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The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R Part 151

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THE LAND MUST HOLD THE PEOPLE: NATIVE MODES OF TERRITORIALITY AND CONTEMPORARY TRIBAL JUSTIFICATIONS FOR PLACING LAND INTO TRUST THROUGH 25 C.F.R. PART 151

*Padraic I. McCoy**

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The land needs to be retained, restored, and redefined. Its economic role — long dormant — must be resuscitated. Its spiritual role — long atrophied — must be revived. Its healing role — long obscured — must be revitalized. The land must hold the people, and give direction to their aspirations and yearnings.¹

I. Introduction

Land is more important to contemporary American Indians and native communities than at any point in history. In this era of increasing industrialization, environmental misuse, urban sprawl, and the judicial diminishment of Indian sovereignty, land — especially protected tribal trust land — sustains and shields Indian communities physically, culturally, and spiritually. Indian trust land provides for tribes' spiritual, physical, economic, and political well-being, while promoting a sense of individual and collective identity, of community. In order to exist as communities and nations in the modern era, American Indians and tribes must have a protected land base.

Yet, despite its importance to tribal cultures and communities, and despite its protective aspect, tribal land has been under assault for several hundred years. From the exploitative misappropriations of land in the colonial period, to the termination era policies of the 1950s, the retention of tribal land is the central struggle of the Indian experience and has shaped the history of Indian-white relations since European contact. Perhaps the low-water mark of this struggle came in 1887 with the allotment and apportionment of tribal lands, reducing Indian land-holdings from 138 million acres in 1887 to forty-eight million in 1934. Nearly half of the lands retained by Indians were desert or semiarid and virtually useless for agricultural, pastoral, and other subsistence purposes. Moreover, because of the Indians' strong cultural and physical connection to and dependence upon their land, allotment nearly destroyed the tribal community as well. But then, in the 1934 Indian Reorganization Act (IRA), Section 5, Congress reversed its allotment policy and authorized the

1. FRANK POMMERSHEIM, BRAID OF FEATHERS, AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 34 (1997).

Secretary of the Interior to acquire lands in trust for individual Indians and tribes — to rebuild not only the Indian land base but tribal communities and identities as well. And in 1980, the Department of the Interior (Interior) issued regulations at 25 C.F.R. Part 151 (Part 151) to guide the Secretary's IRA Section 5 land-into-trust authority. These regulations are the contemporary stage on which the long-time struggle for Indian lands and survival is presently being played out. Thus, even today, the struggle for land continues to shape Indian-white relations.

Interior's land-into-trust regulations are the recent subject of intense scrutiny by the Bureau of Indian Affairs, non-Indian citizens and homeowners groups, state and local governments, several state attorneys general, the Eighth Circuit Court of Appeals, and even the U.S. Supreme Court. Challengers to IRA Section 5 (also known as § 465)² and Part 151 argue that tribes have all the land they need, and that non-Indian governments and communities should have a larger role (than their present role under the existing regulations) in Interior's decision-making process about whether to accept title to land in trust under Part 151. Most importantly here, Part 151 land-into-trust opponents argue that no coherent and modern rationale exists for placing land in trust for tribes today.

The ultimate purposes of this article are to (1) reveal the meaning of placing land into trust and maintaining a protected land base in the modern era, from a uniquely Indian or tribal perspective, and (2) demonstrate the role that Part 151 should play in achieving the goals of modern federal-Indian policy — to rebuild the Indian land base and the native community.

Part II of this article is aimed at demystifying the Indian-land relationship. As such, it explores the various ways native people and communities are physically and emotionally connected to and united with their land (and their tribal home-places, e.g., reservations). Tribes share a meaningful relationship with tribal land because it is homeland and sacred land, which provides a sense of cultural, religious, and ethnic identity and community well-being. But tribes are also attached to the land because it provides a space within which they can exist as autonomous nations — supplying a sense of political and national identity as well.

Part III of this article examines the legal (§ 465) and regulatory (Part 151) framework for placing land in trust for tribes. It first traces the origins of the IRA — the allotment policy and its drastic effect on Indian lands and communities — to determine Congress's intent in the IRA generally and § 465

2. 25 U.S.C. § 465 (2000).

specifically. Part 151 itself is then examined, considering the history of that regulatory process. The Part 151 regulations are examined in order to determine whether they comply with Congress's intent in the IRA and § 465 to rebuild the Indian land base.

Part IV of this article discusses tribal perspectives on placing land into trust in the modern era in order to uncover the true meaning to tribes of the legal and regulatory process — rebuilding not only the Indian land base but the Indian *community* as well. From a tribal perspective, Part IV then examines (1) tribal aspirations for the land-into-trust regulations, (2) the perceived tribal benefits and (3) potential political effects of placing land into trust, as well as (4) the modern tribal justifications for placing land into trust. In order to add context to this important inquiry, Part IV of this article presents a case study conducted on a Southern California Indian tribe long in need of a stronger land base, and which has recently undergone Interior's land-into-trust process.

II. Native Modes of Territoriality

Native North American groups (tribes) have historically been, and continue to be, a land-based culture. The key to understanding modern tribal justifications for placing land into trust, then, lies in understanding the strong connection between native communities and their tribal homeplaces, and in acknowledging the important role a protected land base plays in ensuring survival of the contemporary Indian community.

Native Americans and tribes share a meaningful and culturally significant connection to land far exceeding western notions of land and property typically held by non-Indians. As Newton explains, “tribal people [have] different concepts of the relationship of people to land than those encapsulated in the concept of property in Euro-American cultures.”³ Indians and tribes often conceptualize themselves as being physically and spiritually connected to and united with their land and natural surroundings. But this special connection to land and place is also historical, social, cultural, and, in the modern era, it is especially legal and political.⁴ Moreover, this special

3. Nell Jessup Newton, *Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System*, in *WHEN SORRY ISN'T ENOUGH, THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 261 (Roy L. Brooks ed., 1999).

4. This is not to say that the modern Indian-land relationship is any less culturally or religiously based than in the pre-modern era. It is only to say that, over time and with Westward expansion and a significant increase in non-Indian populations throughout North America, the legal and political dynamics of retaining and protecting Indian land have become increasingly more important.

relationship to Indian land is a fundamental element of the tribal community and deeply important to native notions of individual and collective identity.⁵ In short, Indian communities depend in various and complex ways on the land for their well-being and existence.

