all the land within those boundaries, which is not only acknowledged, but guaranteed by the United States."[37] Treaties defined these territorial boundaries of reserved governance authority and promised continued and exclusive tribal autonomy and control within them, including over internal land tenure.[38]

Tribal sovereignty was, however, limited in some specific ways. Supreme Court cases at this time, including notably *Cherokee Nation v. Georgia*, framed Indian tribes as "domestic dependent nations" within the new country.[39] This meant tribes remained sovereign nations, but they were also subject to the overarching sovereignty or oversight of the United States. Because of this, tribes cannot, for example, negotiate international treaties directly with other nations outside the United States.[40]

The overarching U.S. oversight role did provide some benefits. For example, in exchange for land cessions, treaties often recognized specific federal duties of protection and promised other ongoing obligations to Indian peoples.[41] At the same time, however, this oversight framework also contributed to a dependency structure that buttressed the federal government's ultimate positioning as a self-appointed guardian to the Indian ward.[42] The federal

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[37] 31 U.S. 515 (1832).

[38] *E.g.*, COHEN HANDBOOK, *supra* note 8, § 1.03[4][b], at 51-55 (describing federal policies in the 1830s that emphasized tribal sovereignty and the inherent rights of self-government secured to each tribe, especially within reserved territories).

[39] 30 U.S. 1, 17 (1831).

[40] *Id.*

[41] Charles F. Wilkinson, AMERICAN INDIANS, TIME, AND THE LAW 14, 24 (1987) (describing effect of early Supreme Court opinions in creating a measure of separatism for Indian nations, distinct and particular from state influence).

[42] *See, e.g.*, DAVID H. GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 185 (7th Ed. 2016) (identifying shift in federal policy around this time toward increased "dependency and forced assimilation") (quoting Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN

government's own claims to authority over Indigenous affairs only increased with time and became more intrusive.[43]

Other reservations were even less consensually created. As some Native groups resisted giving their lands by treaty cessions, and pressure for increasing white settlement and expansion grew, the federal government aggressively sought to remove Indians further west. Andrew Jackson in particular was famously hostile to Native interests and sought to displace even existing reservations in favor of moving many Indian citizens further and further west, clearing the way for more white settlement.[44] This culminated in a horrible period of the forced federal removal policy that extended not only to the forced relocation of thousands of Cherokee people in the infamous Trail of Tears but also to as many as thirty other Indian tribes and 80,000 individual Indians who were removed, many to "Indian Territory" in what is now the state of Oklahoma.[45]

While reservations were, on the one hand, initially conceived as promises of some autonomous space for retained Native governance and livelihoods, this policy was also a clear process of confinement—and, in many cases, relocation to dramatically smaller territories in new landscapes—that had terrible consequences for many Indian peoples. While Indigenous nations historically claimed the entire landscape of what is now America, the final result of these reservation and removal policies was today's map of limited

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L. REV. 191, 223, 230 (1989)); *see also* Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 517–18 (2017) (explaining how complexity of current federal property system continues to operate in a way that aggrandizes federal government's own role).

[43] *See infra* Parts II.C-E.

[44] Riley, *supra* note 27, at 373.

[45] *Id.* at 374; *see also* COHEN'S HANDBOOK, *supra* note 8, § 1.03[[4][a], at 41-51.

retained tribal territories in relatively tiny and discrete federal reservation spaces, concentrated most notably in the Great Plains, West, and Southwest.[46]

C. Allotment and the End of Treaty Making (1871-1928)

Ultimately, even the promises of some reserved spaces of federal protection for tribal autonomy and perpetual peace were not kept. Many reservation conditions deteriorated as Indigenous peoples struggled with mass dispossession and the displacement of survival systems that had been developed over many generations. There was also, brashly, a continued U.S. desire for further westward expansion and acquisition of even more Indian lands, even within what had been promised as treaty-protected perpetual reservations. Thus, U.S. policy vacillated again: Could tribes really maintain a separate identity, existence, and territorial domain within reservation boundaries, or should assimilation and integration into the broader United States be the goal? The United States veered strongly toward explicitly assimilationist objectives with the allotment policy of the late Nineteenth Century.[47]

With allotment, the federal government reached into tribally reserved territories and implemented forced property reforms—often, without even the illusion of tribal consent[48]—in an attempt to

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[46] *See* The National Atlas of the United States of America, *Indian Lands*, https://nationalmap.gov/small_scale/printable/images/pdf/fedlands/BIA_2.pdf.

[47] At the same time, the federal role in and around reservations became increasingly restrictive and controlling, with reservations increasingly "envisioned as schools for civilization in which Indians under the control of the agent would be groomed for assimilation." *See* COHEN'S HANDBOOK, *supra* note 8, § 1.03, at 60-61.

[48] *See id.*, § 15.09, at 1050-65 (discussing shift in federal policy away from tribal consent in 1887).

effect sweeping change within Indian communities. Fundamentally, allotment proponents believed that private property ownership would convert "savage" Indians into individualistic, westernized farmers based on the yeoman farmer ideal.[49] This policy, advocated by the "Friends of the Indians," sought to "give" western property notions to Indigenous peoples and, at the same time, dismantle the "tribal mass" altogether.[50]

Allotment operated by reallocating tribally reserved property to individual Indian allottees in parcels ranging on average from 40 to 160 acres each.[51] On the allotments that were made, individuals were to own their squares of property privately, but not in a straightforward fee simple. Instead, initial allotments were placed in a novel trust status. The federal government held the underlying title, for the benefit of the allottee, and acted as a temporary trustee overseeing the individual allottee's land management choices and restricting any transfers for an initial transition period. [52] Importantly, this trust status was designed to "protect" individual

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[49] *See generally* JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934 (1991).

[50] *See* Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 730, 749. Another painful and assimilationist policy during this time period was the mass removal of Indian children into special Indian boarding schools. *See, e.g.*, Becky Little, *Government Boarding Schools Once Separated Native American Children from Families,* HISTORY (June 19, 2018), https://www.history.com/news/government-boarding-schools-separated-native-american-children-families; *see also* MARGARET D. JACOBS, A GENERATION REMOVED THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD (2014) (exploring how U.S. policies separating Indigenous families continued long after boarding schools).

[51] Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10-12 (1995).

[52] General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388, § 5 (codified as amended at 25 U.S.C. § 348 (2018)) [hereinafter Dawes Act].

parcels of land for an initial twenty-five-year period, during which time the Indian allottees would, it was imagined, transform into yeoman farmers and become fully assimilated U.S. citizens—fundamentally changed through the power of self-interested private property ownership.[53]

This was clearly a taking of tribally owned land in order to transfer new rights to individual Indians, but the Supreme Court permitted this as merely a "reconfiguration" of tribal property consistent with the federal government's sui generis trustee status over Indian lands.[54] In *Lone Wolf v. Hitchcock*, the Supreme Court expressly held that Congress not only had broad, plenary power to take and transform tribal property in this way, without tribal consent and in clear violation of treaty promises, but also that no just compensation was due for this taking of tribal property rights.[55]

By design, allotment caused massive damage to Indigenous land tenure systems and traditional social structures. Allotment also caused significant Indian land loss. In total, Indian people lost roughly 80 million of the 130 million acres (about 60 percent) of reservation lands that they held at that time.[56] These losses occurred in two ways. First, many allotment policies mandated the sales of so-

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[53] *See generally* History of the Allotment Policy: Hearings on H.R. 7902 on the Readjustment of Indian Affairs Before the H. Comm. on Indian Affairs, 73d Cong. 431, 432 (1934) (statement of D.S. Otis).

[54] Lone Wolf v. Hitchcock, 187 U.S. 553, 564-68 (1903) (rejecting Kiowa leader's argument that treaty prohibited any cessions of tribal lands without tribal consent and holding that Congress had unilateral authority, as "guardian" over the tribes, to pass laws in conflict with the treaties); *but see infra* Part V.B (describing modern, more expansive protections for takings of certain recognized property titles).

[55] Lone Wolf, 187 U.S. at 564-68; *see also* COHEN'S HANDBOOK, *supra* note 8, § 5.02[4], at 394-96.

[56] LEONARD A. CARLSON, INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING 18 (1981).

called "surplus" lands (i.e., lands not allotted to presently living tribal citizens) to non-Indian homesteaders, often without tribal permission.[57] This was designed not only to satisfy white appetite for land but also to facilitate Indian integration and assimilation. If Indians and non-Indians lived together, federal reformers assumed that this would speed the Indians' intended transformation. In total, Indians lost almost 60 million acres of their reserved territories through these surplus land sales, significantly reducing the available remaining land on which future generations could spread and introducing new non-Indian landowners into formerly exclusive tribal territories.[58]

The second cause of land loss through allotment occurred by virtue of so-called competency sales. When the federal government or its agent deemed an individual allottee to be "competent" to hold property in an unrestricted fee title, the trust restrictions could be removed before the twenty-five-year period ended. This almost always resulted in immediate sale of that land to a non-Indian purchaser. [59] Many of these sales included fraudulent and unscrupulous dealings. As one government report from 1935 concluded, "[t]he granting of fee patents has been practically synonymous with outright alienation."[60] Ultimately, 23 to 27 million

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[57] *Id.*; *see also* Royster, *supra* note 51, at 13–14.
[58] MCDONNELL, *supra* note 49, at 121.
[59] Office of Indian Affairs, U.S. Dep't of the Interior, *Indian Land Tenure, Economic Status, and Population Trends*, in Supplementary Report of the Land Planning Committee to the National Resources Board, pt. 10, at 6 (1935) [hereinafter 1935 LAND PLANNING REPORT] ("Indians who retained their land after coming into full control over it were rare exceptions.").
[60] *Id.* After the fact, the federal government estimated only 3 to 20 percent of fee-patented land remained in Indian ownership. *Id.*

acres of originally allotted Indian land passed out of Indian ownership from these forced-fee transactions.[61]

Of course, allotment also failed in its ambition to produce fully assimilated Indian landowners. Instead, allotment—sloppily implemented and poorly designed—quickly exacerbated reservation poverty and further decimated Indian communities.[62] Allotment quickly "shifted … from an educative process whereby Indians could learn how to manage private property to an administrative problem in which the federal government was assumed to be the supervisor of how Indian property was used."[63]

Allotment also caused a new set of land tenure problems. Where entire territories had once been set aside for exclusive Indian use and control, now retained allotments (as well as, over time, retained tribal lands) were subject to a comprehensive federal oversight role in nearly all matters of Indian land use and management. In addition, allotment transformed reservations from exclusively tribal domains to a checkerboard of mixed and complex ownership forms. By 1881, non-Indians owned approximately two-thirds of what had been reserved lands for Indian people, and Indian tribes and

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[61] *Id.*; *see also* MCDONNELL, *supra* note 49, at 88–99 (describing how approximately 27 million acres of lands were lost through "competency determinations" after which newly acquired fee titles were sold or transferred to land speculators who either effectuated the competency determinations in the first place or pounced soon thereafter to acquire land from unsuspecting (and unprotected) allottees).

[62] *See generally* LEWIS MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION (Inst. for Gov't Research ed., 1928) [hereinafter MERIAM REPORT] (broadly critiquing federal allotment policy with details of subsequent reservation poverty).

[63] VINE DELORIA, JR., ED., AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 247-48 (1985) (arguing "Indians became an attachment to their lands rather than their owners" by virtue of various amendments to the original allotment intent).

individuals retained only 52.5 million acres of reservation land.[64] Some, but not all, of this land loss resulted in diminished reservation territories and a shrinking of exterior reservation boundaries.[65] In most cases, however, the result was a checkerboard of mixed land ownership—with non-Indian-owned lands interspersed with Indian allotments and tribal properties—within reservation boundaries.[66] Because non-Indians are not citizens of tribal governments, however, tribal jurisdiction over these properties became more complicated.[67]

In addition, as early as 1881, 7 million of the retained individual Indian allotments were already in "heirship status," or shared among multiple descendants of the original allottee in undivided co-ownership.[68] As the numbers of co-owners began to grow over generations, these co-owned allotments quickly presented still more complex ownership arrangements known to be "so involved that no one benefits, while the clerical costs of handling multiple-fractionate interests hangs like a deadweight upon the Indian Office."[69]

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[64] *See* PRUCHA, *supra* note 12, at 950 (Map 11).
[65] *See, e.g.*, Nebraska v. Parker, 577 U.S. ---, 136 S.Ct. 1072 (2016) (reiterating that some, but not all, land sales in the allotment era resulted in redrawing exterior reservation boundaries); *see also infra* Part IV.A.
[66] *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 471 n.12 (1984) (describing "checkerboard" land tenure patterns).
[67] *See generally* Jessica A. Shoemaker, *Emulsified Property*, 43 PEPP. L. REV. 945 (2016) [hereinafter Shoemaker, *Emulsified Property*] (discussing relationship between owner identity and property's jurisdiction and status).
[68] PRUCHA, *supra* note 12, at 950 (Map 11).
[69] *Id.*

D. Reorganization and Tribal Governments (1928-1942)

By the 1920s, critics of the assimilationist policies of the Indian Office were becoming more vocal, and the Secretary of the Interior commissioned a comprehensive and independent study of the status of Indian affairs.[70] The resulting Meriam Report, published in 1928, revealed the grinding poverty experienced within reservation communities after reservation containment and allotment and sparked a movement toward change.[71]

After such a strong—and failed—effort to assimilate Indian people into the dominant U.S. society, a new effort arose in the 1930s to reverse allotment's negative effects and promote instead group self-determination and preservation of Indian culture. John Collier, the new Commissioner of Indian Affairs under Franklin Delano Roosevelt, pursued a "new deal" for Indian peoples, with what was at the time a revolutionary zeal for tribal self-determination and respect for tribal culture and identity.[72] Collier identified land tenure issues as fundamental to his agenda and sought to "reverse the allotment policy."[73] The broad goals of his administration included ceasing any future allotment, reconsolidating trust lands under tribal ownership, and ultimately transferring federal land powers to the Indian tribes themselves.[74] He also proposed a corporate model by which individual tribal citizens would exchange individual

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[70] PRUCHA, *supra* note 12, at 808-11.
[71] MERIAM REPORT, *supra* note 62; *see also* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).
[72] *See* PRUCHA, *supra* note 12, at 940-41.
[73] *See id.* at 954.
[74] *Id.* at 954-55.

allotments for stock or shares of tribal assets via an incorporated tribal entity.[75]

These proposals were met with mixed reactions—both in Indian Country and outside of it.[76] The final result was the Indian Reorganization Act of 1934 (IRA). The IRA formally ended the allotment policy and extended the trust status of remaining allotments—and its accompanying restrictions on alienation and bureaucratic oversight—indefinitely.[77] Given allotment's connection to overwhelming land loss, this restriction on further transfers out of the protective trust was desired. This now-permanent trust status was intended to preserve title in Indian hands and put a stop to the tremendous land loss that had occurred during allotment. It also, however, cemented the federal supervisory role as permanent trustee over Indian reservation lands.[78] The Act did not change anything with respect to the new non-Indian-owned parcels within reservation territories, but it did provide that remaining (unsold) surplus lands could be restored to tribal ownership, individual allotments could be voluntarily transferred to the tribe, and the Secretary of the Interior was authorized to acquire additional lands for a reservation—the land-into-trust process that continues today.[79]

The IRA is otherwise perhaps most widely known for related provisions recognizing tribal rights to organize as a formal tribal government with an approved constitution and bylaws.[80] Many

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[75] *Id.* at 955, 958.
[76] *E.g.*, *id.* at 956-57, 960.
[77] Wheeler-Howard Act, ch. 576, 48 Stat. 984 § 2 (1934) (codified as amended at 25 U.S.C. §§ 461–494 (2012)); *see also* 1935 LAND PLANNING REPORT, *supra* note 59, at 4.
[78] For some detail of how this modern oversight role plays out, *see infra* Part III.B.
[79] *See also infra* Part IV.D.
[80] *See, e.g.*, 25 U.S.C. § 476 (transferred to 25 U.S.C. § 5123).

tribal governments did reorganize with new constitutions adopted pursuant to the IRA. Tribes could also get a special federally issued charter to create a tribal corporation to hold and manage some aspects of tribal property more directly.[81] Tribes could also opt out of the Act by a majority vote in a special election called for that purpose.[82] Although "accepted more widely by Indians than most earlier policies," the IRA is not without controversy—particularly from modern critics who see the IRA as incorporating or substituting western understandings of governance for traditional Indigenous legal orders.[83]

E. Termination Failures (1942-1961)

After World War II, the dominant philosophy in U.S. Indian affairs shifted again to assimilation. Many reservation communities continued to suffer from historical harms, and there was increased attention to the costs of federal oversight. This ushered in the next swing in federal Indian law—the termination era.[84] The termination era focused on withdrawing special federal programs (and responsibilities) for Indian people as a means of "freeing" the Indians from what was billed as an oppressive ward-like status and

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[81] These business corporations are established under Section 17 of the IRA, which is codified at 25 U.S.C. § 477 (transferred to 25 U.S.C. § 5124).