While this native-land relationship is ultimately important to the tribal community, tribal culture, and an Indian identity, it is unfortunately not well understood by those outside the Indian community. As a result, the native-land relationship is often mistakenly believed to be the product of some outdated religiosity or useless mysticism best left to the world of legend, myth, and folklore — having no place in the modern era and no function in our contemporary political and economic culture.⁶ From a tribal perspective, however, this special relationship is very much alive and serves an important function in, among other respects, sustaining a sense of community and cohesion within the tribe. Tribal land is, in other words, *culturally* productive.⁷

But what is at the core of this native relationship to tribal land? And why is it so important? How does this connection to Indian land support tribal culture, community, and identity? Are there certain tribal ceremonial or religious sites that engender feelings of attachment to land? To one another? Or is this connection simply due to longtime tribal occupation of a particular

5. See, e.g., Karen I. Blu, "Where Do You Stay At?" *Home Place and Community among the Lumbee*, in *SENSES OF PLACE* (Steven Feld & Keith H. Basso eds., 1996); see also PETER NABOKOV, *NATIVE AMERICAN TESTIMONY, A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT* (1999). As Nabokov explains,

[T]he late Cherokee anthropologist Robert K. Thomas once wrote that 'persistent peoples' like Indians needed four basic elements to survive: 1) a sacred language, or some sort of mother tongue they could call their own; 2) a unique religion, which could also blend old and new beliefs, such as the dozens of American Indian Christian denominations across the country; 3) a sacred homeland, or stories that linked them to a special piece of ground; and 4) a sacred history, providing some sort of charter for that society's special heritage and destined right to exist.

Id. at 443-44.

6. The misunderstanding of this special connection to land has other detrimental effects. In the modern era, non-Indians sometimes claim, for example, that this special relationship has been fabricated for some material or financial gain, such as the protection of purportedly "sacred" sites.

7. A peripheral purpose of this paper is to break up the set of assumptions that commonly exist regarding the connection between native people and tribal land; that tribal land is only useful to the extent of its agricultural or other economic output or productivity. But tribal land is much more than a means for producing economic opportunity; it is culturally productive as well.

place? Or is it that native people value tribal land because it provides a space within which they might exist as nations, as a people?

The native modes of territoriality discussed here represent the three dominant ways in which Indian people and tribes are connected to and united with the tribal homeplace. They are an attempt to demystify the sometimes misunderstood connection to land — to dissect, into its most elemental parts, the native-land relationship. The modes recognize the importance of religious, social, cultural, historical, legal, and political elements and tribal values that constitute, as a whole, the native-land relationship.

Review of predominant native-land concepts. Native connections to land and place have been the focus of much discourse, often from differing perspectives.⁸ Therefore, a comprehensive review of the native-land literature is beyond the scope of this paper. Yet it serves us well to examine a few of the popular and recent concepts in this discourse.

Wilkinson argues that tribal land, and more particularly the Indian reservation, is valuable to tribes because it helps fulfill the promise of a “measured separatism.”⁹ As Wilkinson explains, the creation of reservations reflected early tribal desires for a separatism and was “intended to establish homelands for the tribes, islands of tribalism largely free from interference by non-Indians or future state governments.”¹⁰ Additionally, Wilkinson explains, the separatism is measured, rather than absolute, “because it contemplates supervision and support by the United States.”¹¹

Pommersheim reveals why, despite their sometimes desolate nature and even poverty-stricken character, native people are still largely committed and connected to the reservation.¹² He tells the story of countless Indians who,

8. The recent literature on native connections to place, to homeland, has come from a wide variety of academic disciplines, including Native American or American Indian studies, anthropology, linguistics and linguistic anthropology, political science, history, philosophy, and cultural geography. See, e.g., Blu, *supra* note 5. The discipline from which I heavily rely upon here is the field of Indian law. The whole history of Indian-white relations has been, of course, a history of the law’s effect on the status of native North America. There has been a developing undercurrent in legal literature on native attachments to the reservation and to homeland.

9. CHARLES WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* (1987). Measured separatism, Wilkinson explains, was the “central thrust” of the old laws — the treaties and treaty substitutes that created many Indian reservations. He adds that, “isolation of Indian societies on the reservations was a common policy goal of both tribal and federal negotiators” to these treaties and treaty substitutes. *Id.* at 16.

10. *Id.* at 14.

11. *Id.* Supervision and support includes food, housing, and healthcare. But federal support also comes in the form of the politically fluid federal trust responsibility toward Indians.

12. See POMMERSHEIM, *supra* note 1, at 34-35. One fault with Pommersheim’s analysis is

usually for economic and educational reasons, leave the reservation, but because of their attachment to that place, often return home or “go back” at some point.¹³ His answer, building on Wilkinson’s measured separatism, attempts to explain native connections to tribal land in terms of an attachment to the “reservation as place.”¹⁴ He defines the reservation as “a physical, human, legal, and spiritual reality that embodies the history, dreams, and aspirations of Indian people, their communities, and their tribes.”¹⁵ It is a place, Pommersheim explains, that “marks the endurance of Indian communities against the onslaught of a marauding European society; it is a place that holds the promise of fulfillment.”¹⁶ Lastly, Pommersheim asserts that the reservation “constitutes an abiding place full of quotidian vitality and pressing dilemmas that continue to define modern Indian life.”¹⁷

Karen Blu, in her article on the North Carolina Lumbee, focuses on native attachments to past and present tribal home places and how those relationships are shaped.¹⁸ Blu focuses on the formation of Indian identity, and claims that tribal home places are important because they are essential to Indians’ “sense of peoplehood, their ethnicity.”¹⁹ She explains that,

Indian identities have seemed to hinge critically on their retention or reconstruction of and access to a home place, perhaps because displacement was so common and so devastating, so politically beyond the control of most groups throughout their histories. Whether one’s group has a reservation or not is still a

that it focuses too strongly on the Indian reservation, which is a non-Indian construct; a place created by the federal government in its effort to deal with the “Indian problem” (as it was often referred to). Often, though, Indians desire reconnecting with their traditional tribal home place or tribal ancestral lands, which may or may not be within the tribe’s recognized reservation, if one exists.

13. See, e.g., NABOKOV, *supra* note 5, at 388.

14. POMMERSHEIM, *supra* note 1, at 11.

15. *Id.*

16. *Id.*

17. *Id.* However, a significant percentage of Indian people reside outside of the reservation, placing the accuracy of this statement in some doubt.

18. See Blu, *supra* note 5.

19. *Id.* at 197-227. Although the Lumbee are a “non-reservation” people (i.e., they have no protected land-base), according to Blu they may actually “offer better clues to the past.” *Id.* at 225. She says that, “the Lumbees and people like them can provide a glimpse, at a distance and through lenses not quite designated for our particular eyes, of possibly older forms of indigenous attachments to land.” *Id.*

vital distinguishing feature among contemporary Native Americans.²⁰

Because the Lumbee are a group with limited federal recognition and no protected land base, Blu's article, uniquely, reveals that Indians and tribes may still be attached to non-reservation home places, or to home places that are not under tribal control and authority.

Finally, Vine Deloria Jr. frames the native-land connection in terms of a spiritual or religious relationship with holy places and sacred sites. He states that a

belief in the sacredness of lands . . . in the Indian context, is an integral part of the experiences of the people — past, present, and future. Indians who have never visited certain sacred sites nevertheless know of these places from the community knowledge, and they intuit this knowledge to be an essential part of their being.²¹

Deloria explains that, “[s]acred places are the foundation of all other beliefs and practices [in the Indian community] because they represent the presence of the sacred in our lives.”²² Deloria's statements suggest, then, that the attachment to holy places and tribal sacred sites are fundamental in the formation of a group identity.