[82] In the two-years following the IRA's enactment, 181 tribes accepted the law and 77 voted to reject it. Another fourteen tribes came under the IRA by default because they did not act either to accept or reject it. PRUCHA *supra* note 12, at 964-65.

[83] *E.g.*, GETCHES, *supra* note 42, at 218 & 224.

[84] *See generally* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

creating greater equality to white citizens—often through forced property conversions, again.[85]

This period proceeded in two main categories: the outright "termination" of tribal relationships with the federal government (and accompanying federal financial obligations) and laws that maintained special tribal statuses in theory but transferred certain federal authorities to state governments instead.[86] The laws in the first category, which directly terminated federal relationships,

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[85] *See* House Concurrent Resolution 108, 67 Stat. B132 (Aug. 1, 1953) (articulating new Congressional policy "to end [American Indians'] status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship" and to do this "as rapidly as possible"); Wilkinson & Biggs, *supra* note 84, at 149-50; *see also* GARY ORFIELD, A STUDY OF THE TERMINATION POLICY (1966).

[86] The most notable law in this second category is known as Public Law 280, passed in 1953. Public Law 280 sought to relieve federal financial obligations and to address problems of "lawlessness" on reservations by extending state jurisdiction into certain reservation territories in lieu of federal authority. The law withdrew federal criminal jurisdiction (and accompanying federal services) and authorized states to assume criminal jurisdiction and hear civil cases against Indians in Indian country. *See generally* CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (CONTEMPORARY AMERICAN INDIAN ISSUES NO. 6) (1997); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in Indian Country*, 44 UCLA L. REV. 1405, 1406 (1997) [hereinafter Goldberg-Ambrose, *Public Law 280*]. Federal courts, however, have largely contained Public Law 280 so that it allows states to define crimes that are prohibited within the reservation but does not allow states to impose other regulations on otherwise allowed conduct. *E.g.*, Bryan v. Itasca County, 426 U.S. 373 (1976) (holding that Public Law 280 does not authorize states to tax Indian property within Indian Country or otherwise regulate behavior on reservation). Public Law 280 applied automatically in six states (Alaska, California, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs), and Wisconsin) and provided a mechanism for future states to assume the same criminal and civil jurisdictions. Goldberg-Ambrose, *Public Law 280*, at 1407. In 1968, Congress finally amended the law to require tribal consent before states could assume jurisdiction under Public Law 280, and no tribes have since consented to state jurisdiction through this tool. *Id.* at 1407-08.

included another round of land-tenure-as-assimilation reforms. Only a handful of tribes were actively terminated during this policy period in a series of special legislative acts, but these acts, when applied, were devastating. Effects included ending the federal trust relationship, ending exemptions from state taxing authority, and effectively seeking to end tribal sovereignty.[87] All of these acts also included some "fundamental changes in land ownership patterns"—either outright sale of former trust lands and distribution of the proceeds to the tribe or transfers of former trust lands into either a private trust or state-law corporation.[88]

Termination was promoted as a beneficial opportunity to free Indian people by reducing federal control over Indian affairs, but it is now generally accepted that termination was also incredibly harmful to the affected Indians and tribes.[89] Termination acts were passed hastily, and while tribal consent was not required, it was often obtained through coercive tactics.[90] Tribes that moved land into corporate or private-trust forms tended to lose that land in short order, and payments for sold land were deemed insufficient, especially as they failed to compensate for other lost federal benefits,

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[87] Wilkinson & Biggs, *supra* note 84, at 152–53.
[88] *Id.* at 152-54.
[89] COHEN'S HANDBOOK, *supra* note 8, § 1.06, at 90–93; *see also* PRUCHA, *supra* note 12, at 1051–56 (describing the termination of the Menominee and Klamath tribes and the resulting catastrophes). The American Indian Policy Review Commission studied the effects of the termination acts extensively and published in a special report in 1976. The study reported overwhelming negative effects on participants' lives, including increased rates of alcohol and drug abuse, reduced access to health care, and reduced employment. AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON TERMINATED AND NON-FEDERALLY RECOGNIZED INDIAN TRIBES 38 (1976).
[90] Wilkinson & Biggs, *supra* note 84, at 157–58.

the new state tax burdens, the loss of tribal government authority, and, in some case, the psychological costs of lost Indian status.[91]

This termination era is also defined by the creation of a massive Indian Claims Commission, which was both designed to provide compensation for past harms and, perhaps more to the point, absolve the federal government and clear the slate of historic injustices going forward. The Indian Claims Commission is discussed in more detail in Part V regarding land claims and remedies.

F. Modern Era and Checkerboards (1961-present)

Today, there are 573 federally recognized Indian nations in the United States, each with their own traditions, cultures, economies, and relationships to the different physical landscapes in which they operate.[92] Since the 1970s, the federal government's focus has been "a new era" of tribal self-determination.[93] This policy is consistent with international law and norms that increasingly protect Indigenous rights, and this self-determination policy has produced many pro-tribal sovereignty federal acts in the United States. These include numerous legal mechanisms for tribes to contract or compact with the federal government to take over, with financial support, the administrative functions that would otherwise be provided by agencies within the Department of the Interior.[94]

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[91] *Id.* at 152-54.
[92] Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1,200 (Feb. 1, 2019).
[93] *E.g.*, COHEN, *supra* note 8, § 7.01, at 1107.
[94] *E.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

As a result of these and other development, many tribes are on more successful trajectories. Some Indian nations engage in sophisticated energy development, food sovereignty enterprises, and other economic and self-governance initiatives.[95] Others lack comparable natural resources or simply make alternative choices. Although a few tribes have had economic success, the reality is still that Indian people, on average, continue to experience more poverty than non-Indians by a sizeable margin.[96] For the majority, the challenge remains how to make meaningful tribal self-determination and community prosperity—particularly with respect to land tenure—a greater reality into the future.

Land tenure within reserved spaces remains highly federalized and, in many cases, subject to modern versions of the same federal supervisory role that has persisted since allotment. Yet, any proposed reform that risks further land loss is often a non-starter, both because of the history of traumatic dispossession and because

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[95] *See*, *e.g.*, Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L. J. 115, 121 (2017); Jim Mimiaga, *Ute Mountain Utes to Build $2 Million Solar Farm*, THE JOURNAL (June 29, 2017), https://the-journal.com/articles/55836-ute-mountain-utes-to-build-2-million-solar-farm; *Quapaw Tribe's $1M Processing Plant Will Aid its Farm-to-Fork Goals and Economic Development*, INDIAN COUNTRY TODAY (June 21, 2017), https://indiancountrymedianetwork.com/news/business/quapaw-tribes-1m-processing-plant-will-aid-farm-fork-goals-economic-development/.

[96] *See* U.S. Census Bureau, Poverty Status in the Past 12 Months, *in* 2015 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S1701&prodType=table (last visited July 6, 2017) (showing that 26.6% of the American Indian and Alaska Native population lives below poverty level while the average percentage of all Americans below poverty level is 19.7%); *see also* Julie Bosman, *Nebraska May Stanch One Town's Flow of Beer to Its Vulnerable Neighbors*, N.Y. TIMES (March 25, 2017) (describing Pine Ridge Reservation as a "catalog of social ills" where "[u]nemployment exceeds 80 percent, poverty affects more than 90 percent of those living on the reservation and alcoholism is rampant").

of the legal reality that continued Indian land *ownership* is often a prerequisite for tribal *governance* authority.[97] Thus, the modern federal trust status—with its alienation restraint and federal oversight of many individual land-use decisions—has persisted and proven difficult to adjust. This modern reservation land tenure framework is discussed in more detail the next Part.

III. Modern Reservation Land Tenure

Modern reservation land tenure is uniquely complex. Two fundamental challenges frame these issues: (1) the jurisdictional complexity created by the checkerboard of mixed Indian and non-Indian landownership within most reservation boundaries and (2) the unique challenges of the trust status itself, including the economic costs created by its overall restrictiveness, the extreme fractionation of individual allotments, and the overarching and expensive federal bureaucracy that frequently fails to leave space for truly flexible tribal land tenure control. This Part provides an overview of these dynamics, focusing on how ownership itself is defined and regulated in these different tenure types.

A. Checkerboard Land and Jurisdiction

One of the first and most important reservation realities in the United States today is the mixed or checkerboard pattern of different property tenure types that exist across the surface of most modern reservations.[98] As a result of allotment and other federal land

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[97] *See infra* Parts III.B.3 & IV.B.

[98] *E.g.*, Solem v. Bartlett, 465 U.S. 463, 471 n.12 (1984) (describing "checkerboard" land tenure patterns); Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1137 (10th Cir. 2010) (en banc) (same). How the exterior boundaries of reservations—or Indian country

reforms, most reservations now have lands that are held in three distinct tenure types. These three types are: (1) historic allotments still held in trust by the federal government on behalf of individual Indian landowners (variously referred to as "individual trust lands" or "allotments"), (2) land held in trust by the federal government for the Indian nation itself ("tribal trust lands") and (3) land held directly in fee title ("fee lands").[99] The presence of these fee lands are primarily the result of the land transfers that occurred in the allotment period through surplus land sales to non-Indians and the issuance of fee patents to allottees following competency hearings.[100] Other fee lands exist today as a result of more modern decisions, including by individual Indian owners themselves, to transfer property interests out of the trust status.[101] Today, fee lands within a reservation are owned by many different types of owners, including individual Indians who are citizens of the governing tribe, individual Indians who are members of different tribes (non-member Indians), non-Indians, the tribe itself, and state or federal governments.

Who governs where in Indian country often varies depending on who owns the property at issue and in what tenure form it is held. Each tenure status—and the particular identity of any given landowner or owners—has distinct legal consequences. In general,

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more broadly—are set and determined is a related, but separate, issue discussed in Part IV.A.

[99] *See* COHEN HANDBOOK, *supra* note 8, §§ 15.02, -.03, -.05, 16.03, at 995-999, 1015, & 1071. A few reservations also include a special Indian-owned "restricted fee" status, which is roughly equivalent to Indian trust status for purposes of limited alienation rights and tribal jurisdiction. *See, e.g.*, *id.* § 4.07[1]-[2] at 288-326 (describing novel histories and land statuses of certain Oklahoma Indians and Pueblo Indians).

[100] *See supra* notes 56-61 (discussing these allotment-era land losses).

[101] *See infra* Part IV.D.

the federal government defines and regulates trust lands. State governments have no or very limited authority over trust lands, but tribal jurisdiction overlaps with federal authorities in complex ways. Tribes have much more autonomy with respect to tribal trust lands than they do on allotments. Fee lands, meanwhile, are generally outside the jurisdiction of the federal government. Instead, state and tribal governments exercise overlapping and often uncertain authority to define and regulate individual fee lands, with the exact jurisdictional mix for any given fee parcel depending on the exact identity of the owner or owners and, in some cases, the location and nature of the land itself.[102]

This Part provides a short summary of the legal definition and institutional parameters of each of these different tenure types. The presence of so many different types of property—with different jurisdictional allocations for each—can cause significant disjointedness in reservation governance.[103] Tribal sovereigns struggle to advance functioning systems of law and order and to implement workable economic development plans in such a piecemeal, and often unsettled, legal landscape.[104] Land-use

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[102] *See also infra* Part III.A.2.

[103] *E.g.,* Matthew Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges,* 81 U. COLO. L. REV. 1187 (2010); Grant Christensen, *Creating Bright Line Rules for Tribal Court Jurisdiction Over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527 (2011); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 193 (2001); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); Singer, *Sovereignty and Property*, *supra* note 9.

[104] *E.g.*, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 219-20 (2005) (articulating related concerns about how a "checkerboard of alternating state and tribal jurisdiction" can "seriously burden" administration of government and

planning, environmental regulation, and natural resource management are all extraordinarily difficult if not impossible to accomplish in sporadic squares of checkerboard spaces, and this jurisdictional complexity and uncertainty adds even more cost to any transaction in Indian communities.

1. Trust Lands

The federal government continues to hold title as trustee for both individual trust allotments and tribal trust lands. Both allotted and tribal trust lands are subject to a near-complete restraint on alienation. As trustee, the federal government often acts as land manager and federal pre-approval is required for most land transactions and uses, including any leases, gifts, sales, mortgages, or devises of trust property. The federal government also bears most of the costs of land administration, including maintaining title and other land records.

Two key benefits of the federal trust status are that it prevents further land loss (by limiting any land transfer) and that it very clearly excludes state authority over most aspects of trust land management. States generally have no authority to define property rights on Indian trust lands.[105] States also have no rights to tax trust

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"adversely affect landowners"); Seymour v. Superintendent, 368 U.S. 351, 357-58 (1962) (allocating jurisdiction "depend[ing] upon the ownership of particular parcels of land" creates "an impractical pattern of checkerboard jurisdiction"); *see also* Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians,* 87 OR. L. REV. 175 (2008) ("Indian law scholars and the Supreme Court are seemingly in agreement on at least one thing: checkerboard areas are bad. *Really* bad.").

[105] *E.g.*, Ducheneaux v. Ducheneaux, 861 N.W.2d 519, 527 (S.D. 2015) (finding that because "Congress has preempted state court jurisdiction over the disposition of Indian trust property, and the United States Supreme Court has made clear that adjudicating the right to possession of Indian trust lands interferes with the interests of the United States," a state court may not even indirectly "adjudicate

property.[106] This protection from state incursions is one of few relatively clear jurisdictional rules in Indian Country.

Determining the degree to which tribal governments also maintain jurisdiction over trust properties, however, is difficult. The federal role is often pervasive and ill-suited to local flexibility and

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the right to possession of Indian trust land"); Unalachtigo Band of the Nanticoke-Lenni Lanape Nation v. New Jersey, 867 A.2d 1222 (N.J. Super. Ct. App. Div. 2005) (holding state courts have no jurisdiction over Indian property disputes based on "clear understanding that Congress expressly intended to preserve exclusive federal jurisdiction over claims to Indian land, which is subject to restriction against alienation"). *But see* Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 423-25, 428-32 (1989) (recognizing some limited state zoning rights over certain Indian trust lands located in largely open, predominantly non-Indian area of reservation). In addition, historically, if an Indian landowner failed to write a will to dispose of trust property, the federal government would probate her intestate estate and distribute it according to state intestacy laws without regard to tribal customs or practices. Dawes Act, *supra* note 52, at § 1; *see also* Act of February 14, 1913, ch. 55, § 2, 37 Stat. 678 (further provision for federal discretion in and administration of Indian trust probates); 25 U.S.C. § 348 (2000); COHEN HANDBOOK, *supra* note 8, at §§ 4.02[3][c][i], 7.04[1][b], at 230-31, 618-19. This changed in 2004 with federal recognition of some tribal authority to pass tribal probate codes for reservation trust properties. *See* American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1809 (2004) (codified at 25 U.S.C. § 2201 et seq.) [hereinafter AIPRA]; *see also supra* note 104 and accompanying text.

[106] Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) (stating modern rule that Indian-owned trust land is tax exempt within reservation boundaries); *see also supra* note 86 and accompanying text (discussing other state taxation limits in Indian Country under Public Law 280). The property tax issue is not quite that black and white in practice because many tribes make special payments in lieu of taxes to state and local government in exchange for services and to help eliminate conflicts over reservation land issues. *See* Rebecca M. Webster, Common Boundaries: Moving Toward Coordinated and Sustainable Planning on the Oneida Reservation (unpublished Ph.D. dissertation) (August 2014), available at https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=2149&context=dissertations [hereinafter Webster, *Common Boundaries*]. In addition, recent cases and regulatory actions have considered new questions about when—or if—states may be able to tax permanent improvements owned by non-Indians on trust lands and non-Indian leasehold interests in trust lands. *See generally infra* notes 133-136 and accompanying text.

tribal control, despite the importance of land tenure for governance and the continuation of essential place-based identities and cultures.[107] The degree to which tribes versus the federal government can flexibly define and regulate land-use choices varies most between allotments and a tribe's own tribal trust lands, as highlighted below.

a. Individual Trust Allotments

The federal government's oversight and management role is most pervasive with respect to individual allotments. Nearly every land management decision by individual landowners is mediated through the federal government, including approving any transfer of trust property before it may be executed, distributing any income from the property, and probating the trust property through a federal probate procedure.[108] Under the system, any transfer of an allotment or interest in an allotment is cumbersome. Leases, gifts, mortgages, and any other transaction that seeks to use the land as collateral requires lengthy federal review and approval, often with federal appraisal prerequisites. The degree of federal oversight can also make direct land use challenging. In fact, under current rules, even an individual trust allotment owner's use and possession of his or her own allotted land can be severely circumscribed by virtue of this trust status. Current rules require even a co-owner to navigate

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[107] *See* Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CALIF. L. REV. 1531, 1536, 1550-51 (2019).