In sum, Wilkinson explains the native-land relationship in terms of a measured separatism, Pommersheim as the reservation as place, Deloria as holy land, and others, including Blu, as the tribal homeland. However, these concepts are problematic in at least two respects: over-generality and under-inclusiveness. First, these concepts are too general — or inadequately analytical — in that they blend together several distinct ideas about how Indians and tribes are connected to the tribal homeplace. Consider, for example, Pommersheim's statement in which he explains that reservations are, “a physical, human, legal, and spiritual reality that embodies the history, dreams, and aspirations of Indian people, their communities, and their tribes.”²³ Here, Pommersheim fuses together several related but distinct ideas

20. *Id.*

21. VINE DELORIA JR., *Sacred Places and Moral Responsibility*, in GOD IS RED 267 (1994) [hereinafter *Sacred Places*]; see also Vine Deloria Jr., *Reflection and Revelation, Knowing Land, Places and Ourselves*, in FOR THIS LAND 250 (James Treat ed. 1999) [hereinafter *Reflection and Revelation*].

22. *Sacred Places*, *supra* note 21, at 281.

23. POMMERSHEIM, *supra* note 1, at 11.

regarding the native-land relationship. Like others, Pommersheim presents an overly general concept whose discrete parts must be individually considered in greater detail in order to gain a deeper understanding of native-land connections in order, ultimately, to appreciate the meaning of the Part 151 land-into-trust process.

Second, some of these concepts are partial; they do not go far enough in explaining the totality of the native-land relationship. Too often, for example, the discussion of native attachments to tribal land or to the reservation is cast in terms of a tribal “homeland.” However, “homeland” is frequently used in an indefinite manner without a precise understanding of what that term implies. Additionally, “homeland” is frequently used in a generic, all-purpose sense, as if it were the only native mode of territoriality — or the only way to understand native connections to tribal land. Instead, this author sees the native-land relationship as one of a complex variety of choices and histories, of circumstances and pressures. Presenting a single, one-dimensional theory about native connections to the tribal homeplace is, therefore, difficult at best. These problems of partiality are addressed by, first, attempting to analyze and explain the concept of a tribal “homeland” in greater depth, and second, by suggesting that “homeland,” as it is popularly used, is really only *one* of the important modes of territoriality. Indians and tribes also possess a sacred and a legal-political bond to the tribal homeplace.

Survey of native-land relationships. Certainly, Indians and tribes are attached to protected tribal homeplaces, e.g., reservations. But they may also be attached to places that are not officially recognized or protected. In the modern era, there are several different legal and cultural relationships between tribes and land, all of which may be explained by the native modes of territoriality.

First, there are federally recognized Indian tribes that reside on their traditional or ancestral lands, such as the Quechan Tribe of Fort Yuma, which resisted several removal and relocation efforts by the United States. Second, there are several federally recognized “removed tribes:” tribes that were relocated from their original homeplace and which now reside on reservations set aside for their use. During the removal period, the Cherokee Tribe, for instance, was forcibly relocated from their homelands in Georgia to their new “home” in eastern Oklahoma.²⁴ As a result of the removal period, Thornton

24. As Deloria explains, the Cherokees were not the only Tribe moved westward during this official period of removal under the 1830 Indian Removal Act. Many tribes were moved west from the Ohio and Mississippi valleys to the plains areas across the Mississippi River. Under the Treaty of Dancing Rabbit Creek, the Choctaws, for example, “surrendered” their ten million

explains, few tribes are found east of the Mississippi River. He states that, “[a]lthough many of the Indians remaining in the East reside on small state and federal reservations, most of the federal reservations are in the West and Southwest.”²⁵ As well, Thornton explains that removal and relocation often “split tribes into two or more groups on different reservations in different regions of the country.”²⁶ The Seminole, for example, are in Florida and Oklahoma, the Cheyenne in Montana and Oklahoma, the Ho-Chunk Nation in Wisconsin and Nebraska, the Oneida in New York and Wisconsin, and the Sioux are located on many reservations in North and South Dakota, Minnesota, and Nebraska.²⁷ Although many Indians and tribes were separated from their ancestral lands through forced removal and relocation, meaningful attachments to those places still remain. Ongoing native attachments to ancestral lands and places are often expressed, for example, in the many off-reservation fishing and hunting rights reserved in the treaties of the Pacific Northwest and in the Great Lakes region.

Similarly, many tribes were locally relocated to less desirable areas within their original home regions. Some of Southern California’s Mission Indians, for instance, now occupy reservations that are not a part of the tribes’ homelands and are situated in arid, semi-mountainous, unproductive regions.²⁸ Additionally, sometimes multiple native groups were removed from their ancestral lands and consolidated onto a single reservation. The Shoshone and Arapaho Tribes, for example, both reside on the Wind River Reservation in Wyoming, and the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota is home to the Mandan, Gros Ventre, and the Arikara people. Finally, there are federally recognized tribes without any protected land base at all. For example, the Coastal Miwok of Graton Rancheria were recently granted federal recognition by Congress but were simultaneously not provided with a land base. They are now searching for a place to call home.²⁹

acres east of the River and moved west. See, VINE DELORIA, JR. & CLIFFORD M. LYTTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 7 (1997).

25. RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL, A POPULATION HISTORY SINCE 1492*, at 51 (1987). For more on the holocaust of America’s indigenous populations, see DAVID E. STANNARD, *AMERICAN HOLOCAUST, COLUMBUS AND THE CONQUEST OF THE NEW WORLD* (1992).

26. THORNTON, *supra* note 25, at 51.

27. *Id.*

28. See, e.g., FLORENCE C. SHIPEK, *PUSHED INTO THE ROCKS: SOUTHERN CALIFORNIA INDIAN LAND TENURE, 1769-1986* (1986).

29. 25 U.S.C.A. § 1300n-2 (West 2001).

There are also many non-federally recognized tribes — tribes whose government-to-government relationship with the United States was officially terminated or never officially recognized at all. Some of these tribes are state-recognized and reside on lands set aside by the state, as with the Mattoponi Indian Reservation in Virginia. Finally, there are non-recognized tribes without a protected land base, but who reside within or near their original homeland region. The Lumbee Tribe (which now has limited federal recognition), for instance, has never had a protected reservation, but they still occupy their traditional homeland area in North Carolina. While the Lumbee are forced to share their homeland space with others, they are still highly attached to that place.³⁰

While there are many federally recognized tribes to whom the modes of territoriality might apply, the modes also apply to non-recognized groups without protected land bases and to any group that feels a significant attachment to a homeplace. It is also important to note that the modes are not exclusively applicable to native North Americans and tribes. Groups the world over feel a sense of connection to a homeplace. Consider, for example, the Haya Tribe of Tanzania's connection to its clan land, Colombia's Embera Katio Tribe's value for its indigenous land, Israel's connection to Jerusalem, and Islam's connection to the holy land of Mecca and Medina, to name only a few.

Group connections to a homeplace are not limited to non-North American groups. As Deloria states, "the land has impressed itself upon rural whites in Appalachia, the South, [and] parts of the Great Plains. . . . and made indelible changes in the way people perceive themselves."³¹ Yet, attachments to the homeplace in North America may, in some cases, exist on a more micro scale than Deloria recognizes. Domestically, for instance, there are ethnic and cultural groups attached to their neighborhoods and boroughs as homeplaces, even where those places are rearranged and renegotiated over time. In this sense, connections to a homeplace are created by, or at least strongly tied to, the involvement of the homeplace in the formation of a cultural or ethnic identity — in the construction of community. In short, any group or

30. See, e.g., Blu, *supra* note 5. While I can find no example of such a group, there may be non-recognized, removed groups of Indians who have no protected land base and little significant homeplace attachment to any location, beyond that which ordinarily exists from the mere ownership of real property.

31. See, *Reflection and Revelation*, *supra* note 21, at 253; see also Kathleen C. Stewart, *An Occupied Place*, in *SENSES OF PLACE* (Steven Feld & Keith Basso eds., 1996) (discussing the attachment of rural whites to the "hills and hollers" of West Virginia).

community within the American polity may feel a sense of attachment to the homeplace.³²

The modes of territoriality are not exclusive to native North Americans and tribes. They are offered because they embody the predominant ways in which Indians and tribes value their homeplaces, whether those places are ancestral lands protected as reservations, subsequently created reservations for removed tribes, or the traditional lands of terminated or non-recognized tribes.

As alluded to, the *homeland*, *sacred-land*, and *nation-state* modes of territoriality represent the three dominant ways in which Indian people and communities connect to and unite with the tribal homeplace.³³ They attempt to dissect the native-land relationship into its most basic and fundamental parts³⁴ to aid our understanding of statements such as Pommersheim's "reservations are a physical, human, legal, and spiritual reality"³⁵

A. *Homeland Territoriality*

Homeland territoriality describes the emotional and physical connection between native communities and the land in which they historically dwelt. While assigning an exact length of tenancy required to experience homeland territoriality is difficult, occupation must have existed for at least a generation.³⁶ Homeland territoriality is made up of several different elements.

Prolonged occupation — the first of the two dimensions of the time component of homeland territoriality³⁷ — calls up notions of community and

32. Additionally, an Indian group's source of connection grows when its place (e.g., its reservation) is held in trust, rather than merely owned in fee. For example, trust land is granted the special status of legal perpetuity (protecting it from alienation), which allows the group to become more permanently attached to that place.

33. Because tribes and communities are only made up of individuals — whose feelings of attachment may vary greatly within the particular group — it, therefore, may be a slight oversimplification to attribute a single emotional attachment to any group.

34. Granted, no research or paper can properly explain the myriad of ways tribes are emotionally connected to their land. These modes are simply a cognitive tool — a way of understanding this amorphous and often undefined relationship in a more concrete fashion. The modes recognize that each tribe has its own history and own experience with land and place, and that each tribe, therefore, has its own unique connection to the tribal homeplace. Further, there is no doubt an unavoidable amount of overlap contained in the modes, and they should not be viewed as impenetrable categories. Some values and attributes that underlie each mode, for instance, might fit perfectly well within another of the modes.

35. POMMERSHEIM, *supra* note 1, at 11.

36. The generational yardstick is important because it suggests that one is not only personally and experientially connected to place, but ancestrally connected as well.

37. The other dimension of the time component of homeland territoriality is discussed *infra*

continuity. As Deloria explains,

without a continuing community, one comes from and returns to, land does not become personalized. The only feeling that can be generated is an aesthetic one. Few non-Indians find satisfaction in walking along a river-bank or on a bluff and realizing that their great-great-grandfathers once walked that very spot and had certain experiences.³⁸

However, as America ages, even non-Indians will begin to have these experiences. Homeland is a place where, according to Pommersheim, “generations and generations of relatives have lived out their lives and destiny — that it is, after all, one’s own home, one’s community.”³⁹

Prolonged occupation is relative. Whereas many non-removed tribes are connected to their homeplace because they have occupied that place for perhaps several generations, removed tribes may also feel a sense of homeland connection to their relatively new tribal homeplace, even though they have occupied that place for only a few generations.

Perpetuity. Indians also value the tribal homeplace because it carries with it a cultural and even legal sense of perpetuity — the second dimension of the time component of homeland territoriality. Perpetuity connotes a general restriction against alienation imposed by the Secretary of the Interior and by tribes themselves, a restriction for which many Indian people fought and died.⁴⁰ The treaties, executive orders, statutes, and other instruments that created many reservations described subsequent Indian land tenure as permanent.⁴¹ For example, the federal treaty negotiators often promised Indian parties they would have a “permanent home from which there will be no danger of your moving again”⁴² One treaty promise stated that, “[t]he land on which you live will be your own and when you die it will be your children’s”⁴³ The promise of perpetuity — that tribal land will remain

note 38

38. *Reflection and Revelation*, *supra* note 21, at 254.

39. POMMERSHEIM, *supra* note 1, at 14.

40. Tribal land, reservations, and other forms of “Indian country,” are generally protected by tribal and federal rules prohibiting alienation of such land. In the federal context, consent must usually be obtained from the Secretary of the Interior before tribal trust land may be alienated. Tribal prohibitions also exist.

41. See, WILKINSON, *supra* note 9, at 15.

42. *Id.* at 17 n.55 (citing the treaty with the Chippewas, Ottawas, and Potawatamies, June 5 & 17, 1846, 9 Stat. 853, Speech of Commissioner in Journal of Proceedings (Nov. 12, 1845)).

43. WILKINSON, *supra* note 9, at 17 (citing the Treaty of Lapwai with the Nez Perce, June

so forever — is an important tribal value and helps shape and define a group's unique sense of homeland territoriality.⁴⁴

Collectivity. Collectivity helps further define homeland territoriality and is a tribal desire for unity of possession; that equitable title to all lands within the exterior boundaries of its domain or reservation be held by the group, i.e., collectively.⁴⁵ Collectivity generally opposes the private fee ownership of individual tracts of land within a tribe's territorial boundaries. Except for the American concepts of joint-tenancy and tenancy in common,⁴⁶ collectivity is a principle at direct odds with the Euro-American notion of fee ownership. It was this tribal value of collectivity or unity of possession, in fact, that the official allotment of Indian lands was intended to attack.⁴⁷ This value may be expressed through the corporate ownership of property, as in the case of Alaska Native State Corporations, but is generally expressed through the tribal desire to hold land in trust, rather than in fee as a native corporation owns land.⁴⁸

9, 1863, 14 Stat. 647, Statements by Commissioners in Journal of Proceedings Connected with the Negotiation of a Treaty (June 4-5, 1863)).

44. Prolonged occupation and perpetuity, then, are two dimensions of the time component of homeland territoriality. Prolonged occupation expresses the value of a past tenancy, and perpetuity is an expression of the value for continued future tenancy.