[108] *E.g.*, Act of February 28, 1891, § 3, ch. 383, 26 Stat. 794 (amending General Allotment (Dawes) Act to allow some leasing of allotments with federal approval and oversight); Act of June 25, 1910, ch. 431, § 2, 36 Stat. 847 (codified as amended at 25 U.S.C. § 373) (permitting Indian allottees to pass property through federally approved testamentary devices); *see also* Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1 (2004) (describing scope of modern BIA trustee function).

the federal process and acquire a federally approved lease or land-use agreement from all of his or her other co-owners before taking possession of his or her own land.[109]

The rights of tribal governments to regulate or define specific Indian owners' rights to trust allotments are limited. Tribal governments can regulate some agricultural uses of individual allotments through tribally-created agricultural resource management plans.[110] In addition, since legislative changes in 2004, tribal governments have been able to execute tribal probate codes to direct the intestacy defaults for individual allotments, so long as the tribal probate codes are consistent with certain federal land policies in favor of consolidation of tiny interests.[111] Other tribal zoning authorities can also apply, perhaps assuming the allotment is not an otherwise predominantly non-Indian area of a reservation.[112] Tribal governments' current authority to define owners' rights and responsibilities within allotments, however, is generally otherwise more limited.[113]

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[109] *See generally* Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383 (2015) [hereinafter Shoemaker, *No Sticks*].

[110] 25 U.S.C. § 3711(b) (2018). This authority is part of a larger agricultural management regime. *See generally* American Indian Agricultural Resource Management Act (AIARMA), Pub. L. No. 103-177, tit. I, § 105, 107 Stat. 2011, 2017–18 (1993) (codified at 25 U.S.C. § 3701 et. seq); *see also* Shoemaker, *No Sticks*, *supra* note 109, at 421-24 (describing AIARMA history and implementation).

[111] *See* AIPRA, *supra* note 105.

[112] *See* Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408 (1989).

[113] *See, e.g.*, Milo E. Cadotte v. Acting Aberdeen Area Director, 31 I.B.I.A. 175, 176 (Sept. 22, 1997) (suggesting in dicta that a tribe could modify a trust co-owner's rights in that trust property to, for example, eliminate the federal requirement of fair market value rent even from co-owners); *see also* COHEN HANDBOOK, *supra* note 8, §§ 4.02[3][c][i], 7.04[1][b], at 230-31, 618-19.

b. Tribal Trust

Tribal trust property is also bureaucratic and restrictive,[114] but it is subject to a different set of rules for many transactions than individually owned trust property.[115] In general, tribal governments have more opportunities to bypass the federal government—through specific federally defined legal mechanisms—and make more direct choices about the land the tribe itself owns. Although the general rule is still that tribal trust property cannot be transferred, alienated, or leased without the approval of the Secretary of the Interior,[116] some new exceptions for certain tribal leases of tribal lands now exist that do not apply to individually owned trust allotments. For example, the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (the HEARTH Act) allows tribes, if they first promulgate federally approved leasing regulations, to elect to execute some surface leases of tribal land without federal oversight of each individual lease (although the federal government does maintain oversight of the overall leasing operation).[117] Similarly, recent federal rules suggest federal agencies

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[114] *See, e.g.*, Alex T. Skibine, *Using the New Equal Protection to Challenge Federal Control over Tribal Lands*, 36 PUB. LAND & RESOURCES L. REV. 3, 5 (2015).

[115] *See, e.g.*, 25. C.F.R. §§ 162.109(b)(4), .014(b)(3) (permitting tribal laws generally to supersede or modify federal regulations over leases of trust property but only as to tribal lands); *but see id.* §§ 162.109, .202 (arguably broader tribal authority over agricultural leasing rules but only where tribal law is deemed to be not in conflict with federal trust responsibility).

[116] *See, e.g.*, 25 U.S.C. §§ 177, 348, 464 (transferred to § 5107), 2216, 2218; *see also* 25 C.F.R. § 152.17 (2014).

[117] Originally, many of these exceptions to Secretarial approval requirements were specific to individual tribes. *E.g.*, 25 U.S.C. § 415(b) (as modified by Act of June 2, 1970, Publ. L. No. 91-274, § 3, 84 Stat. 301, 302 (1970) and Pub. L. No. 99-500, § 122, 100 Stat. 1783 (1986)) (exception for Tulalip Tribes); 25 U.S.C. § 415(e) (as modified by Omnibus Indian Advancement Act, Pub. L. No. 106-568, § 1202(b)(3), 114 Stat. 2868, 2934 (2000)) (exception for Navajo Nation). More recently, with the passage of the HEARTH Act, nearly all tribes have the option to pursue authority to lease

should defer to tribal authorities to regulate land use and zoning on tribal trust lands, but still subject to any superseding and conflicting federal authority.[118]

Federal law has also permitted other specific opportunities for specific categories of more flexible tribal trust land transactions, such as rules that exclude encumbrances of less than seven years and certain tribal corporation leases of less than twenty-five years from any federal oversight.[119] Tribes also still have the authority to allocate internally certain use or possession rights to their own tribal lands to their own individual members in fairly informal, temporary arrangements without federal oversight (or recognition).[120] These

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their own tribal trust lands without a Secretarial approval requirement, where certain qualifying conditions are met. *See* HEARTH Act, Pub. L. No. 112-151 § 2(h), 126 Stat. 1151 (allowing for the lease of nearly all tribes' tribal trust lands without approval from the Secretary, provided tribal regulations approved by the Secretary are followed); *see also* Judith v. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1078 (2008) (describing some specific rules for energy development on tribal lands); *see also infra* note 146 and accompanying text (discussing scope of the HEARTH Act).

[118] Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. at 72,446–48 (articulating Interior policy of deference to tribal law in leasing and recognizing that "tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land"); *see also* 25 C.F.R. § 162.016 ("Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction….").

[119] *E.g.*, 25 U.S.C. § 81 (2012) (excluding encumbrances lasting lest than seven years on tribal trust lands from federal approval requirements); 25 U.S.C. § 5124 (2012) (permitting certain tribal corporations to execute leases of corporate assets for up to twenty-five years without federal oversight).

[120] *See, e.g.*, 25 C.F.R. § 162.207(a) (referencing practice of tribal land assignments and requiring consent of both tribe and individual assignee before a grant of an agricultural lease of such tribal land may be approved by the Secretary of the Interior). In general, however, when the tribe grants an assignment of tribal land, the Interior Department "will not recognize a tribal land assignment as an

may be in the form of "assignments" of tribal lands—a property right subject to specific terms, such as a 99-year assignment of tribal land on which a house may be built. Or, other tribes, such as the Navajo Nation, continue to recognize other forms of individual customary use rights on tribal lands that are also outside of federal oversight and control.[121]

States have even less jurisdictional claim to define any aspect of tribal trust property than they do individual Indian trust lands. Tribes also have sovereign immunity, which may prevent other attempts by states to assert and then enforce any jurisdiction.[122]

2. Fee Lands

Unlike trust properties, fee lands within reservation boundaries are categorically excluded from federal jurisdiction.[123] Fee lands within reservation boundaries are instead subject to a mix of state and tribal property laws. In general, fee lands within reservations are freely alienable under state law and presumptively subject to

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individual trust interest that may be conveyed or that operates as an encumbrance on tribal trust land although the tribe may treat the assignment as a temporary possessory interest or owner use privilege." Indian Affairs Manual, Directive 52 IAM 10, Release No. 08-04, *Tribal Land Assignments* (Feb. 11, 2008). The assignee's rights are defined by the tribe alone. *Id.*

[121] *See, e.g.*, Ezra Rosser, *This Land is My Land, This Land is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 257, 263 (2005).

[122] *E.g.*, Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788-90 (2014) (holding that Indian tribes have sovereign immunity from suit by a state absent a waiver or abrogation by Congress). In contrast, the scope of tribal sovereign immunity—and whether it exists at all—in *in rem* actions involving off-reservation, non-trust real property is unsettled. *See* Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1654-55 (2018); *see also infra* note 213 and accompanying text.

[123] *See, e.g.*, Estate of James Byron Granbois, 53 I.B.I.A. 252 (June 28, 2011) (example of BIA and IBIA finding no jurisdiction over property issues once land has passed out of trust to non-Indian heir).

state and local property taxes.[124] When these fee lands are owned by non-Indians, the case for state law jurisdiction and state-based property rights and regulations is typically strong and frequently accepted. Fee lands owned by Indians or the Indian tribe itself, however, are more complicated.

Today, tribes and individual Indians frequently own land in fee within a reservation, often after a purchase of that land from non-Indians.[125] It is generally accepted that "[t]itle to tribal lands held in fee simple is owned under the same terms as title held by non-Indians" and is typically subject to state property taxes.[126] However, there may be some argument the Nonintercourse Act's restriction on alienation applies even to Indian-owned fee property.[127] There is also strong authority for the proposition that Indian tribes do retain the sovereign right to define property rights, at least internally, and especially as to Indian-owned fee properties.[128]

Ultimately, the definition and regulation of fee properties, including the whole spectrum of different Indian and non-Indian fee owners, is an area of significant ongoing debate and uncertainty

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[124] COHEN HANDBOOK *supra* note 8, § 16.03, at 1071-89.
[125] *Id.* § 15.04[4], at 1015.
[126] *Id.*; *but see infra* note 203 and accompanying text (describing pending case that may clarify—and expand—recognized exceptions to this general rule).
[127] COHEN HANDBOOK *supra* note 8, § 15.04[4], at 1015 (citing United States v. Candelaria, 271 U.S. 432 (1926)).
[128] Abraham Bell & Gideon Parchomovsky, *Property Lost in Translation*, 80 U. CHI. L. REV. 515, 525 at n. 31 (2013) (citing United States v. Tsosie, 92 F.3d 1037, 1044 (10th Cir. 1996) (requiring tribal court exhaustion); Gooding v. Watkins, 142 F 112, 113 (8th Cir. 1905) (applying tribal law to adverse possession claim)); *see also* Jones v. Meehan, 175 U.S. 1, 29 (1899) (determining that right to inherit unrestricted land owned by Indian chief "was controlled by the laws, usages, and customs of the tribe, and not by the law of the state of Minnesota, nor by any action of the Secretary of the Interior").

within Indian Country. The complexity of this debate is also compounded by the frequent difficulty of even distinguishing "Indian" and "non-Indian" owners. Who qualifies as an Indian for whom trust property may be held is complicated. Generally, there is no single universal definition of "Indian" for purposes of federal law, and who is considered an Indian for legal purposes varies depending on the legal context.[129]

In addition, even an "Indian" owner of fee property might include a wide spectrum of different owner types, with the potential for different legal consequences for each. For example, Indian fee owners might include Indians who are citizens of the local governing tribe, the tribe itself, or even Indians who are not citizens of any tribe or who are citizens of a different tribe.[130]

3. Emulsified Properties

It is also important to acknowledge that things are actually more complicated than even the checkerboard analogy reveals. This is because, within a single parcel of individual trust land, it is not uncommon for the number of co-owners to be exponentially large and for those co-owners to fall into different identity groups (family members and strangers, Indians and non-Indians, private and public) in ways that complicate both ownership and governance.[131] In many instances, there are co-owners of undivided interests in the

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[129] COHEN, HANDBOOK, *supra* note 8, § 3.03[1], at 171.

[130] Many individual Indians marry non-Indians or Indians with ancestry or membership in another tribe, and as a result, many Indigenous peoples today have ancestry from multiple tribes or may not qualify for membership in any single tribe. *See, e.g.*, Kristina McCulley, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401 (2005) (discussing sample family relationships not covered by existing Indian definitions).

[131] *See generally* Shoemaker, *Emulsified Property*, supra note 67.

same single physical property who own their fractional shares in different tenure statuses. Thus, these mixed-tenure properties—what I have elsewhere called "emulsified properties"—are actually neither exclusively trust nor exclusively fee but rather are a blended mix of co-owners with different and incongruent property rights to the same physical space, all allocated, governed, and enforced by different—and sometimes deeply uncertain—jurisdictional rules.[132]

Recent federal reforms have furthered this trend of emulsifying reservation lands. For example, federal rules now define permanent improvements on trust land as fee property, putting these improvements categorically outside of the federal government's authority.[133] This means a house on trust land is now treated differently than the underlying land on which it sits, with house and land subject to entirely different jurisdictions and different rules for probate, use, and alienation.[134] Although the Department of the Interior tried to make clear that the fee status of permanent improvements on trust lands should not give rise to state taxing authority,[135] the broader issue of when—and if—states can tax these

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[132] *Id.*

[133] Indian Trust Management Reform-Implementation of Statutory Changes, 76 Fed. Reg. 7500, 7501 (Feb. 10, 2011) (codified at 25 C.F.R pt. 15) (clarifying that the Department generally "considers permanent improvements [attached to trust or restricted property] to be non-trust property");

[134] *See* Shoemaker, *Complexity's Shadow*, *supra* note 42, at 523–24 (discussing same).

[135] Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,449 (Dec. 5, 2012) (codified at 25 C.F.R. § 162.017) [hereinafter 2013 BIA Final Leasing Rule] (explaining federal position that states cannot tax improvements on trust leaseholds "regardless of who owns the improvements").

improvements or other aspects of trust land leaseholds themselves has been subject to frequent recent litigation.[136]

B. Challenges Specific to the Trust

Beyond the fundamental governance challenges created by these checkerboarded reservations, there are also unique challenges inherent in the trust itself. This section focuses briefly on four: (1) increased transaction costs impacting reservation economics, (2) fractionation of allotments, (3) limits on tribal expressions of sovereignty, and (4) the scope of resources deployed to the federal land bureaucracy.

1. Transaction Costs, Alienation, and Economics

The special trust status means, fundamentally, that the federal government has a duty to manage the land for the benefit of individual Indian owners or tribes. The intervention of the federal government as property manager and administrator, though, has created a property system that is notoriously restrictive, cumbersome, and bureaucratic. These layers of federal restrictions and oversight limit the ability of trust landowners to move resources flexibly to alternative users for a range of local purposes, from housing to agriculture to economic development. The trust status

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[136] *See, e.g.*, Confederated Tribes of Chehalis Reservation v. Thurston Cty. Bd. of Equalization, 724 F.3d 1153 (9th Cir. 2013) (finding no county authority to tax non-Indian owned permanent improvements on Indian trust land pursuant to 25 U.S.C. § 465 (2012) [recodified as 25 U.S.C. § 5108], even where those trust lands were outside the tribe's reservation); *see also* Desert Water Agency v. United States Dept. of the Interior, 849 F.3d 1250 (9th Cir. 2017) (finding that federal regulations do not categorically preempt all state taxation of non-Indian leaseholds but rather that individual preemption issues must be decided on a case-by-case basis with a balancing of federal, state, and tribal interests); Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324 (11th Cir. 2015) (holding that federal leasing regulations do preempt state taxes on non-Indian rent payments made to tribe).

also creates obstacles to accessing credit in Indian country, as land cannot easily be used as collateral for secured transactions. The process of federal approvals and other federal land management steps—such as recording and reporting on who owns what through title status reports—is also notoriously slow, and this has been blamed for significant delay in many trust land transactions.

In general, these restrictions tend to make it more expensive to use Indian trust lands than the lands of non-Indian fee neighbors. These added transaction costs limit economic development and have been pointed to as reducing investment on trust lands, compared to neighboring fee properties. Thus, although the trust status does preserve landownership, it is also often blamed for contributing to the widespread poverty that persists in much of Indian Country, despite significant resources at least in technical ownership.[137]

2. Fractionation

Second, in direct relation to the restrictiveness of this land regime, many of the individually owned trust allotments are now co-owned by many hundreds or even thousands of co-owners, a condition described in this context as fractionation. In the period immediately after allotment, the original trust status denied individual Indian allottees the right to determine, through devise or other tribal inheritance institutions, who received the allotment after death.[138] Instead, many allotments were distributed formulaically to

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[137] *See* Shoemaker, *Transforming Property*, *supra* note 107, at 1545-47 (collecting data and authorities).

[138] Instead of applying traditional tribal inheritance systems, after allotment, all individual allotments passed by the intestacy laws of the state that surrounded them, often to multiple children and relatives. Dawes Act, *supra* note 52, at § 5; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § B(4)(a), at 618-19 (Rennard

multiple heirs via state intestacy laws.[139] This started the process of co-owned inherited property, and modern rules still limit avenues for any efficient transfer or consolidation during life. This means today it is simply easier to hold the land passively, with no costs of ownership, in fractionated state than to consolidate it.