Additionally, perpetuity may not be necessary to homeland territoriality. Countless tribes who have been removed from or dispossessed of large portions of their ancestral lands still experience a strong sense of homeland attachment to that place. Consider, for example, the Sioux Tribe of South Dakota who were dispossessed of the Black Hills following the discovery of significant gold deposits within that area. For more examples, see KLAUS FRANTZ, *INDIAN RESERVATIONS IN THE UNITED STATES, TERRITORY, SOVEREIGNTY, AND SOCIOECONOMIC CHANGE* 192 (1999). This is also not to say that perpetuity is a sufficient condition of homeland perpetuity; prolonged occupation (even for removed tribes with a relatively short tenure in their homeland) must generally be present as well.

45. Often, though, this value is only aspirational, as many reservations have been severely allotted and "checkerboarded." This phenomena arose as a result of the federal government's allotment policy and the subsequent sale of individually allotted parcels to non-Indians. This eventually created the "crazy-quilt" pattern of land tenure existing on many reservations. See, e.g., DELORIA & LYTLE, *supra* note 24, at 70.

46. Joint tenancy and tenancy in common are forms of ownership of realty by two or more persons in which each owner owns or shares the right to the use of an undivided interest in the whole. BLACK'S LAW DICTIONARY 1635-36 (1968).

47. See discussion *infra* Part III.A.1.

48. Ownership of land in trust, versus in fee, arguably provides a higher level of protection to the tribal value of collectivity because fee land — whether owned individually or by a native corporation — may be lost in a state property tax sale, encumbered and lost by foreclosure of a mortgage or deed of trust, or simply alienated (sold) by a fee owner.

Some early tribes saw collectivity as fundamental to sustaining the group as a nation. As Strickland argues, “[a]bsolutely essential to the maintenance of the Cherokee Nation were the [laws] making all land the ‘common property of the Nation.’”⁴⁹ The early Cherokee legal system, for example, considered the retention of tribal land so important that they made the act of selling national land a capital offense. The law provided that any persons who “enter into a treaty . . . to sell . . . National Lands are declared to be outlaws, and any person . . . may kill him . . . within the limits of the [Cherokee] Nation, and shall not be held accountable to the laws.”⁵⁰ However, contemporary Indian tribes also value the personal use of and individual benefit from particular tracts of land. The Quechan Tribal Constitution, for instance, requires all lands within the Reservation to be held tribally, but allows individual assignments.⁵¹ Indeed, many adult members of the Quechan Nation, as with members of other tribes, live on and benefit from the personal use of their “assignments.”⁵²

Culturally Preservative Regions. In addition, native connections to the tribal homeland often run deep because those lands are culturally preservative regions. Inherent in the value of such a region is a tribal prerogative to accomplish two interrelated goals: achieve physical and cultural separateness from the dominant society, and maintain a sense of internal social connectedness or nationhood within the group.

Similar to Wilkinson’s measured separatism,⁵³ native people and groups value the tribal homeland because it provides a physical as well as cultural barrier between the native and non-native societies. Pommersheim has said that one motive, from a tribal perspective, in creating the reservations was that tribes wanted to be “left alone.”⁵⁴ In fact, Wilkinson explains that, “[i]solation

49. RENNARD STRICKLAND, *FIRE AND THE SPIRITS* 65 (1975).

50. *Id.* at 78 (citing the 1852 Laws of the Cherokee Nation).

51. QUECHAN CONST. art. VIII, § 1. The section reads: “The unallotted lands of the Fort Yuma Reservation and all lands which may be acquired in the future by or for the Quechan Tribe shall be held as tribal lands forever.” *Id.* This intention that all lands remain tribal lands forever is an expression of the tribe’s values of both collectivity (*tribal lands*) and perpetuity (*tribal lands forever*). In section 2, parts (a) through (d), the Constitution furnishes a method by which a tribal member may be given an assignment of tribal land. *Id.* art. VIII, § 2(a)-(d). Consistent with the characteristics of perpetuity and collectivity, part (a) reads: “Assignments of land shall be held for life, but after the death of the assignee, his requests or his heirs shall be given due consideration in the reassignment of the land.” *Id.* art. VIII, § 2(a).

52. These benefits sometimes take the form of short-term, revocable agricultural and farming leases to non-Indian interests (e.g., date farmers, cabbage and lettuce farmers, etc.).

53. See discussion *supra* note 9.

54. *Id.* at 18.

of Indian societies on the reservations was a common policy goal of . . . tribal . . . negotiators.”⁵⁵ The reason for this desired physical separation was (and is) the hope that it might provide for a sort of cultural separation as well. As Pommersheim explains, the reservations were to be domains protected “against the rising tide of white civilization.”⁵⁶ He says that reservations were to be “Islands of Indianness,”⁵⁷ and “places luckily isolated from the predations of the twentieth century.”⁵⁸ In short, “[w]ithout the land,” Pommersheim argues, “there is no center to resist the historical pressures created by the dominant society.”⁵⁹

This physical and cultural separation was (and is) desired to achieve a sense of nationhood, in the sense of the Latin *natio* — which connotes more than a body of people associated with a particular territory. *Natio*, and the Arabic *ummah* (literally translated as “community”), symbolizes the notion of shared values, of a shared collective history and identity that transcends borders. Blu says that what sets Indians apart from other groups in the American polity is that, “having a particular home place in the United States makes them a particular people; it is the fundamental part of their identity as a “nation,” “tribe,” or “group.”⁶⁰ Clearly, the two concepts — separateness and nationhood — are interrelated. As Wilkinson states, “[i]mplicit in all the talk [of creating reservations by treaty] was not only the expectation that each tribe would remain a people, but also a perception that a homeland, separate and distinct from the surrounding white culture, was a requisite element of that survival.”⁶¹ And Pommersheim has said that, “whatever the conditions, tribal members have been committed to remaining indelibly Indian, proudly defining themselves as a people apart and resisting full incorporation into the dominant society around them.”⁶²

Dependence. Dependence is also important to a sense of homeland. As used here, dependence suggests the native community is dependent upon the tribal homeland for its way of life; that without its homeland, the community would be changed, and would struggle to remain “indelibly Indian.” In other

55. WILKINSON, *supra* note 9, at 16.

56. POMMERSHEIM, *supra* note 1, at 17.

57. *Id.* at 18.

58. *Id.* at 11 n.2 (referencing Peter Nabokov, *Present Memories, Past History*, in THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY 144 (Calvin Martin ed., 1987)).

59. POMMERSHEIM, *supra* note 1, at 27.

60. Blu, *supra* note 5, at 223.

61. WILKINSON, *supra* note 9, at 18.

62. POMMERSHEIM, *supra* note 1, at 13.

words, absent a tribal homeland, the tribe, its community, and identity suffer in some profound way.⁶³

Dependence is also physical and practical. Many Indian people feel a deep sense of attachment to their homeland because it provides for their basic physical needs, as well as for tribal housing needs, agricultural development, and for other economic purposes. Tribal housing, for example, is a very important contemporary tribal need, and helps define modern homeland territoriality. In many tribal communities today, a population increase is occurring and is due, in part, to Indian people “coming home.” There is a strong desire, for example, among young Indian college graduates to return to the homeland to put their educations and experiences to work for positive change. But there is also a generalized desire by Indians of all ages and backgrounds to move home, to go back to the place they came from.⁶⁴ As a result, there is an increased need for and dependence upon land.