Today, individual trust allotments are often co-owned by hundreds or even thousands of co-owners. This extreme degree of pervasive co-ownership increases the costs of land use in Indian country as individual co-owners must not only navigate the federal bureaucracy but also, in many cases, locate and get other co-owners' permissions before most actions.[140] All of this culminates in statistics like this: Today, more than 60 percent of these fractionated individual trust lands are idle or generating no income, with federal maintenance costs often exceeding the value of the underlying asset.[141]

These small fractional interests also exacerbate the Department of the Interior's accounting challenges.[142] The federal management role grows in proportion to fractionation and creates enormous expense for U.S. taxpayers annually, with no sign of abatement despite several legal response attempts.[143] For example, even an ongoing $1.9 billion buy-back program to repurchase individual

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Strickland et al. eds., 1982 ed.)

[139] Dawes Act, *supra* note 52, § 5.

[140] *See* Shoemaker, *No Sticks*, *supra* note 109, at 394 (although undivided use and possession rights are a core feature of non-Indian co-ownership, Indian co-owners must uniquely obtain the permission of all of their co-owners and the Bureau of Indian Affairs before taking possession of their own land).

[141] U.S. DEP'T. OF THE INTERIOR, 2016 STATUS REPORT: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 6 (Nov. 7, 2016), https://www.doi.gov/sites/doi.gov/files/uploads/2016_buy-back_program_final_0.pdf.

[142] *Id*.

[143] Shoemaker, *No Sticks*, *supra* note 109, at 440.

allotted interests from willing sellers and return those lands to tribal ownership is insufficient to eliminate current fractionation, and recent projections show fractionation doubling again in a mere thirty years, despite this investment.[144]

3. Limits on Tribal Sovereignty

This entire land tenure structure limits tribal expressions of sovereignty. The checkerboarded mix of ownership types and owner identities within reservations already challenges cohesive tribal governance, but with respect to trust properties specifically, the degree of federal control comes at the expense of another layer of tribal autonomy and self-determination. The core property right allocations and definitions for trust properties, including primarily the rights of landowners to possess and alienate their own property, are still largely defined at the federal level—and not through any kind of reservation-specific robust democratic process.[145] This is particularly problematic given the importance of land and land

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[144] *See, e.g.*, U.S. DEP'T OF THE INTERIOR, INITIAL IMPLEMENTATION PLAN: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 9 (December 18, 2012), https://www.doi.gov/sites/doi.gov/files/migrated/buybackprogram/upload/Initial-Implementation-Plan-508.pdf ("[D]espite the size of the Fund, the Fund may not supply sufficient capital to purchase all fractional interests across Indian country."). Moreover, the plan applies only to willing sellers, and "it is not clear how many of the 219,000 individual owners will be interested in selling their fractional interests." *Id.* at 9. A time limit also precludes any purchases after ten years. *Id.* There are also concerns that, as developed, costs of appraisals and other administrative requirements will consume a significant portion of the funds. *See, e.g., id.* at 8-9.

[145] *See, e.g.*, Milo E. Cadotte v. Acting Aberdeen Area Director, 31 I.B.I.A. 175, 176 (Sept. 22, 1997) (suggesting in dicta that tribe could modify a trust co-owner's rights to use his or her own trust property by eliminating federal rent requirement); COHEN HANDBOOK, *supra* note 8, §§ 4.02[3][c][i], 7.04[1][b], at 230-31, 618-19.

governance to any government's expression of values around how people relate to each other and to the environment.

Recent efforts to increase tribal self-governance over land matters tend to be still very restricted. For example, the federal government's recent implementation of the HEARTH Act—which allows tribes that opt-in to the system to execute their own leases without secretarial approval, as long as those tribal leases are executed under tribal leasing regulations that are themselves approved by the Secretary—still requires that tribal leasing regulations be "consistent" with federal leasing regulations.[146] This dramatically limits tribal choices and flexibility. Likewise, when Interior recently reaffirmed tribal authority to regulate some land uses on tribal trust lands, that right was made subject to superseding and conflicting federal authority.[147] This pattern of restrictively cabining tribal flexibility and creativity persists across numerous land-tenure dimensions.[148]

4. The Costs of Bureaucracy

Finally, the federal bureaucracy is very expensive. A class action lawsuit seeking an accounting from the federal government

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[146] 25 U.S.C. § 415(h)(1); *see also supra* note 117 and accompanying text (discussing HEARTH Act developments).

[147] 2013 BIA Final Leasing Rule, *supra* note 135, at 72446-48 (articulating Interior policy of deference to tribal law in leasing and recognizing that "tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land"); *see also* 25 C.F.R. § 162.016 (2015) ("Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws relating to land use, environmental protection, and historic or cultural preservation.").

[148] *E.g.*, 25 U.S.C. §§ 2205-06 (2014) (permitting only federally approved tribal probate codes); *id.* § 3712 (permitting only federally approved agricultural resource management plans).

regarding who owned what in the federal trust resulted in the government admitting it simply could not do such an accounting and a $3.4 billion settlement to class members.[149] Meanwhile, many more billions have been paid to tribal governments for similar breach of trust claims.[150] And, even when the trust is operating correctly, it is expensive—with administrative costs often exceeding the value of the underlying asset.

These costs show no sign of abating. Part of this is inherent to how bureaucracies operate. Even federal reforms purporting to reduce or eliminate federal oversight and control of some tribal leasing decisions often actually *perpetuate* and create new forms of federal bureaucracy by continuing to require different layers of programmatic federal oversight, recordkeeping, and appeals. This is all part of a pattern of ever-increasing granularity in property regulation and jurisdictional differentiation in this land-management bureaucracy. Even reforms intended as beneficial tend to add significant information and other costs.[151]

IV. Land and Governance in Indian Country

This Part expands beyond the ownership institutions within reservation land tenure. This Part focuses on additional layers of property and sovereignty dynamics. Property law in Indian country implicates more than just determining what rights an owner has vis-à-vis a specific parcel of land. An owner's property decisions also

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[149] *See* Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010); *see also* Cobell v. Norton, 392 F.3d 461, 463–64 (D.C. Cir. 2004) (detailing federal breach of trust).

[150] *See infra* Part III.C.3.

[151] *See generally* Shoemaker, *Complexity's Shadow*, *supra* note 42.

impact the fundamental relationships among sovereigns: the tribe, the state, and the federal government. Who owns what property influences which government has authority to define and prosecute crimes, which governments' civil and tax laws apply, and even the dispute-resolution jurisdiction of tribal, state, and federal courts.

This Part first explores the territorial concept of "Indian country" and the rules that set its physical parameters, including how the exterior bounds of a reservation's territory are defined. Then, it explores in more detail the relevance of this territorial status and, specifically, the relationship between land status and more general jurisdictional questions in Indian country. Increasingly, land status has come to impact which sovereign has authority over which regulatory and adjudicatory matters. This bizarre conflation of property and governance rights is unique to Indian law and has resounding consequences for tribal sovereignty and the choices that are made about reservation land tenure. Finally, this Part concludes with a brief discussion of special jurisdictional issues that have arisen in reacquired lands and how a particular parcel's tenure status can sometimes be changed via the fee-into-trust process.

A. Defining Indian Country and Reservation Boundaries

Typically, sovereignty encompasses dominion over territory.[152] Thus, a sovereign's reach is generally demarked by the boundaries of its territory and reaches to all persons who come within that territory, regardless of that person's citizenship status or how any particular property parcel is owned within that domain.[153] This was the original promise of Indian treaties and the reservation policy,

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[152] *See* Royster, *supra* note 51, at 3.
[153] *See* Monette, *supra* note 9, at 35.

too: that reservations would remain territories of exclusive tribal dominion and control.[154] Today, however, the presence of non-Indian owned fee lands within reservation boundaries has had cascading effects for jurisdictional determinations within Indian country. Now, most of our understandings about jurisdiction and land tenure apply differently in Indian country.

Although for many contexts tribal sovereignty is no longer truly territorial and instead reflects something closer to a checkerboard of governance rights, the over-arching "Indian country" designation is still a relevant legal category that refers, generally, to the territorial space in which tribal governments have the best opportunity to exercise sovereign authority and where the special federal laws relating to Indian people are most likely to apply. This section emphasizes how this territorial category is defined and what spaces are included. The next section explores the jurisdictional realities—what is territorial and what is property-specific—within this area.

As a territorial concept, Indian country refers to a bounded jurisdictional geography without regard to land ownership. The most common, default definition of Indian country is found in a criminal statute, but this definition has been extended to civil matters as well.[155] By this federal statute, Indian country includes (1) "all land within the limits of any Indian reservation," without regard to property ownership; (2) all "dependent Indian communities;" and

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[154] *See supra* note 38 and accompanying text.

[155] *See* COHEN HANDBOOK, *supra* note 8, § 3.04[1], at 183-84 (discussing this general context and providing specific examples of alternative definitions in a few specific statutory schemes); *see also* DeCoteau v. Dist. County Ct., 420 U.S. 425, 427 n.2 (1975) (explaining that statutory definition of Indian country for criminal purposes also extends to civil matters).

(3) any other Indian trust lands (whether trust allotments or tribal trust lands) that are not otherwise within reservation boundaries or within a dependent Indian community.[156]

This final trust-land category means, effectively, that all trust lands, whether individual allotments or tribally held, are included within the concept of Indian country no matter where they are located. This makes trust status the clearest and most direct way for land to qualify as Indian country.[157] This certainty explains, in part, why many tribes seek to have fee lands they own, including lands both within and outside of reservations, transferred into the trust status. One trust-status benefit, of many, is that the trust status cements Indian country status, too.[158]

The more difficult parts of deciding the boundaries of Indian country relate, instead, to the first two parts of the definition and require clarifying what constitutes a "reservation" and a "dependent Indian community" for this purpose. Within reservation boundaries and within a qualifying dependent Indian community, whole territorial spaces are included in Indian country without regard to who owns what parcel in those spaces. Non-Indian fee lands within reservation boundaries, therefore, are still technically part of Indian country—though, as described in more detail below, the jurisdictional consequences of this have become more complicated.

In terms of what qualifies as an Indian reservation, original reservation boundaries were set by terms of the reservation-creating treaty or by whatever statue or executive order established the reservation. Complications arise, however, because the Supreme

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[156] 18 U.S.C. § 1151(a).
[157] *E.g.*, United States v. Azure, 801 F.2d 336, 339 (8th Cir. 1986) (confirming Indian country status of off-reservation trust land).
[158] *See infra* Part IV.D.

Court has also said that Congress can unilaterally terminate or change the boundaries of a reservation (and thus remove some or all of a former reservation from its associated Indian country status).[159]

The Supreme Court has held numerous times that "only Congress can divest a reservation of its land and diminish its boundaries,"[160] and Congressional "intent to do so must be clear."[161] Merely opening a reservation for non-Indian settlement or selling some reservation land to non-Indians does not necessarily diminish or change its territorial boundaries. The fundamental inquiry is what Congress intended at the time of the relevant act, and this issue has produced significant litigation, especially surrounding the territorial effects, if any, of Congress's actions to open reservations and sell so-called surplus lands during allotment. Congress was rarely explicit about its intended effect on reservation boundaries at the time of allotment, and so the Court instead has attempted to divine historic intent by looking at surrounding evidence. The result is a three-part test—often called the *Solem* test—that is used to determine historic Congressional intent. This test looks to (1) legislative language, (2) legislative history, and (3) to a lesser degree, the subsequent treatment of the area by tribal, state, and federal governments.[162]

As a general rule, the effect of the allotment policy's surplus land sales was not to diminish reservation boundaries, but the Supreme Court has found that *some* post-allotment surplus land sales did diminish reservation boundaries. In general, when surplus land

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[159] *E.g.*, Solem v. Bartlett, 465 U.S. 463, 470 (1984).
[160] *Id*.
[161] Nebraska v. Parker, 577 U.S. ---, 136 S.Ct. 1072, 1078-79 (2016).
[162] *See* Solem v. Bartlett, 465 U.S. 463 (1984) (articulating three-part test for Congressional intent of reservation diminishment).

sales resulted in a categorical transfer of a section of reservation property out of tribal control and in exchange for a lump-sum payment to the tribe, the Court is more likely to find diminishment. When Congress instead merely advertised lands for sale and acted more in the context of a sales agent, transferring purchase proceeds to the tribe on a property-by-property basis, there is less likely to be diminishment.

More recently, some litigants have sought to modify the Court's traditional three-part diminishment test. In particular, litigants have tried various strategies to increase emphasis of current conditions in order to increase the relevance of longstanding assertions of state jurisdiction over any historic Congressional intent. In 2018, for example, the Supreme Court heard *Carpenter v. Murphy*, which raises related questions about the current status of a large portion of the former Indian Territory in Oklahoma.[163] In a series of unusual moves, the Court ordered supplement briefing in December 2018, and in June 2019, announced that no decision had been reached and that the case would instead be restored to the 2019-2020 calendar for reargument.[164] More recently, the Court has granted certiorari in a second case involving a similar reservation disestablishment dispute in Oklahoma, and these issues are still developing.[165]

Meanwhile, the test for what constitutes a "dependent Indian community" applies only if Indian country cannot be determined first by reference to an existing reservation boundary or trust land

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[163] Carpenter v. Murphy, Case No. 17-1107 (U.S., pending); *see also infra* Part IV.C (describing related arguments about the relevance of long passages of time without tribal assertions of jurisdiction in these and other cases).
[164] *See* Docket Entries, *Carpenter v. Murphy*, Case No. 17-1107 (U.S., Dec. 4, 2018 & Jun. 27, 2019).
[165] *See* McGrit v. Oklahoma, Case No. 18-9526 (U.S., pending).

ownership. The Supreme Court has defined dependent Indian community to require both some special (non-trust) federal set-aside of land or territory for Indian use and possession *and* some ongoing federal oversight or superintendence over those lands.[166] Thus, lands owned by pueblo people in New Mexico that were held in fee simple prior to, and after, the creating of the United States qualified,[167] but lands subject to the Alaska Native Claims Settlement Act, which were transferred to corporate ownership in a system intended to end most federal oversight, did not.[168]

B. The Conflation of Property and Sovereignty

Defining the exterior boundaries of a reservation and the full scope of Indian country does not resolve all jurisdictional issues. Whether an event or conduct occurs in Indian country often matters most for Indian people. Major federal statutes, like the Major Crimes Act, extend federal criminal jurisdiction for enumerated crimes over Indian people only, and only then when the alleged crime occurred within Indian country. Tribal government institutions, including tribal courts, are also generally deemed valid and competent authorities for all Indian participants, and this authority generally extends across Indian country, too.[169] In this context of governing

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[166] Alaska v. Native Village of Venetie, 522 U.S. 520, 530 (1998).
[167] United States v. Sandoval, 231 U.S. 28, 46 (1913).
[168] *Venetie*, 522 U.S. at 533; *see infra* Part V.A.2 (describing Alaska land claims in more detail).
[169] *See, e.g.*, Williams v. Lee, 358 U.S. 217, 221-23 (1959) (holding that tribes have the right "to make their own laws and be ruled by them" and therefore tribal court had exclusive jurisdiction over claim by non-Indian plaintiff to collect a debt arising on the reservation against a tribal member defendant); Fisher v. District Court, 424 U.S. 382, 389 (1976) (exclusive tribal court jurisdiction over Indian adoption proceeding arising on Indian reservation).

Indian people specifically, the Supreme Court has repeatedly described tribal governments as competent and emphasized that tribal courts are fair, efficient, and cost-effective vehicles for the administration of justice.[170] Especially since the 1980s, however, the U.S. Supreme Court has significantly limited tribal authority over non-Indians, even within Indian country, and especially when that non-Indian conduct occurs on land that is owned by non-Indians.

In part, the ensuing limits on tribal jurisdiction (and, corresponding extension of state jurisdiction) in Indian country reflect the Supreme Court's concern for non-Indian individuals' rights to be governed by a sovereign of which they are an enfranchised constituent.[171] Non-Indians are not citizens of the resident tribal government and thus cannot vote in most tribal government affairs. This introduces a due process concern.[172] This

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[170] *See, e.g.*, National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856-57 (1985) (requiring exhaustion of tribal court remedies before federal court may exercise jurisdiction over question of scope of tribal court authority because it promotes "orderly administration of justice"); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 15-16 (1987) (requiring tribal court exhaustion before federal court may exercise diversity jurisdiction as well); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.").

[171] *See* Fletcher, *Unifying Theory*, *supra* note 103, at 838 (discussing problem of "democratic deficit").