Tribal housing is also important because of its association with local culture. In some native communities, such as the New Mexico Pueblos, there is a strong value of remaining physically connected to the community by living in close proximity to one another. In native communities, like the Mesa Grande and Yavapai-Apache, there is strong tribal desire for controlling the arrangement and grouping of tribal housing.⁶⁵

However, the dependence on tribal land extends beyond tribal housing needs. Many tribes, for instance, use their land for economic development purposes, to provide income and jobs for the tribe as a whole. Tribal economic development today takes on many forms. Several tribes are involved, for example, in ranching, farming, grazing, and timber harvesting, and some tribes lease their tribal land to non-Indian interests for these same agricultural and pastoral ventures. Other tribes participate in leasing for mineral production, and oil and gas extraction. And several tribes across the country are involved in Indian gaming, which has become a major source of economic stimulus to tribes. The gaming facilities vary greatly — from the giant “Vegas-style” Pequot casino in Ledyard, Connecticut, to the tiny card

63. See discussion *infra* Part III.A.1. This proposition hardly needs support considering the undeniable and drastic effects reaped on the tribal community by the allotment of Indian lands during the late nineteenth and early twentieth centuries.

64. See, e.g., NABOKOV, *supra* note 5, at 388.

65. Tribes, in fact, often seek to place land in trust (discussed more fully in Parts III and IV *infra*) to gain control over that area for tribal housing purposes and thus avoid the local government’s zoning laws which might otherwise prevent tribes from arranging their housing as they see fit.

rooms and bingo halls of the Hoopa Valley Reservation in Northern California.⁶⁶

Tribes, then, are dependent upon their land as a resource, which allows them to negotiate their values for cultural and environmental preservation and protection on the one hand with the need for income via economic development on the other. As a result, the existence and exercise of governmental authority over tribal land (tribal sovereignty), and over parties conducting business on tribal land, becomes an important aspect of controlling the culture versus economic development trade-off. Sovereignty is also an important defining characteristic of homeland territoriality.⁶⁷

There is much more, though, to native attachments to the tribal homeplace than homeland territoriality can explain. Religious and sacred bonds to land and place also form and maintain connections to the tribal homeplace.

B. Sacred-Land Territoriality

Native people and tribes are meaningfully and intimately connected to the tribal homeplace not only because it embodies their homeland, but because they are spiritually, religiously, and mythically bound to that place. As Deloria explains, "Sacred places are the foundation of all other beliefs and practices because they represent the presence of the sacred in our lives."⁶⁸ He continues, "Every society needs sacred places because they help to instill a sense of social cohesion in the people"⁶⁹

There are three dimensions to sacred-land territoriality. First, valuing tribal land, or a particular place within the tribal homeplace, because of its sacredness, is culturally definitional. It helps define and shape the unique culture and sense of community of the particular group to whom that place has

66. But recently, tribal economic development — as evidence of a dependence upon Indian land — has taken on new forms, such as event and concert facilities, championship golf courses, day-spas, shopping malls, luxury resorts, and hydro-electric production.

67. Because it is a topic with its own set of defining characteristics, tribal sovereignty is addressed in more detail separately in the discussion on Nation-State territoriality, *infra* Part II.C.

68. *Sacred Places*, *supra* note 21, at 281.

69. *Id.* at 272. Importantly, due to removal and relocation efforts and dispossession of ancestral lands by the United States, many sites of holy or sacred significance are located off-reservation. For example, the Chimney Rock area (a religious site to the Yurok, Karok, and Tolowa Indians) is located on federal, non-reservation land in the Six Rivers National Forest. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). For an in-depth discussion of sacred land, and the closely related holy land, see *Sacred Places*, *supra* note 21.

meaning. Pommersheim reveals that tribal land is the “cultural centerpiece” to reservation life.⁷⁰ It is “the source of spiritual origins and sustaining myth, which in turn provide a landscape of cultural and emotional meaning.”⁷¹ Wilkinson explains that, “[f]or people with close . . . spiritual relationships with the earth, preserving [tribal land is] seen as essential to preserving tribal cultures.”⁷² The land helps define the culture, and the culture helps define the people. Sacred-land territoriality hence plays a large part in shaping the identity of the people who occupy and are attached to that place.⁷³ For example, Blu explains that, “Tewas see themselves as situated amid sacred mountains, springs, earth navels, and other highly visible and important places *defining* ‘the Tewa world.’”⁷⁴

Culturally instructive. Sacred land is not only culturally definitional, but it is culturally instructive; it teaches *how to live*. It instructs by the way it is used in lessons and ceremonies, and in the way it is valued and thought of by the tribal community. As Pommersheim says, the land evokes fundamental aspirations “to live in harmony with Mother Earth and to embody the traditional virtues of wisdom, courage, generosity, and fortitude.”⁷⁵ Consider, for example, “Wisdom Sits in Places,” the moral of two tribal narratives retold in Frank Basso’s work of the same name.⁷⁶ Here, Basso retells two Western Apache Cibeqe stories in which an old man exhausts and shames himself after foolishly pursuing two young girls in a place known as “trail goes down between two hills.” As with many native stories, these are allegories that instruct their listeners (often Cibeqe children) on Cibeqe notions of

70. POMMERSHEIM, *supra* note 1, at 14.

71. *Id.*

72. WILKINSON, *supra* note 9, at 18.

73. While the culturally definitional aspect of sacred-land territoriality is similar to homeland territoriality, in that they both help to define the culture of a place, they are slightly different. Here, it is exclusively the sacredness, the holiness, or the religious make-up or use of the land that helps define the local culture. With homeland territoriality, many features (e.g., prolonged occupation, perpetuity, collectivity, dependence) help to construct the local culture.

74. See Blu, *supra* note 5, at 225 (emphasis added). Blu goes on to say that, “[f]or a group like the Tewas, frequent and wide-ranging moves would, presumably, be entirely wrenching and destructive of their basic worldview. (The Tewa worldview, in fact, fits nicely with their having lived in essentially the same place for many centuries.)” *Id.* For more on the Tewa and their unique identity, see PAUL V. KROSKRITY, LANGUAGE, HISTORY, AND IDENTITY: ETHNOLINGUISTIC STUDIES OF THE ARIZONA TEWA (1993).