[172] *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 384-85 (Souter, J., concurring) (expressing concern about difficulty of outsiders being able "to sort out" the law applicable to tribal court, which may include unwritten "values, mores, and norms of a tribe"); Plains Commerce, 554 U.S. at 337 (describing how Indian nations are "outside the basic structure of the Constitution" and "nonmembers have no part in tribal government" so "those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions"); *see also* Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 634 (2008) (arguing in favor of tribal court civil jurisdiction over non-Indians).

same concern, however, seems not to extend as often to non-member Indians (i.e., Indians who also cannot vote in tribal government affairs but are often nonetheless subject to tribal and federal jurisdiction when within another tribe's reservation).[173] In the context of criminal jurisdiction in Indian country, for example, the Supreme Court has held that tribal governments are categorically excluded from asserting criminal jurisdiction over non-Indians, absent some special and limited legislation.[174] Congress later clarified, in an act affirmed by the Supreme Court, that tribes do however retain inherent sovereign criminal jurisdiction over non-member Indians within reservation boundaries.[175] Thus, for purposes of criminal jurisdiction, Indian nations have clear territorial jurisdiction but only over crimes committed by Indians, whether members or not of the respective tribe.[176]

In terms of civil jurisdiction, however, the analysis has often turned to property law in an upside-down accounting of how property and sovereignty typically work. In Indian country, Indian

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[173] Non-member Indians are individuals who may socially, culturally, and biologically identify as Indian but who are not enfranchised members of the resident tribe (and may or may not be Indians of another tribal government on a different reservation). Non-member Indians are generally subject to a tribe's territorial jurisdiction, without regard to their lack of enfranchisement in that particular tribal government. *See, e.g., Lara*, 541 U.S. at 199–200.

[174] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) ("Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."); *see also id.* at 211-12.

[175] *See* United States v. Lara, 541 U.S. 193, 196 (2004).

[176] In 2010, Congress changed this slightly, extending tribal jurisdiction over certain crimes of violence committed by non-Indian partners or others in a romantic relationship with an Indian in Indian Country as part of the Violence Against Women Act reauthorization process. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (signed by President Obama on July 29, 2010).

property rights are often tied to Indian sovereignty. Indian nations' rights to govern a given space are often conflated with the property rights of an owner to exclude non-owners from the premises.[177] As Indian property transferred to non-Indian ownership, Indian nations no longer had the property right to exclude non-Indians from that physical space, and over time, the Supreme Court extrapolated to conclude that without the property right to exclude, Indian nations also lacked the sovereign right to regulate other conduct in that alienated space.[178] Thus, for tribal governments trying to express a cohesive land ethic—or otherwise govern cohesively as a sovereign across territory—patchwork ownership is really problematic.

The foundational case for assessing the scope of tribal civil regulatory authority over non-Indians—and the potential relevance of land ownership to that *ad hoc* balancing of jurisdictional factors—is *Montana v. United States*.[179] In *Montana*, the Supreme Court held that the Crow Tribe could not regulate non-Indian fishing and hunting when it occurred on non-Indian lands within in the reservation—going to great lengths, for example, to determine as a prerequisite matter that the bed of the Bighorn River on which the fishing at issue was conducted had passed to the State of Montana

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[177] *E.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) ("hallmark of Indian sovereignty is the power to exclude non-Indians"); *see also* Singer, *Sovereignty and Property*, *supra* note 9, at 3, 6 (arguing that the distinction between Indian nations as sovereign governments with public powers and as property owners with property rights has been "manipulated…in a way that has given tribal governments the worst of both worlds").

[178] Montana v. United States, 450 U.S. 544 (1981); *see also* South Dakota v. Bourland, 508 U.S. 679, 689 (1993) (holding that when an Indian tribe conveys ownership of land to non-Indians it loses the right to exclusive use and occupation and the regulatory authority incident to that right).

[179] *Montana*, 450 U.S. at 566-67. The Montana Court described the question before it as a "narrow one," relating only to tribal regulatory power over non-Indians on non-Indian lands. *Id.* at 557.

upon statehood.[180] *Montana*'s reasoning was firmly rooted in property concepts. The *Montana* Court reasoned that the tribe lost its right to exclude when the land passed to non-Indian ownership and therefore held that the tribe could not prohibit non-Indian hunting and fishing on those alienated lands.[181] The Court did recognize that tribal jurisdiction might exist, however, over non-Indians on non-Indian lands if one of two exceptions were met: (1) there existed a consensual relationship between the non-Indian and the tribe or its members or (2) the non-Indian "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[182]

In later cases, this conflation of a citizen's property right to exclude and a sovereign's territorial right to govern persisted, and these exceptions have narrowed. For example, in a case about the scope of a tribal court's jurisdiction to hear a civil dispute involving a non-Indian defendant for a tort, property status again mattered. In *Strate v. A-1 Contractors*, the Court found no tribal court jurisdiction over the non-Indian defendant who was working on the reservation and involved in a highway accident with tribal citizens.[183] To reach this conclusion, the Court emphasized that although the collision occurred on a highway that crossed tribal trust lands, the state right-of-way for the highway itself was the "equivalent, for nonmember purposes, to alienated, non-Indian land," and the tribe therefore could not assert "a landowner's right to occupy and exclude."[184]

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[180] *Id.* at 553-57.
[181] *Id.* at 558-59.
[182] *Id.* at 564-65.
[183] 520 U.S. 438, 442 (1997).
[184] *Id.* at 454, 456.

More recently, in *Plains Commerce Bank v. Long Family Land & Cattle Company*, the Court also used property-based reasoning to limit tribal jurisdiction within reservation boundaries. There, the Supreme Court categorically prohibited tribal governments from restricting the alienation of non-Indian fee lands within reservation boundaries, even as a potential remedy for discriminatory lending claims involving an Indian-owned business.[185] In *Plains Commerce*, an Indian-owned cattle company mortgaged its fee land on the reservation with a non-Indian bank. After foreclosing on the mortgage, the bank sold the fee land to non-Indians. The tribal business filed suit in tribal court alleging discriminatory practices and sought, as remedy, the right to purchase the property back on the same terms as the non-Indian purchasers. The Supreme Court, however, found no tribal authority for such a remedy because "[b]y definition, fee land owned by nonmembers has already been removed from the tribe's immediate control" and "alienated from the tribal trust."[186]

Property ownership is not the only factor in these jurisdictional calculations, but it remains an important variable.[187] In general, tribal rights to regulate nonmembers are greatest on tribal trust lands or

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[185] Plains Commerce Bank v. Long Family Land & Cattle Co. Inc., 554 U.S. 316, 128 S.Ct. 2709, 2715 (2008).
[186] *Id.* at 335-36.
[187] *See generally* Krakoff, *supra* note 103. There is also significant literature on the issue of tribal civil jurisdiction over non-Indians. *See, e.g.*, Christensen, *supra* note 103; Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89 (2005); Thomas P. Scholsser, *Tribal Civil Jurisdiction Over Nonmembers*, 37 TULSA L. REV. 573 (2001).

allotments,[188] but even then they are not certain.[189] The lower federal courts, however, do continue to find tribal court jurisdiction over nonmember conduct more predominantly when it occurs on land in which an Indian individual or tribe retains a property interest than when there is no such land status at issue.[190] For example, the Ninth Circuit required a non-member defendant to exhaust tribal court remedies before it would hear a challenge to tribal court jurisdiction over claims arising when she set a fire that damaged or destroyed large swaths of tribal lands.[191] Because her conduct threatened, and in fact did damage, tribal lands, the non-member defendant was at least arguably still within tribal jurisdiction.[192]

Because of the fact-intensive tests created for assessing civil jurisdiction in Indian country, the reality is an often uncertain and overlapping jurisdictional framework within reservation boundaries. This plays out across numerous jurisdictional domains, but one specific recurrent issue is land-use planning and zoning, where piecemeal jurisdiction is particularly difficult and

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[188] For a long time, *Montana* was understood to mean that there was presumptively no tribal jurisdiction over non-Indians on non-Indian property within reservations but that tribes did retain authority over nonmembers when the conduct occurred on Indian-owned lands. In fact, the Montana Court said it could "readily agree" with the lower court's holding that the Tribe could prohibit, or for that matter, regulate nonmember hunting and fishing "on land belonging to the Tribe or held by the United states in trust for the Tribe." *Montana*, 450 U.S. at 557.

[189] *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001) (finding no tribal court jurisdiction over state police officers for events arising in execution of search warrant on tribal member's allotted trust land).

[190] *See* Krakoff, *supra* note 103, at Appendix (collecting lower court cases from 1997 to 2010).

[191] Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 844, 849-50 (9th Cir. 2009).

[192] *See id.*; *see also* Krakoff, *supra* note 103, at 1231-32.

problematic.[193] For zoning to work and the collective benefits of reciprocal and interlocking land-use plans to be realized, the zoning has to encompass a reasonably comprehensive area. If state and local governments control the development of nonmember land on Indian reservations but tribal governments separately control the development of tribal trust land and tribal member trust land (subject to federal oversight), the result is a patchwork of uncoordinated and potentially conflicting land uses.[194]

In the one instance in which the Supreme Court weighed in on this topic, the Court looked not to ownership on a property-by-property basis but instead focused on the character of the reservation area-by-area. In *Brendale v. Confederated Tribes and Bands of Yakima Nation*, the Supreme Court determined that the Tribe had jurisdiction to zone the "closed" portion of the reservation, including non-Indian fee lands located within an area significantly still subject to Indian control, but not the "open" portion of the reservation characterized by more non-Indian ownership[195] Thus, the Court upheld a tribal zoning ordinance governing 160 acres of fee land within the Yakima Indian Reservation. However, no opinion in *Brendale* garnered a majority of the Court, so its final persuasive authority is hard to measure.[196] Still, *Brendale* suggests that tribal

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[193] *See, e.g.*, Nicholas C. Zaferatos, *Planning the Native American Tribal Community: Understanding the Basis of Power Controlling the Reservation Territory*, 64 J. AM. PLAN. ASS'N. 395 (1998); *see also* Webster, *Common Boundaries*, *supra* note 106, at 12-13.

[194] *E.g.*, Webster, *Common Boundaries, supra* note 106, at 12-13 & 30 (citing Gobin v. Snohomish County, 304 F.3d 909 (9th Cir. 2002); Cayuga Indian Nation of New York v. Village of Union Springs, 390 F.Supp.2d 203 (N.D.N.Y. 2005); Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, 233 F.R.D. 278 (N.D.N.Y. 2006)).

[195] Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 423-25, 428-32 (1989).

[196] The maze of opinions in *Brendale* are hard to track. Justice Stevens, for example, declined to apply *Montana* and focused on the location of the land rather than

regulatory jurisdiction can and should extend to at least some non-Indian fee land within the reservation, depending on the character of the area where it is located.[197]

In practice, there are significant conflicts ongoing in reservation communities around these issues.[198] There are some exceptional examples of cooperation between tribal and state jurisdictions to plan cooperatively across jurisdictional divides.[199] But at least equally as often, the checkerboard land tenure patterns create particularly difficult jurisdictional conflicts in land-use planning and other civil regulatory and adjudicatory domains, including property tax, eminent domain, and a range of other governance policies.

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ownership, likening the power of the tribe to an "equitable servitude; the burden of complying with the Tribe's zoning rules runs with the land without regard to how a particular estate is transferred." 492 U.S. at 442 (opinion of Stevens, J.). There is early authority for focusing on tribal authority incident to location, rather than ownership. *See*, *e.g.*, *Buster v. Wright*, 135 F. 947, 951-52 (8th Cir. 1905). ("The jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances"). *But see* Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 653, n. 4 (2001) ("But we have never endorsed *Buster's* statement that an Indian tribe's jurisdiction to govern the inhabitants of a country is not conditioned or limited by title to the land'… *Buster* is not authoritative precedent.").

[197] *Brendale*, 492 U.S. at 432-33, 444.

[198] *See generally* Rebecca M. Webster, *The Land Can Sustain Us: Cooperative Land Use Planning on the Oneida Reservation*, 17 PLAN. THEORY & PRAC. 9 (2016) (discussing history of conflict but sounding optimistic about potential for more cooperative planning); *see also* Sharon Hausam, *Maybe, Maybe Not: Native American Participation in Regional Planning*, *in* RECLAIMING INDIGENOUS PLANNING (Ryan Walker, et al, ed. 2013).

[199] *E.g.*, Webster, *Common Boundaries*, *supra* note 106, at 52-53 (describing case study of intergovernmental planning cooperation between Swinomish Tribe and Skagit County in Washington).

C. Special Cases of Reacquired Lands and the Passage of Time

One net effect of the current civil jurisdiction analysis is that the loss of any Indian property rights within reservation boundaries is likely to be accompanied with significant losses of tribal sovereign governance rights. If a tribe can lose sovereignty by selling property within reservation boundaries, the same logic suggests that a tribe should be able to reacquire that sovereignty by regaining that foundational property ownership right. The Supreme Court, however, has disagreed and instead made the risk of sovereignty loss from property alienation apply in one direction only, to the detriment of the tribal government.[200]

These issues can be difficult to comprehend, but an example should help. A short tax refresher is needed first. As a reminder, one of the few bright-line rules in Indian country is that tribal and individual trust lands are exempt from federal and state property taxation.[201] Taxation of fee properties within reservation boundaries, however, is more complex. Indian-owned fee properties that were taken out of trust have generally been considered subject to state property tax by virtue of specific language in the General Allotment Act.[202] However, when Indian landowners came to own fee lands via

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[200] *See* Matthew L.M. Fletcher & Wenona Singel, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

[201] Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) (stating modern rule that Indian-owned trust land is tax exempt within reservation boundaries, but Indian-owned fee land is not); *see also Chehalis*, 724 F.3d at 1154 (prohibiting count taxation of non-Indian permanent improvements on off-reservation trust lands as part of a joint venture with tribal government); *but see supra* note 133-136 and accompanying text (discussing some recent uncertainty over possible state taxation of improvements owned by non-Indians in fee).

[202] Dawes Act, *supra* note 52, § 5.

other mechanisms, many have argued that Indian citizens and especially tribes themselves should not be subject to state taxation.[203]

In the case of *City of Sherrill v. Oneida Indian Nation of New York*, the Oneida Indian Nation had reacquired by purchase on the open market certain lands that had been illegally taken by the state more than 200 years earlier in a transaction that violated the Trade and Intercourse Act.[204] The Tribe argued that it should be immune from state tax on these tribally owned fee lands, which were still within the Tribe's original reservation and had been unlawfully taken from them in the first place. But, the Supreme Court disagreed and held that the doctrine of laches prevented the tribe from enjoying tax immunity on these fee lands. Because there had been such a long history of the state exercising jurisdiction over the relevant parcel of land, even if that initial state assertion was unlawful, the tribe could not "rekindle[e] embers of sovereignty that long ago grew cold" by repurchasing the disputed land and attempting to unify title and governance rights.[205] The Tribe was subject to state property tax.[206]

The implications of *Sherrill* are still to be determined in many respects. For example, in *Sherrill*, the Court upheld the city's authority to tax tribal fee land without first determining whether the land was still within a reservation or whether that reservation had

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[203] *See, e.g.*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisc., et al., v. Walker, et al., Case No. 3:18-cv-00992-jdp (W. Dist. Wisc., pending). This pending case squarely raises the question of state taxation authority over non-allotted fee lands and the scope of related treaty language.
[204] 544 U.S. 197 (2005).
[205] *Id.* at 214.
[206] If that land had been taken back into trust status, it would be tax exempt. *Id.* at 220-21.

been disestablished.[207] In a more recent case, *Nebraska v. Parker*, non-Indian liquor store owners in a space where reservation boundaries were disputed argued that, even if a reservation remained, *Sherrill* stood for the proposition that the Omaha Tribe should not be able to assert any authority over that area now "in light of the Tribe's century-long absence from the disputed lands."[208] In the *Parker* case, however, the Supreme Court ultimately expressed "no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax" non-Indian retailers in the recognized reservation because the parties had not properly raised that issue in time.[209] These types of issues may arise again in pending Supreme Court cases about the status of current reservation boundaries in the former Indian Territory in Oklahoma.[210]

Likewise, the relationship between *Sherrill* and a tribe's more general sovereign immunity from suit is uncertain. Although the *Sherrill* case held that the state had the power to tax those tribally owned fee lands, the Court did not resolve how, or if, the state could actually enforce that right against the tribal government. When the county actually tried to foreclose on the tribe for non-payment of taxes after *Sherrill*, the Second Circuit held that this foreclosure was prohibited by the tribe's sovereign immunity from suit.[211] The

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[207] *Id.* at 216 n.9. Justice Stevens, in dissent, sharply criticized the Court for failing to account for precedents indicating that only Congress can disestablish an Indian reservation and that state jurisdiction over Indians is constrained within Indian country. *Id.* at 224–225 (Stevens, J., dissenting).

[208] *Parker*, 577 U.S. at ---, 136 S.Ct. at 1082 (citing City of Sherrill v. Oneida Indian Nation of N. Y., 544 U. S. 197, 221 (2005)).

[209] *Id.*; *see also supra* notes 163-165 and accompanying text (discussing more recent pending litigation on similar issues).