75. POMMERSHEIM, *supra* note 1, at 35.

76. “Trail Goes Down Between Two Hills,” and “Old Man Owl at Trail Goes Down Between Two Hills,” retold in full in SENSES OF PLACE 53-90 (Steven Feld & Keith Basso eds., 1996).

wisdom, a sacredly held value in that community. And because wisdom is sacred in the Cibeqe community, places that teach wisdom are also sacred.⁷⁷

Sacred land is also *culturally provisional*. In some native communities, it is part of the tribal religion and local custom to give thanks to the earth for sustaining the group in order to ensure continued provision. For example, the Iroquois traditionally participated in Longhouse ceremonies for this purpose. The “thanksgiving address,” the “tobacco burning,” and the “skin dance” are either “thanking events” — where the performer gives thanks to the Creator for His provision — or they are “beseeching events” — where the performer asks, even begs the Creator for continued blessing. In other native communities, individuals are called upon to visit certain sites of sacred or religious significance, as those sites are the exclusive source of sacred power. In some native religious systems where a certain site or set of sites provide the source of sacred power, that power or “medicine,” is necessary for both the practice of the tribe’s religion as well as for the tribe’s successful renewal.⁷⁸ “Similarly, individual trib[al] members may seek curative powers for the healing of the sick, or personal medicine for particular purposes such as good luck in singing, hunting, or love.”⁷⁹

Sacred-land territoriality is sometimes reflected as a generalized connection to the earth. For example, Pommersheim explains that, “[l]and is Mother Earth,”⁸⁰ and Ward Churchill writes “The Earth Is Our Mother.”⁸¹ However, sacred-land territoriality is more appropriately attributed to a connection with a particular place, such as a mountain or river. For example, consider the Pueblo of Sandia’s sacred attachment to Sandia mountain, the Quechan

77. This example illustrates the slight divergence between sacred-land and holy-land. Here, trail goes down between two hills is held sacred to the Cibeqe community because of its role in teaching the sacred value of wisdom. But that place is not necessarily a holy place or tied to the religion of the Cibeqe people.

78. See Justice Brennan’s discussion of general concepts of Native American land and religion in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, at 459-62 (1988). The Chimney Rock area of the Six Rivers National Forest, at issue in *Lyng*, was “indispensable” to the religious systems of the Yurok, Karok, and Tolowa peoples. The Supreme Court recognized the lower court’s decision that the proposed government action (building a paved road through that area) might destroy the Indian’s ability to practice their religion, *id.* at 464, but held that the proposed action was not in violation of the First Amendment’s prohibition against permitting restrictions on the free exercise of religion.

79. *Id.* at 461.

80. POMMERSHEIM, *supra* note 1, at 13.

81. Ward Churchill, *The Earth Is Our Mother: Struggles for American Indian Land and Liberation in the Contemporary United States*, in *THE STATE OF NATIVE AMERICA, GENOCIDE, COLONIZATION, AND RESISTANCE* (M. Annette Jaimes ed., 1992).

Nation's sacred attachment to certain locations in the California desert, the Navajo and Hopi's sacred-land attachment to the San Francisco Peaks, and the Tohono O'Odham's (Papago) sacred-land attachment to the Baboquivari Mountain Range.

In the traditional American legal landscape, sacred sites and notions of sacred-land territoriality have been largely ignored or dismissed.⁸² But in recent times, a certain shift toward legal and political legitimacy has begun to occur (a prime reason why a discourse on native modes of territoriality is so important).⁸³ Tribal sacred sites (many of which are located off reservation), for example, are now in some cases protected by the federal government as Traditional Cultural Properties, also known as "TCPs."⁸⁴ In some instances, sacred sites may be protected even when not located within a tribe's territorial boundaries.

The protection of TCPs and other sacred sites is gaining legitimacy, however, in part because of the recognition that sacred-sites and sacred-land territoriality play an important role in sustaining the tribal community and its unique culture and identity, even in the modern era. But homeland and sacred-land modes of territoriality do not fully explain the relationship between Indian people and their land. There is also a legal and political connection between Indians and the tribal homeland.

C. Nation-State Territoriality

Nation-state territoriality says that native people are connected to the tribal homeland because it is "Indian country"⁸⁵ and represents a defined, legally

82. See, e.g., *Lyng*, 485 U.S. at 439.

83. As Nabokov explains, "[t]he enduring importance of sacred geography to American Indian traditions was given prominence in court battles that followed the passage of the 1978 American Indian Religious Freedom Act." NABOKOV, *supra* note 5, at 445. After a long string of losses, Nabokov tells, "Indian traditionalists continue to fight for historical sites, religious places, or burial grounds from which they draw strength and pride and full responsibilities to their ancestors." *Id.*

84. The National Park Service defines a TCP as property "eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." U.S. Dep't of the Interior, Nat'l Register Bulletin No. 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1992). The Park Service states that such properties are "vital to maintaining the group's sense of identity and self-respect." *Id.*

85. See discussion *infra* Part IV.B.1.a.

protected territory within which tribes exercise their inherent sovereign right of self-government.⁸⁶ Several attributes shape this mode of territoriality.

Clear boundedness. The nation-state mode of territoriality suggests the existence of clearly defined territories and the value of clear boundedness over which no other organized political entity (notwithstanding the existence of concurrent jurisdiction⁸⁷) may exercise governmental powers. While clear boundedness may be a shared value of today's Indian tribes, universal applicability of that concept to pre-modern tribes may not be fitting. Albers and Kay challenge the clear boundedness notion by presenting ethnographic and historic evidence supporting a less-rigid notion of native territoriality and defined boundaries.⁸⁸ They argue that tribes were regularly engaged in territorial "sharing," where the employment of flexible and even seasonally floating semi-boundary systems was the norm. Nation-state territoriality is then perhaps a concept best applied to the contemporary era of Indian land tenure in the United States. In this view, clear boundedness can best be viewed as a value created and sustained by the necessity of tribal survival in the face of westward expansion, allotment and assimilation, and the still present hunger for valuable Indian land.

Perpetuity and collectivity also help define nation-state territoriality. While these two values operate in much the same way under this mode as they do under homeland territoriality, there are distinctions. Here, territorial collectivity is valued because, in the current state of federal-Indian law, it is

86. This mode is expressed in petitions from groups like the Embera Katio Tribe to the Government of Colombia to "respect our autonomy and territory." Colombia currently is home to over 700,000 indigenous people who are members of eighty-four tribes and who speak sixty-four different indigenous languages. Those eighty-four tribes occupy more than fifty million acres of land granted to them by the government. The Colombian government has even signed "accords" with the tribes to ensure their autonomy and human rights; but the tribes must frequently urge the government to comply with these accords. See Scott Wilson, *Colombian Indians Resist an Encroaching War*, WASH. POST, June 18, 2001, at A10.

87. In the modern federal-Indian law system, it is not uncommon for two separate sovereigns to share jurisdiction over certain matters within Indian country. In Public Law 280 states, this is exactly the case, for instance, in the exercise of criminal jurisdiction over certain crimes and parties within Indian country by both state and tribal governments. As Carole Goldberg-Ambrose has said, Public Law 280 did not divest tribal governments of their criminal jurisdiction, but merely transferred the federal government's criminal jurisdiction to certain states. See CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280*, at 9-10 (1997).