[210] *See, e.g.*, *supra* notes 163-165 and accompanying text (discussing pending Supreme Court litigation on reservation boundary issues).

[211] Oneida Indian Nation v. Madison County, 605 F.3d 149 (2d Cir. 2010).

Supreme Court granted certiorari to resolve the scope of a tribe's sovereign immunity in this context, but the tribe then affirmatively waived its immunity—and therefore made the lawsuit moot before it could be heard.[212] More recently, the Supreme Court remanded a related question—the scope of a tribe's sovereign immunity from *in rem* actions involving tribally owned off-reservation fee lands—back to the state supreme court for further analysis but declined to resolve the scope of tribal immunity directly.[213] These issues of where, when, and how the tribe can assert sovereign immunity, especially with respect to reacquired or newly acquired immovable property, will be important to resolve.

Sherrill's use of laches-like equitable defenses to tribal claims has also been extended by some lower courts to tribal claims for damages for otherwise valid land claims.[214]

Future litigants are sure to continue to argue for other extensions of the *Sherrill* precedent, but its actual implication in other contexts remains an open issue.

D. Switching Between Fee and Trust Statuses

Finally, in some cases, a parcel of property can be transferred from fee simple into trust status, or vice versa, and this tenure status change also changes its jurisdictional consequences. In general, the federal government can only hold trust property for the benefit of an Indian citizen or tribal government. Thus, whenever trust land is

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[212] *See* Madison County v. Oneida Indian Nation, 131 S.Ct. 704 (2011).
[213] Upper Skagit Indian Tribe v. Lundgren, 138 S.Ct. 1649, 1654-55 (2018).
[214] *See infra* Part V.A.2 (discussing specific cases); *see also* Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357, 381-88 (2009) (discussing novel extensions of laches doctrine in recent federal Indian law cases).

transferred to a non-Indian, it goes out of trust and into fee. Historically, this occurred most often when an individual Indian owner sought to transfer trust land to a non-Indian spouse or non-Indian child, either during life or at death. An owner of trust land could also seek to remove the land from trust and receive a fee patent on the land for other reasons. All of this is subject to federal oversight and approval, however, and more recently these mechanisms are increasingly limited and foreclosed to avoid further trust land loss and accompanying tribal governance loss.[215]

In the other direction, Congress has also created vehicles for fee lands to be moved into the federal trust—including land both within existing reservation boundaries and, in some cases, outside of a current reservation. In particular, Section Five of the Indian Reorganization Act established a vehicle for the Secretary of the Interior, in her discretion, to place land into federal trust status for Indian tribes and individual Indians.[216] This Section Five process is part of the overall efforts in the IRA to undo some of the effects of the allotment policy and to revitalize tribal self-governance.

In general, after a tribe acquires fee land, it can be taken into trust status only after a long and complicated administrative process.[217] The Department of the Interior has defined, by regulation, the criteria it uses to consider such fee-to-trust acquisitions, with more onerous review required for off-reservation trust acquisitions than

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[215] *See* Shoemaker, *Emulsified Property*, *supra* note 67, at 966-76 (discussing these jurisdictional issues in more detail).

[216] *See* 25 U.S.C. § 5108; COHEN HANDBOOK, *supra* note 8, § 15.07, at 1039-54.

[217] *See* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519 (2013). A discretionary fee-to-trust conversion process can take more than a year. *See* Indian Land Tenure Foundation, *Fee-to-Trust Transfer*, https://www.iltf.org/resources/fee-to-trust-transfer (last visited February 17, 2015).

on-reservation lands.[218] Interior considers multiple factors, including (1) the impact on state and local tax rolls, (2) "[j]urisdictional problems and potential conflicts of land use which may arise," and (3) "whether the BIA [Bureau of Indian Affairs] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status."[219]

States do sometimes object to these fee-to-trust conversions, and their objections tend to emphasize two risks: (1) potential political disadvantages to non-Indian governments if fee land is removed from state tax rolls and made tax exempt pursuant to the trust status and (2) the jurisdictional problems and potential land use conflicts that could arise from increasing checkerboard patterns of ownership.[220] Tribes, meanwhile, often seek to transfer more land into this formal tribal trust status because it provides more certainty and security for jurisdictional and land preservation purposes.[221] If the fee lands at issue in *Sherrill* had been successfully transferred into trust prior to the lawsuits, for example, the state would certainly have had no right to tax the properties.

The Secretary's authority to oversee this land-into-trust mechanism has been the source of numerous legal challenges,[222] but

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[218] *Cf.* 25 C.F.R. § 151.10 (on-reservation trust acquisitions); § 151.11 (criterial for outside reservation boundaries).

[219] 25 C.F.R. § 151.10(d)-(g); § 151.11(a) (2015). The regulatory requirements even for making an individual application are difficult. *See* Department of the Interior, Bureau of Indian Affairs, Office of Trust Services, Division of Real Estate Services, Acquisition of Title to Land Held in Fee or Restricted Fee Status Handbook, Release #16-47, Version IV (rev. 1) 10-11 (6/28/16) *available at* http://bia.gov/WhatWeDo/Knowledge/Directives/Handbooks/index.htm.

[220] *See* Pommersheim, *Land into Trust*, *supra* note 217, at 537-38, 540.

[221] *See* 25 C.F.R. Pt 151; COHEN HANDBOOK, *supra* note 8, § 15.07, at 1039-45.

[222] *See* Pommersheim, *Land into Trust*, *supra* note 217, at 529.

constitutional challenges to the Secretary's land-into-trust discretion have largely failed.[223] More recently, however, litigants opposed to fee-into-trust conversions have successfully challenged on whose behalf the Secretary can exercise this authority. In *Carcieri v. Salazar*,[224] the Supreme Court determined that the use of the word "now" in Section Five of the IRA limited the Secretary's authority to take land into trust for tribes that were under federal jurisdiction at the time the IRA was enacted in 1934.[225] Thus, in *Carcieri*, the Court concluded that the Narragansett Tribe of Rhode Island, which was federally recognized in 1983, could not participate in the land-into-trust process.[226]

To the surprise of many observers, the Supreme Court subsequently extended this ruling's impact to potentially upend previously finalized land-into-trust decisions, too. In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the Court held that sovereign immunity of the United States did not bar legal challenges to these previous trust land acquisitions.[227] In general, the

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[223] These challenges included arguments that, by transferring this discretionary land-into-trust authority to the Secretary of the Interior, Congress violated the separation of powers (and the non-delegation doctrine, specifically). At one point, the Eighth Circuit did find the Secretary's broad assertion of authority unconstitutional on these grounds. South Dakota v. U.S. Dept. of Interior, 69 F.3d 878, 885 (8th Cir. 1996), *vacated* 519 U.S. 919 (1996). The Supreme Court ultimately remanded that opinion, however, with instructions to reconsider the issue in light of new federal land-into trust regulations. Dept. of Interior v. South Dakota, 519 U.S. 919, 920 (1996). After multiple jurisdictional hoops, the Eight Circuit ultimately affirmed the constitutionality of the Secretary's authorities, *see, e.g.*, South Dakota v. Dept. of Interior, 423 F.3d 790, 799 (8th Cir. 2005), cert. denied, 549 U.S. 813 (2006), and all other federal courts faced with the issue have agreed. *See* Pommersheim, *supra* note 217, at 535 (collecting cases).

[224] 555 U.S. 379 (2009).

[225] *Id.* at 395.

[226] *Id.* at 395–96.

[227] 567 U.S. 209 (2012).

federal Quiet Title Act does not permit litigants to sue and assert title in real property held in trust or restricted status by the United States on behalf of Indian peoples or tribes.[228] In *Match-E-Be-Nash-She-Wish Band*, the Court held that this sovereign immunity protection did not bar claims challenging previous trust land acquisitions, as long as the plaintiff alleged a general injury by the trust acquisition and not an interest in the property itself. This creates additional uncertainty about not only new trust lands acquired after *Carcieri* but also the persistence of other trust lands that were acquired after 1934.

The *Carcieri* Court, however, did not fully weigh or explain what showing would be necessary to determine whether a tribe was under federal jurisdiction in 1934.[229] Following *Carcieri*, the Office of the Solicitor in the BIA during the Obama Administration interpreted the "now under federal jurisdiction" requirement broadly and did not require formal federal recognition, thereby limiting the scope of *Carcieri*'s effect.[230] This interpretation was upheld by the D.C. Circuit Court of Appeals as a reasonable interpretation of Section Five of the IRA[231] and has also been adopted by the Second and Ninth Circuit

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[228] 28 U.S.C. § 2409a(a) (2018).
[229] Carcieri v. Salazar, 555 U.S. 379, 391 (2009).
[230] *See* Dept. of Interior Solicitor Opinion, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act*, M-37029 (March 12, 2014), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf. Instead, the BIA asked "whether there is a sufficient showing in the tribe's history, at or before 1934, that ... the United States had ... taken an action or series of actions ... that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe." *Id.* Then, the BIA asks if that jurisdictional status was intact in 1934. *Id.*
[231] Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell, 830 F.3d 552, 564 (D.C. Cir. 2016).

Courts of Appeals.[232] More recently, however, under the Trump Administration, the BIA has retreated from the Solicitor's test.[233] The Trump Administration, for example, recently reversed, after remand from a federal district court, a 2015 decision by the Obama Administration to take land into trust for the Mashpee Wampanoag Nation, a tribe that had pursued its land claims for decades but was not federally recognized until 2007.[234] The Trump Administration concluded, controversially, that the Mashpee Wampanoag Nation—despite being the tribe that identifies itself as having earliest contact with English colonists in Massachusetts Bay in the early 1600s—did not qualify as "Indian" under federal jurisdiction in 1934.[235]

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[232] Upstate Citizens for Equality, Inc. v. United States, 841 F.3d 556 (2nd Cir. 2016); County of Amador v. U.S. Dep't of the Interior, 872 F.3d 1012 (9th Cir. 2017). Some courts, however, reject other aspects of the Obama-era interpretation. *See, e.g.*, Littlefield v. U.S. Dep't of Interior, 199 F. Supp.3d 391 (D. Mass. 2016) (finding efforts to take land into trust for certain Indian descendants contrary to the plain language of the IRA).

[233] *See Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act: Oversight Hearing Before the Subcomm. on Indian, Insular, & Alaska Native Affairs of the H. Comm. on Natural Res.*, 115th Cong. 44 (2017) (statement of James Cason, Acting Deputy Secretary, U.S. Dep't of the Interior) (expressing "concerns" about the breadth of discretion permitted under the Solicitor's advice).

[234] Letter from Asst. Sec. Indian Affairs Tara Sweeney to Chairman Cedric Cromwell (Sept. 7, 2018), https://bloximages.chicago2.vip.townnews.com/capenews.net/content/tncms/assets/v3/editorial/a/2b/a2bbaabf-32dc-5a8d-a050-99abedaeb769/5b97e59502aa6.pdf.pdf.

[235] *Id.*; *see also* Jourdan Bennett-Begaye, *Interior Denies Mashpee Trust Land: 'You Do Not Meet Definition of an Indian,'* INDIAN COUNTRY TODAY (Sept. 19, 2018), https://newsmaven.io/indiancountrytoday/news/interior-denies-mashpee-trust-land-you-do-not-meet-definition-of-an-indian-3qLsXhzf2kyptA5oxX4VpA/; Jeremy C. Fox, *Mashpee Wampanoag Protest Trump Administration Land Ruling*, BOSTON GLOBE (Oct. 6, 2018), https://www.bostonglobe.com/metro/2018/10/06/mashpee-wampanoag-protest-trump-administration-land-ruling/nCbjv89IXcUS0t2uHnKbUM/story.html

In light of all of this uncertainty and controversy, advocates have been pursuing a legislative fix. In its broadest form, proposed legislation would amend the IRA to clarify that the BIA may continue to take lands into trust for all—or at least a wider category of—tribal governments, but this kind of reform proposal has not yet been enacted as law.[236] Other more limited proposals have sought to clarify that individual tribes' reservations or trust acquisitions are valid.[237] Some, but not all, of these more *ad hoc* relief efforts have been successful, and when they are passed, the Supreme Court has so far upheld these Congressional acts over separation of powers challenges that they may interfere with pending litigation.[238] There are sure to be ongoing developments in this area.

V. Land Claims and Remedies

Another issue endemic to the Indigenous land tenure landscape is how, or if, the federal government provides remedies for the illegal or immoral takings of Indigenous lands. For purposes of proving land claims and then calculating a remedy for any land loss, yet another taxonomy of land tenure has emerged. Here, the law generally distinguishes claims based on original Indian title (also called Aboriginal title) and claims based on so-called "recognized title," which refers most often to Indigenous land rights that have been formally endorsed by Congress via a treaty or statute. This Part

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[236] *E.g.*, An Act to Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land into Trust for Indian Tribes, and for Other Purposes, H.R. 375, 116th Cong. (2019).
[237] *E.g.*, Mashpee Wampanoag Reservation Reaffirmation Act of 2019, H.R. 312, 116th Cong. (2019).
[238] *See* Patchak v. Zinke, 583 U.S. ---, 138 S.Ct. 897 (2018).

explores briefly the history and status of land claims under both categories, as well as brief examples of more recent land claim settlements involving Alaska and certain East Coast tribes, which assert lingering claims arising from unresolved acts of the thirteen colonies.

A. Aboriginal Title

Original Indian title—or Aboriginal title—refers to rights of occupancy that Indigenous peoples possess and claim based solely on their status as the original inhabitants of the land, without any reliance on a grant or other recognition from the United States or other sovereign. In general, to be recognized in U.S. courts, a claim of Aboriginal title requires proof of "actual, exclusive, and continuous use and occupancy 'for a long time.'"[239]

In *Johnson v. M'Intosh*, the Supreme Court recognized validity of original Indian title as a right of occupancy on top of the discovering sovereign's underlying fee title. *Johnson* also made clear that original Indian title rights could only be extinguished be federal, not state, action. Later decisions have repeated that this extinguishment can only occur with a clear and unambiguous act[240] and emphasized that this is a political act committed to the authority of Congress. There is also authority suggesting that a tribe may lose Aboriginal title rights by voluntarily abandoning lands.[241]

While it might be problematic enough that the federal government has vested itself with authority to extinguish Aboriginal title unilaterally, the Supreme Court has also held that, once they do,

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[239] Sac & Fox Tribe of Okla. v. United States, 383 F.2d 991, 997–998 (Ct. Cl. 1967); *see also* COHEN HANDBOOK, *supra* note 8, § 15.04[2], at 999-1004.
[240] *See* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941).
[241] *E.g.*, Baker v. Harvey, 181 U.S 481, 498-99 (1901).

no compensable property taking has occurred under the Fifth Amendment and, thus, no just compensation is owed. Most notoriously, when Congress directed the sale of timber claimed by the Tee-Hit-Ton Band of Tlingit Indians of Alaska, the Supreme Court held that original or Aboriginal title could be taken by the United States without any compensation because Aboriginal title is not property within the meaning of the Fifth Amendment.[242] This *Tee-Hit-Ton* decision has been roundly criticized, and often the federal government has awarded some relief for the taking of ancestral lands despite this precedent.[243] Still, this rule remains the constitutional baseline.

Today, as a practical matter, most Aboriginal title claims have been extinguished in the United States for purposes of federal law. Historically, many Aboriginal title claims were extinguished as a result of treaty promises or other federal mechanisms to create formal reservations of lands for exclusive tribal occupancy. These reservations typically came on the condition of a cession of any claims to ancestral lands outside those reservation boundaries. To the extent other Aboriginal title claims remained after the period of reservation policy, many of those claims were instead extinguished by the preclusive effect of Indian Claims Commission decisions or by other land claims settlements, such as with the Alaska Native claims and many land claims along the East Coast. Each of these historical events and results is discussed briefly below.

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[242] Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

[243] *See, e.g.* Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1220-26 (1980); Singer, *Sovereignty and Property*, *supra* note 9, at 17-20.

1. Indian Claims Commission

The Indian Claims Commission (ICC) is worth additional attention. In the first half of the Twentieth Century, if a tribe wanted to bring suit against the United States for any kind of land claim, it would have to get permission under a special statute. Otherwise, the sovereign immunity of the United States barred lawsuits by tribes seeking compensation for the takings of their lands. Thus, grievances required a special act of Congress to create tribe-by-tribe federal court jurisdiction, and by 1946, only twenty-nine of 200 Indian claims had resulted in actual awards to tribal plaintiffs this way.[244] In 1946, President Truman signed the Indian Claims Commission Act.[245] The Act created a commission to hear any "ancient" claims (for wrongs accruing before August 13, 1946) and provided that, as long as these claims were filed by August 13, 1951, no statute of limitations or laches defense would apply.[246]

Categories of potential claims were broad. The commission could hear violations of laws or treaties and traditional common law claims but could also explore (1) broad claims based on what a treaty would have been if revised on the grounds of fraud or unconscionability, (2) any land taking claim, including both original Aboriginal title claims and claims related to the loss of specific treaty-recognized lands,[247] and (3) a catchall category for any other "claims based upon

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[244] PRUCHA, *supra* note 12, at 1018; *see also* Glen A. Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEORGETOWN L. J. 511 (1966).
[245] *See* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992); Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453 (1994).
[246] 25 U.S.C. §§ 70-70v (2012).
[247] *See also infra* Part V.B.

fair and honorable dealings that are not recognized by existing rule of law or equity."[248]

The great majority of claims involved land disputes, and the commission interpreted the Act as only permitting it to award monetary relief, although the language of the Act arguably would have permitted a broader range of remedies.[249] This meant tribes only received monetary compensation, if any relief, for lost lands.[250] The method of valuing and calculating these damage awards was also controversial, with no interest provided on Aboriginal title claims (as opposed to treaty-protected taking claims) and the reduction of some judgments by an off-set for prior "gratuities" bestowed on tribes by the United States (including, for example, non-treaty-promised health and educational expenditures). These off-sets reduced tribal awards, overall, by 60 percent.[251]

The preclusive effect of ICC decisions is also highly controversial. For example, the tension between individual and tribal claims came to a head in the ICC process. Mary and Carrie Dann, two sisters who raised livestock on what is now federal land in Nevada, famously challenged a trespass action brought against them for livestock grazing without a federal permit by alleging they possessed persistent Aboriginal title rights. The Danns asserted an individual Aboriginal right to graze these lands and argued an ICC judgment in favor of their tribe, the Western Shoshone, could not be preclusive

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[248] 25 U.S.C. § 70a; *see also* Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D.L. REV. 359 (1973).
[249] Danforth, *supra* note 248, at 390, 392.
[250] *Id*.
[251] GETCHES, *supra* note 42, at 308-09.

against them, for multiple reasons.[252] The Supreme Court, however, disagreed and held, unanimously, that the ICC litigation extinguished any Aboriginal title claim to lands for which compensation was paid, even if the claim was individual but the compensation paid to the tribe as a whole.[253]

The degree to which the ICC also has a preclusive effect on other Aboriginal title claims is somewhat unresolved. For tribes that did bring claims, acceptance of a monetary award was often deemed final resolution of the claim and, for purposes of claims resolution, a date of Aboriginal title extinguishment was often stipulated to by the lawyers. Tribes pursuing "live" Aboriginal titles were in a bind: pursue an ICC decision and get money to extinguish that persistent claim or fail to bring a claim and risk a preclusive effect from that failure to file.[254] Recent case law suggests that failure to file an ICC action may not be preclusive to persistent claims of unextinguished Aboriginal title, at least where the applicable cause of action in the litigation only arose after the ICC cut-off date in 1946, but this

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[252] *See* Allison M. Dussias, *Squaw Drudges, Farm Wives and the Dann Sister's Last Stand: American Indian Women's Resistance to Domestication and the Denial of their Property Rights*, 77 N.C. L. REV. 637 (1999). To further complicate their case, the money damages to the Western Shoshone were never disbursed. *Id.*

[253] United State v. Dann, 470 U.S. 39, 50 (1985). This failure to provide individual process and relief to the Dann sisters ultimately led to international condemnation of the United States. *See* Mary & Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc. 5 rev. 1 (Dec. 27, 2002); Comm. for the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure, Decision 1 (68), United States of America, U.N. Doc. No. CERD/C/USA/DEC/1 (Apr. 11, 2006).

[254] For more on this bind, see, for example, Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 410 (1988) and Michelle Smith & Janet C. Neuman, *Keeping Indian Claims Decisions in Their Place: Assessing the Preclusive Effect of ICC Decisions in Litigation Over Off-Reservation Treaty Fishing Rights*, 31 HAW. L. REV. 475 (2009).

remains unclear across all of the circuits and may apply in only a limited set of cases.[255]

2. Specific Land Claims, Settlements, and Equity Issues

After the Indian Claims Commission, several outstanding land claims remained—including, in particular, in Alaska and from tribes along the East Coast. Both of these specific contexts resulted in a series of comprehensive land settlements, with different effects.

a. Alaska

Alaska Natives are subject to different land and governance structures than tribal governments in the United States. When Russia ceded the Alaskan territory to the United States in 1867, the United States asserted a general policy of recognizing, but not clearly defining, pre-existing Aboriginal land rights.[256] After Alaska became a state in 1959, Native land rights were again recognized but conflict emerged, leading to a freeze on public land selection in 1969 until Native land claims could be settled.[257] Congress ultimately passed the 1971 Alaska Native Claims Settlement Act (ANCSA), which defined specific monetary and land rights for Alaska Natives and extinguished any other ancestral or Aboriginal land rights.[258]

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[255] Pueblo of Jemez v. United States, 790 F.3d 1143 (10th Cir. 2015).

[256] *See* Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?*, 14 ALASKA L. REV. 443, 445-46 (1997); *see also* COHEN'S HANDBOOK, *supra* note 8, § 4.07[3][b][i], at 326-41.

[257] *See Alaska: Withdrawal of Unreserved Lands*, Pub. Land Order No. 4582, 34 Fed. Reg. 1025, 1025 (Jan. 17, 1969).

[258] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. § 1601 et seq.); *see also* 43 U.S.C. § 1603 ("All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy ... are hereby extinguished.").

The ANCSA creates a complex structure of Native Alaskan corporations at both regional and village levels.[259] Alaskan Natives alive on December 18, 1971, were eligible to enroll and receive stock in one regional and one village corporation based on their place of residence.[260] These corporations were funded with a total of $962.5 million and 38 million acres of fee land.[261] The ANCSA provided detailed formulas for the allocation of these resources, including both surface and subsurface rights, and profit-sharing among certain regional and village corporations. Although the land and other assets held by the corporations were alienable, the ANCSA provided that the Native-owned corporate stock would be inalienable for twenty years to protect Native control of Native land and to create economically viable Native corporations.[262] It soon became apparent, however, that twenty years would not be sufficient to achieve these goals, leading Congress to amend ANCSA in 1991.[263] These amendments extended the restraints on alienation for the Native corporate stock indefinitely and created land-bank provisions to protect more Native lands.[264] These changes also include protections from property taxes, involuntary corporate dissolution, adverse possession, and bankruptcy.[265] Native corporations may now elect to opt out of these restrictions, though no corporation has yet done so at this point.[266]

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[259] COHEN'S HANDBOOK, *supra* note 8, § 4.07[3][b][ii][B], at 330-34.
[260] *Id.*
[261] *Id.* The thirteenth regional corporation received only money because its shareholders resided outside of the state.
[262] COHEN'S HANDBOOK, *supra* note 8, § 4.07[3][b][ii][C], at 334-37.
[263] *Id.*
[264] *Id.*
[265] 43 U.S.C. § 1636(d).
[266] COHEN'S HANDBOOK, *supra* note 8, § 4.07[3][b][ii][C], at 334-37.

The creation of the ANCSA did not provide for a clear framework for the continued existence of Alaskan Native tribes as sovereign entities and rather focused on resource management and control.[267] Nonetheless, sovereign Native tribes "continue to exist, often side by side with village corporations, and have members and shareholders in common."[268] That is, tribes serve governmental functions while village and regional corporations operate to serve proprietary functions.[269] In 1993, Interior published a revised list of federally recognized tribes and included Alaskan Native villages as self-governing tribes. In *In re C.R.H.*, the Alaska Supreme Court found that this list declared the sovereignty of the Alaskan Native villages,[270] and soon Congress followed suit.[271]

However, while the sovereignty of Alaskan Native villages was theoretically recognized, their jurisdiction in many cases only extends to lands classified as "Indian country,"[272] and the Supreme Court held that lands acquired pursuant to the ANCSA are not within the definition of Indian country.[273] This meant, as a practical matter, that the jurisdictional reach of many Alaska villages was limited.

More recently, because Indian country does include trust lands, some Alaska tribes have sued to recognize their right to have certain

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[267] *Id.* § 4.07[3][d][i], at 353-54.
[268] *Id.*
[269] *Id.*
[270] 29 P.3d 849 (Alaska 2001).
[271] *See* Pub. L. No. 103–454, 108 Stat. 4791 (1994) (including Alaskan Native tribes in the list of federally recognized tribes).
[272] COHEN'S HANDBOOK , *supra* note 8, § 4.07[3][d][ii], at 354-56.
[273] Alaska v. Native Vill. of Venetie Tribal Govern., 522 U.S. 520 (1998); *see also supra* Part IV.A.

lands taken into trust pursuant to the IRA.[274] A district court in D.C. struck down a Department of the Interior regulation that prohibited Alaskan Native tribes from having their land taken into trust pursuant to the IRA.[275] After this decision, Interior amended the regulation to remove the Alaskan prohibition.[276] As such, Alaskan Native tribes may now have their land taken into trust, at least under current precedent and given current litigation statuses.

The Alaska Supreme Court has also recently determined that Alaskan Native tribes may have jurisdiction despite the lack of Indian country status in some cases where tribal interests are central.[277] For instance, the Alaska Supreme Court held that Alaskan Native tribes have inherent jurisdiction over parental support obligations owed to Native children[278] and that Alaskan Native tribes enjoy tribal sovereign immunity.[279]

b. East Coast Land Claims

Land claims along the eastern United States also arose from a unique history. In many cases, eastern tribes alleged that early land transfers executed by individual non-Indians or the colonial or state governments—without federal approval but also, to some degree, before the primacy of federal approval was well clarified—were void for violating the trade and intercourse acts, which permitted alienation of Indian title only to the federal government or with

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[274] Akiachak Native Cmty. v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2013), *vacated*, Akiachak Native Cmty. v. United States Dep't of the Interior, 827 F.3d 100 (D.C. Cir. 2016) (finding the case moot due to a change in regulations).
[275] *Id.*
[276] Akiachak Native Cmty. v. United States Dep't of the Interior, 827 F.3d 100 (D.C. Cir. 2016).
[277] *See* Baker v. John, 982 P.2d 738 (Alaska 1999).
[278] State v. Cent. Council of Tlingit, 371 P.3d 255 (2016).
[279] Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska, 403 P.3d 1172 (Alaska 2017).

federal consent.[280] These claims were largely successful for the tribes. For example, in *County of Oneida v. Oneida Indian Nation*, the Supreme Court agreed with the Oneida Indian Nation that their ancestors' alleged transfer of 100,000 acres of land to the state of New York in 1795 violated the law of federal supremacy for Indigenous land transfers and thus was void.[281] The tribes brought their case on a limited trespass theory—strategically choosing to avoid a more dramatic claim to full title recovery or to otherwise reassert their own possessory rights—and also only sued over lands occupied by the counties, not individuals.[282] As a remedy, the Court ordered trespass damages for the defined two-year period from 1968 to 1969.[283]

Concern by current non-Indian landowners and the states about the insecurity created by these persistent Indigenous land claims led to numerous Congressional settlements.[284] These settlements, in general, resulted in tribal waivers of any lingering title claims in exchange for compensation. Typically, any lands acquired or

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[280] *See supra* note 23 and accompanying text; *see also* CONFERENCE OF W. ATTY'S GEN., AMERICAN INDIAN LAW DESKBOOK § 3.2 (2019) ("Aboriginal title-based occupancy rights") (discussing persistent eastern land claims after the Indian Claims Commission); *see also* Karim M. Tiro, *Claims Arising: The Oneida Nation of Wisconsin and the Indian Claims Commission, 1951-1982*, 32 AM. INDIAN L. REV. 509 (2008) (discussing some efforts to avoid preclusion by Indian Claims Commission process).

[281] 470 U.S. 226, 230 (1984).

[282] *Id.*

[283] *Id.* at 229.

[284] *E.g.*, Rhode Island Indian Claims Settlement Act (25 U.S.C. §§ 1701–1716); Maine Indian Claims Settlement Act (25 U.S.C. §§ 1721–1735); Connecticut Indian Land Claims Settlement Act (25 U.S.C. §§ 1751–1760); Massachusetts Indian Land Claims Settlement Act (25 U.S.C. §§ 1771–1771i); Seneca Nation (New York) Land Claims Settlement Act (25 U.S.C. §§ 1774–1774h); & Mohegan Nation (Connecticut) Land Claims Settlement Act (25 U.S.C. §§ 1775–1775h).

subsequently purchased pursuant to these settlement terms were made subject to state civil and criminal laws but not state taxation.[285] Some tribes, however, continued to pursue litigation and other strategies and faced new uphill battles in the courts. The *Oneida* trespass case made clear that tribes can have "a live cause of action for a violation of its possessory rights that occurred 175 years ago," but the parties in that case had not raised any laches defense.[286] Later, in 2005, the Court in *City of Sherrill v. Oneida Indian Nation of New York* drastically limited the likelihood of success on these causes of action.[287]

As already described above in Part IV.C, when the Oneida repurchased some of these illegally taken lands from their non-Indian possessors, the *Sherrill* Court held that the tribe was subject to state property tax because, although presumably part of a still-valid historic reservation, the state had exercised sovereignty over that land for such a long time.[288] The Court refused a theory of re-bundling Aboriginal and fee titles to renew tribal sovereignty and held that equity would "preclude the Tribe from rekindling embers of sovereignty that long ago grew cold."[289] Later, in the context of other eastern land claims, the appellate courts have extended the *Sherrill* Court's emphasis on laches and passage of time to limit other damages awards and other forms of relief, concluding that "it is now well-established that Indian land claims asserted generations after

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[285] AMERICAN INDIAN LAW DESKBOOK, *supra* note 280, § 2.13 ("Land claims settlement lands").
[286] *Oneida*, 470 U.S. at 230, 244-45.
[287] 544 U.S. 197 (2005); *see supra* notes 203-206 and accompanying text (discussing this case in more detail).
[288] *Sherrill*, 544 U.S. at 215-16*; see also* COHEN'S HANDBOOK, *supra* note 8, § 15.06[5], at 1036-39.
[289] *Sherrill*, 544 U.S. at 214.

an alleged dispossession are inherently disruptive … and are subject to dismissal on the basis of laches, acquiescence, and impossibility."[290]

B. Recognized Title

When the federal government instead takes tribal property that has been recognized by treaty or statute, the rule is that Congress must pay just compensation.[291] These are considered takings of "recognized title," as opposed to the uncompensated (at least for Fifth Amendment) takings of Aboriginal title. Although the earlier *Lone Wolf* case held that forced allotment of tribal lands was a political question not subject to judicial review, in more recent years the Supreme Court has taken a more protective stance with respect to takings of Indigenous lands with recognized title.[292] The foundational cases for this more modern rule is *United States v. Sioux Nation*, which clarified that while the federal government may have broad powers to manage Indian lands it cannot confiscate or condemn recognized Indian property without just compensation.[293]

The test for whether a taking has occurred in this context is unique, however, as the Court asks not whether just compensation has been paid objectively but whether Congress has made "a good

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[290] Stockbridge-Munsee Comm. v. New York, 756 F.3d 163, 165 (2d Cir. 2014).
[291] United States v. Sioux Nation, 448 U.S. 371 (1980); *see also Tee-Hit-Ton*, 348 U.S. at 277-78 (clarifying that "[w]here the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking").
[292] *See Sioux Nation*, 448 U.S. at 413 (confirming that the political question doctrine had been "discredited in takings cases" of Indian lands and had been "expressly laid to rest") (citing Del. Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977)); *cf. supra* note 55 and accompanying text.
[293] *Id.* at 408.

faith effort to give the Indians full value for their land."[294] Thus, the Court notoriously suggested that allotment was not a taking because it was "a mere change in the form of investment" to transfer tribal lands to individual citizens.[295] But, where the federal government expropriated more than seven million acres of the Black Hills from the Sioux Nation, the Court did find a taking and required compensation.[296] The same is true for laws that attempted to require forced escheat of some small interests in trust allotments, which the Court held could not be enforced without just compensation for individual tribal citizens.[297]

A final category of land relevant for takings purposes is land set aside by executive order, rather than by treaty or statute. Approximately 23 million acres of Indian reservation lands were set aside from the public domain by executive order between 1855 and 1919.[298] These executive order reservations generally have the same status and validity as other reservations.[299] For takings purposes, however, there is federal authority that executive order lands are more impermanent than lands recognized by treaty or statute and

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[294] *Id.* at 408-09.
[295] *Id.* at 413. This idea has also been widely critiqued. *E.g.*, Joseph William Singer, *Lone Wolf, or How to Take Property by Calling It a "Mere Change in the Form of Investment*," 38 TULSA L. REV. 37, 43–47 (2002).
[296] *Sioux Nation*, 448 U.S. at 432-24; *see also* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 ORE. L. REV. 245, 249, 251-52 (1982).
[297] Hodel v. Irving, 481 U.S. 704, 717 (1987) (finding unconstitutional taking of heirs' rights to tiny fractional interests after federal government attempted to force to escheat as anti-fractionation measure); Babbitt v. Youpee, 519 U.S. 234, 242-43 (1997) (same).
[298] COHEN'S HANDBOOK, *supra* note 8, § 15.04[4], at 1012-15.
[299] *Id.*

thus just compensation is not due when those lands are taken.[300] More recently, however, it has at least been the practice of Congress to elect—as a political policy, not as a constitutional requirement—to compensate tribes for the taking of executive order lands.[301]

Finally, apart from direct takings liability, Congress also has a trust responsibility with regard to Indian land, which arguably includes unextinguished Aboriginal title claims, and so a confiscation or diminishment of those rights may constitute a breach of the trust responsibility, even if not a taking under the Fifth Amendment.[302] This is discussed briefly in the next Part.

VI. Indigenous Rights Beyond Land Ownership

Finally, although somewhat adjacent to the scope of this Article's emphasis on land tenure and land ownership as it impacts American Indian citizens and tribal governments, this discussion would be incomplete without at least some acknowledgement of the range of other property-related rights and issues that often arise here,

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[300] *See, e.g.*, Sioux Tribe v. United States, 316 U.S. 317, 325 (1942) (finding no compensable property right where executive order created a temporary buffer zone adjacent to Great Sioux Reservation that was later revoked); Karuk Tribe v. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (affirming lower court decision that no taking claim could accrue for tribal member's alleged loss of executive order lands that were reassigned to a different tribe).

[301] COHEN'S HANDBOOK, *supra* note 8, § 15.09[1][d][iii], at 1059-61 & n. 82 (collecting examples).

[302] *Id.* § 15.09[1][d][i], at 1056 & n.49 (articulating this theory and citing Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966)); *see also* Shinnecock Indian Nation v. U.S. 782 F.3d 1345, 1347 (Fed. Cir. 2015) (considering this kind of claim but finding it unripe because other litigation over substance of Aboriginal title claim ongoing).

including rights that exist beside or even without respect to any formal allegation of ownership or persistent territorial control. In this spirit, this Part discusses briefly the federal trust responsibility, the federal duty to consult tribal governments, off-reservation treaty rights, and, briefly, the possibility of other special federal protections or other inherent religious or other rights to specific sacred spaces.

A. Federal Trust Responsibility

Although not limited to trust land ownership, the federal trust responsibility to Indian nations and citizens does include a federal duty to protect tribal resources and manage them in the best interests of their Indian owners. This duty flows from the common law and the special treaty relationship between Indian nations and the federal government, but in most cases today, any actionable claim for breach of trust also arises from the extensive federal statutes and regulations that now address the federal-tribal relationship.[303] This duty also extends to individual allotment owners and trust beneficiaries. For example, in one of the most famous breach of trust cases—the *Cobell* class action lawsuit—individual allotment owners successfully alleged a breach of the federal trust responsibility when the federal government admitted it could not accurately provide an accounting of individual trust money accounts and its own management, as trustee, of these funds.[304]

When the claim is for money damages as a result of a trust violation, the legal foundation becomes even more complicated. Federal law requires tribes to establish that specific treaties, statutes, regulations, or executive orders create "a substantive right

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[303] *See* COHEN'S HANDBOOK, *supra* note 8, § 5.05[1][a], at 416-19.
[304] Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001); *see also supra* note 149 and accompanying text.

enforceable against the United States for money damages."[305] Within this framework, the general or historic common-law trust responsibility, derived from the historic relationship between the federal government and Indian tribes, is typically not money-mandating, and specific relief is harder to achieve on such general theories.[306] In one classic example, however, the Supreme Court was satisfied that the comprehensive statutory and regulatory regime giving Interior a pervasive role in Indian timber management was sufficient to establish a fiduciary relationship that could be remedied with money damages if breached.[307]

B. Duty to Consult

Both federal and international law also require consultation with Indigenous nations when development affects them, even if the development occurs in spaces of special significance where the Indigenous parties are not owners of the land formally. At least one scholar has argued that this duty to consult should be seen as the procedural component of the common-law trust responsibility owed by the federal government to the Indian nations of this country.[308]

In this regard, however, international law is often more protective than U.S. law. For example, Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples requires

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[305] United States v. Mitchell, 463 U.S. 206, 216 (1983).

[306] *See* COHEN'S HANDBOOK, *supra* note 8, § 5.05[1][b], at 419-26. In addition, Courts have also recognized more narrow statutory duties that can give rise to equitable relief (for specific enforcement of the limited obligation provided) but are also not the basis of money damage suits. *Id.*

[307] *Mitchell*, 463 U.S. at 224-26.

[308] *See generally* Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 MICH. J. L. REFORM 417 (2013).

states to "consult and cooperate in good faith with the indigenous peoples ... to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[309]

In domestic law, the U.S. duty to consult often comes from a mix of executive orders and federal statutes. On November 6, 2000, President Bill Clinton issued Executive Order 13175 on "Consultation and Coordination with Indian Tribal Governments."[310] This executive order requires federal agencies to consult with tribal governments on a broad range of "policies that have tribal implications."[311] The U.N. Special Rapporteur on the Rights of Indigenous Peoples identified Executive Order 13175 as "well intentioned" but concluded that, as implemented, it "developed into a confusing and disjointed framework that suffers from loopholes, ambiguity, and a general lack of accountability."[312] For example, by its own terms, the order seeks "to improve the internal management of the executive branch," but it "is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person."[313]

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[309] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 at Art. 32 (Sept. 13, 2007).
[310] *See* Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).
[311] *Id.*
[312] *See End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, on her U.S. Visit* (Mar. 3, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21274&LangID=E.
[313] Exec. Order No. 13175, 65 Fed. Reg. 67249, 67252.

Instead, litigants often rely on other specific statutes and regulations; yet, given the fairly *ad hoc* nature of these promulgations, a complete list has proven elusive.[314] One of the primary statutory sources of federal consultation requirements comes from the National Historic Preservation Act, which requires federal agencies to "take into account the effect" of any federal "undertakings" on qualifying sites of historic and cultural significance, including sites of significance to Indian nations.[315] In a notable recent example, the Standing Rock Sioux Tribe and others nations challenged federal decisions to approve the Dakota Access Pipeline for failure to adequately consult under this statute.[316] Previously, a federal court also overturned a Bureau of Land Management fracking rule for, among other reasons, failure to follow Interior's own policies on meaningful tribal consultation.[317]

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[314] *See, e.g.*, Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N. DAK. L. REV. 37, 51 (2015) (describing it as "perhaps even impossible ... to set out the entire laundry list of congressional acts and administrative rules that require consultations with tribes and sometimes tribal consent before various actions can be undertaken"); *see also* Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 21 n.3 (1999) (providing a list of sample requirements).

[315] 54 U.S.C. §§ 306102, 306108. This is separate from a previously established duty to consult about the provision of services to Indian nations and peoples. *E.g.*, 25 U.S.C. § 2011(a) (2012) (requiring Indian tribes be "actively consulted" in design of educational programs for Indian children).

[316] Jessica A. Shoemaker, *Pipelines, Protest, and Property*, 27 GREAT PLAINS RESEARCH 69 (2017).

[317] Wyoming v. United States Dep't of the Interior, 136 F.Supp.3d 1317 (D. Wyo. 2015) (vacated upon President Trump rescinding rule and mooting appeal at Order, Wyoming v. Sierra Club, Case Nos. 15-8126, 15-8134, (10th Cir. July 13, 2016)); *see also* Troy A. Eid, *Fall of Fracking Rule: When Agencies Don't Consult Tribes*, LAW 360 (Oct. 7, 2015), https://www.law360.com/articles/711376/fall-of-fracking-rule-when-agencies-don-t-consult-tribes.

C. Off-Reservation Treaty Rights

Many tribal governments and tribal citizens also continue to assert and exercise persistent treaty-protected rights to use or access specific resources or spaces off reservation, including, typically, important rights to hunt, fish, or gather at traditional places and using traditional methods. The Supreme Court has generally been fairly protective of these off-reservation rights, recognizing a framework of reserved rights that means tribal governments, as sovereigns, are presumed to retain any rights that have not been clearly extinguished by Congress or specifically negotiated away in a treaty.[318] In past cases, this has meant not only that a tribe may retain the right to access privately owned properties to exercise historic treaty fishing rights[319] but also, more recently, that a state may be required to remove barriers—including culverts—that unlawfully infringe of the health of a salmon fishery resource a tribe has ongoing rights to access.[320] Notably, these off-reservation rights have also included tribal authority to co-manage resources, such as salmon and other fisheries, with the surrounding state government.[321]

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[318] *E.g.*, United States v. Winans, 198 U.S. 371 (1905) (affirming tribal citizens' reserved treaty fishing and other rights); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (affirming persistence of certain Ojibwe hunting, fishing, and gathering rights on lands that had been ceded in treaty); Herrera v. Wyoming, Case No. 17-532, --- U.S. ---, 138 S.Ct. 720 (2018) (upholding tribal citizens' treaty right to hunt in national forest without a state license).

[319] *Winans*, 198 U.S. at 384.

[320] Washington v. United States, 584 U.S. --- (2018) (per curiam) (4-to-4 Supreme Court decision left standing lower court order requiring state to repair roads that had damaged salmon habitat).

[321] *E.g.*, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th 1975). This well-known decision—commonly called the Boldt Decision—affirmed the treaty rights of several tribes in the Pacific Northwest to

D. Special Legal Protections for Specific Places

Finally, in some cases, tribes have also asserted religious or other rights to protect specific sacred spaces that are outside of recognized ownership boundaries today. Recently, the Hopi and Navajo nations tried, unsuccessfully, to use these theories to stop the use of wastewater for snow-making on a sacred mountain where ski resorts had been developed.[322] Although many of these claims have had limited success so far, important scholarly work is ongoing about the proper scope of protections for these kinds of claims.[323]

Separately, the Antiquities Act of 1906 authorizes the President to set aside areas of public lands for protecting important historical, cultural, and ecological sites.[324] The protections afforded designated national monuments vary by location but generally restrict or regulate grazing, logging, and mineral extraction (though oil and gas development often continues). In December 2016, President Obama used this authority to create the Bears Ears National Monument, protecting a 1.35 million-acre high-desert plateau in southeastern Utah that many southwestern tribes consider a sacred place.[325] This designation was championed as a watershed moment in U.S. tribal

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both co-manage and harvest salmon and other fish outside of reservation territories. *Id*.

[322] *See, e.g.*, Michelle Kay Albert, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 COLUM. H. R. L. REV. 479, 492-96 (2009); Christopher Dobson, *RFRA Land-Use Challenges After* Navajo Nation v. U.S. Parks Service, 4 ENV. & ENERGY L. & POL. J. 139 (2009).

[323] *See, e.g.,* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites: Asserting a Place for Indians as Non-Owners*, 52 UCLA L. REV. 1061 (2005).

[324] *See* 54 U.S.C. § 320301(a).

[325] *See generally* Charles Wilkinson, *"At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top": The Creation of the First Native National Monument*, 50 ARIZ. ST. L.J. 317 (2018).

relations as the proclamation also designated a group of tribal leaders to consult on management of the monument.[326] On April 26, 2017, however, President Trump signed an executive order directing Interior to review national monuments designated since 1996.[327] Many in Indian country felt this action targeted Bears Ears in particular, and on December 4, 2017, President Trump acted to dramatically reduce the size of Bears Ears National Monument.[328]

Some scholars have argued the President lacks legal authority to either abolish or downsize a national monument, and several tribes have sued alleging President Trump's actions are unlawful.[329] This dispute is likely to continue. Meanwhile, tribes are looking for other creative mechanisms to preserve important places. For example, the Ponca Tribe of Nebraska is engaged in efforts to commemorate the tribe's history of forced removal from Nebraska to Oklahoma in 1877. In May 2017, the Nebraska Trails Foundation donated a 19.7-mile stretch of the Chief Standing Bear Trail to the Tribe.[330] There are ongoing efforts for federal recognition of this Standing Bear trail by

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[326] *Id.*; *see also* Pres. Proclamation No. 9,558, Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139 (2016).
[327] Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (2017); *see also* Jake Bullinger, *"Will Bear Ears Remain a National Monument?,"* THE ATLANTIC (June 9, 2017).
[328] *See* Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213 (2018).
[329] Mark Stephen Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VIRGINIA L. REV. ONLINE 55, 71 (2017); Hopi Tribe, et al., v. Trump, et al., Case No. 1:17-cv-02590-TSC (D.D.C., pending).
[330] Sam Craig, "Long Road for Ponca Ends with Deed Signing," *Columbus Telegram* (May 11, 2017), http://columbustelegram.com/news/state-and-regional/long-road-for-poncas-ends-with-deed-signing/article_4e3e2ec2-3148-544e-b3c3-5ab8eb360c46.html

special statute[331] and to tell the story of Standing Bear's fight for equal dignity and respect.[332]

In other cases, such as the Sioux Nation's ongoing efforts to reclaim the Black Hills, tribes have purchased lands on the open market and then transferred those fee lands back into the federal trust as a means to protect and preserve the land for the future.[333]

VII. Conclusion and Future Directions

In this map of modern American Indian land tenure, there are many confusing—and often overlapping—legal layers. Today, American Indian property sits at a unique intersection. Vital, vibrant Indigenous identities are still intimately tied to place and the unique connections and relationships that are located there. At the same time, historic and current federal land polices have lasting and intrusive effects. All of these federalized property controls still sit heavily across the reservation.

Reconciliation has many meanings, but most fundamentally, it means repairing relationships and imagining new futures based on mutual respect. It is not a thing that happens once, with a financial or other settlement, but instead requires an ongoing process of renegotiation and learning. One of the most optimistic things Canadian scholar Hadley Friedland has said—in the context of that country's own ongoing reconciliation process—is that, with good

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[331] *E.g.*, H.R. 5086, 113th Cong. (2014).
[332] *See* JOE STARITA, "I AM A MAN": CHIEF STANDING BEAR'S JOURNEY FOR JUSTICE (2008).
[333] *See* Shoemaker, *Transforming Property*, *supra* note 107, at 1537.

hearts and honest intentions, non-Indigenous people can learn to learn.[334] That is the small hope of this project.

There is much we can do to facilitate this process. First, the fact that many law students graduate from law school with little or no introduction (much less analysis) of the stains of colonialism that still exist in our most fundamental democratic institutions—including every property title in this country—is unconscionable. This is true of other students in other disciplines, too. For the United States to move forward, we have to confront the injustices we are built upon. These injustices, unfortunately, are many, but the history and consequences of colonialism are foundational to this conversation.

Second, there are essential needs for more careful and respectful research and engagement. For example, the trust tenure status presents serious challenges, including how to address the problem of extreme fractionation in many allotments and how to best use inalienable property rights to still unlock and build community wealth and prosperity, without creating unnecessary risk of land loss and self-governance vulnerabilities. Because there has not been sufficient sustained and creative engagement with these and other land-related issues, the solutions that have been tried are incomplete, have often caused other unintended negative consequences, and have simply not worked. Meanwhile, these land challenges become more entrenched and more difficult to address as more time passes.

Absent richer and more informed dialogue, the current conversations about future institutional and governance trajectories for reservation land tenure are extraordinarily thin. Most reformers today, not unlike Senator Dawes himself or the advocates for

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[334] *See supra* note 13 and accompanying text.

termination after him, assume that choices for land futures are either maintaining the status quo trust status or privatizing lands to (again) "free" the Indian from the restrictive alienation restraints. There is much more imagination to bring to bear. Just as Indigenous nations had pluralistic and varied land tenure systems before federal interference, that pluralism could emerge again. Property scholars' expertise in this most fundamental property work can help with this, without supplanting Indigenous decision-making or re-committing the colonial sins of the past.

The questions are many and important: How do we balance the stability demands of property as an institution with the goals of pluralism and the realities of dynamism in other property systems? What do we know about how, and if, property systems change and adapt and how do we support that process? What do we know about land governance, and also issues of cooperation among governments in land use and other contexts, that can be brought to bear? What do we learn and know from issues of scale and concerns of local versus federal versus international decision-making? What remedies are needed to repair historic takings and other harms, and how do we design that process to be as restorative as possible?

Property scholars are often interested in property because it is so powerful, not just as an economic currency but as a social institution that literally shapes how we relate to each other and our environment. Colonial-era reformers intuited this power and intentionally used property as a tool to force political, social, and economic change within Indigenous communities. Today, these otherwise rejected historic goals still shape the man-made layers of law that construct land tenure in Indian country. The question for the future is how to support the redrawing of a new kind of property map—one that is shaped by Indigenous choices, identities, and

knowledge systems. As Judge Tah-bone would say, understanding the problem is the first step, but it is only the first step.