88. Patricia Albers & Jeanne Kay, *Sharing the Land: A Study in American Indian Territoriality*, in *CULTURAL GEOGRAPHY AND AMERICAN INDIANS* (Thomas E. Ross et al. eds., 1995).

necessary for tribal governmental jurisdiction over the entire tribal homeplace.⁸⁹ Without tribal ownership over all land within the tribal homeplace, tribes' power to express themselves *as nations*,⁹⁰ and to form and maintain *political*, as opposed to solely ethnic, identities, is diminished. In other words, due to the courts' recent treatment of tribal jurisdiction, non-Indian activity on fee land within reservations greatly threatens tribal efforts to act authoritatively as a nation.⁹¹

Sovereignty. The right of self-government is the most important attribute of nation-state territoriality.⁹² Ideally, territorial sovereignty means tribes may assert their governmental authority over all land within their jurisdiction. Because tribal governmental authority generally extends only to those lands within a recognized land base, such as a reservation, the exercise of tribal jurisdiction takes on especially important meanings in Indian country and is often broken into three separate types: (1) legislative jurisdiction (the right of tribal governments to establish tribal laws enforceable within the reservation); (2) regulatory jurisdiction (the right to enforce tribal laws and regulate behavior within the reservation); and (3), adjudicatory jurisdiction (the right of tribal governments to hear and decide civil and criminal disputes concerning member Indians or arising within the reservation). Absent a legally recognized tribal homeplace or territory, tribes have little opportunity to assert their legislative, regulatory, or adjudicatory authority, and little opportunity to maintain an identity as modern nation-states.

The value for territorial sovereignty is strong among contemporary tribes and their legal codes and constitutions.⁹³ However, the value of territorial and governmental sovereignty also existed in the historic era. Wilkinson explains that during the creation of treaty reservations, "Jackson promised . . . that

89. See discussion *infra* Part IV.B.1.a.

90. "Nation-state," means a sovereign or autonomous polity occupying a relatively definable territory (e.g., the Indian reservation) and inhabited by a fairly homogenous group of people who share feelings of common nationality.

91. See *infra* notes 272-73 and accompanying text.

92. The notion of Indian sovereignty is central to a tribal existence in the modern era. Its importance cannot be overstated. However, there are differing interpretations of tribal sovereignty even within the Indian community. This section, therefore, does not attempt to outline or discuss sovereignty in any great detail; it is only meant to introduce the notion as being a key component to the nation-state mode of territoriality. See generally FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

93. The Quechan Constitution, for example, declares that: "[t]he jurisdiction of the Council and courts of the Quechan Tribe shall extend to the land now or hereafter comprised within the Fort Yuma Indian Reservation." QUECHAN CONST. art. 2, § 1.

within the reservations, the Indians were to have governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace"⁹⁴ Wilkinson continues that federal negotiators tried to persuade Eastern tribes to remove West by promising they would be "away from white people, and from their laws, and be able to live under [their] own [laws]."⁹⁵ Federal negotiators often promised Indians that reservations would be "your own country."⁹⁶

In sum, nation-state territoriality, defined by the characteristics of clear boundedness, collectivity, perpetuity, and sovereignty, advances the tribal goal of a desired political identity. Indians and tribes not only yearn for the shared social and ethnic identity advanced by homeland and sacred-land territoriality, but also for an identity as contemporary governments.

D. Conclusion

The tribal homeplace is not only a "reservation," not only a physical, geographical place valued for its promise of a measured separatism. It is homeland, valued because of its prolonged occupation, culturally preservative nature, cultural and physical sustenance, and for the promise of perpetuity. The tribal homeplace is also a sacred territory, valued for its religious, spiritual, and mythic importance to the group, and for its culturally definitional, instructive, and provisional role. Finally, the tribal homeplace is a legal and political boundary, valued as a place within which tribes exercise their sovereignty and exist as authoritative nation-states.

Only tribal trust land (and other Indian country) can guarantee endurance of the tribal homeplace. Because of its special legal status and restraint against alienation, only tribal trust land ensures protection of the values expressed in the native modes of territoriality (i.e., the "modal" values).

Over the past 500 years, tribes lost much of their original homeplaces. Allotment alone effected the loss of over ninety million acres of Indian land. Even today, tribes continue to lose protected tribal homeplaces. From 1985 to 1995, for example, for the sixteen tribes with reservations in Nebraska, North Dakota, and South Dakota, a net total of 28,279 acres of land were taken out of trust status,⁹⁷ sometimes through the sale of individual allotments

94. WILKINSON, *supra* note 9 (citing 2 JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 452, 457-458 (1902)).

95. *Id.* (citing Treaty with the Potawatamie Nation, June 5 & 17, 1846, 9 Stat. 853).

96. *Id.*

97. Brief for Amici Curiae at 3, *Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996) (No. 95-1956).

to non-Indians. So how are tribes supposed to remain “indelibly Indian,” when the source of their identity, community and survival — the land — is disappearing? Unless tribes place some of their lost land (and other useful land) into trust — back into a protected status — the tribal homeplace and perhaps even tribal communities will be lost.

Recognizing the failure of allotment, Congress in 1934 established the statutory basis for tribes to rebuild the Indian land base — the Indian Reorganization Act (IRA).⁹⁸ In 1980 Interior implemented that statute through regulations published at 25 C.F.R. Part 151.⁹⁹ Together, these two sources create the modern framework for placing land into trust for individual Indians and tribes. The process, meaning, and effect of this legal and regulatory framework are discussed next.

III. The Legal and Regulatory Framework for Placing Land Into Trust

The process of placing land into trust for Indians and tribes pursuant to the IRA¹⁰⁰ is administered by the Interior and governed by Part 151. The Part 151 process, presently the primary method of placing land into trust, is critical to Indians and tribes because it is the principle mechanism for rebuilding the Indian land base, and because land taken into trust via Part 151 becomes “Indian country”¹⁰¹ (subject to the authority of tribes, generally exempting such land from state taxation and other laws). Recently, the concern over Part 151 has increased substantially because Interior is presently reconsidering the policy and standards that guide the Part 151 land-into-trust process. Naturally, tribes are concerned that if the existing land-into-trust process is made more demanding, which appears to be the present desire of Interior,¹⁰² that process will fail to adhere to Congress’s intent in § 465 — to rebuild the Indian land

98. 25 U.S.C. §§ 461-491 (2000). See also INST. FOR GOV’T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION vii-viii (1928) [hereinafter MERIAM REPORT], discussed in part at note 118 and following text.

99. Land Acquisitions, 25 C.F.R. § 151 (2002).

100. 25 U.S.C. § 461-479 (2000) (also known as the Wheeler-Howard Act). IRA Section 5 (codified at § 465) allows the Secretary to accept title to land in trust for both individual Indians and tribes. Tribes, as used here, refers also to individual Indians, unless otherwise noted. Further, acquisitions pursuant to § 465 are not limited to tribes that voted to accept the IRA provisions. See 1983 Indian Land Consolidation Act, 25 U.S.C. § 2202 (2000).

101. “Indian country” is land within which federally recognized Indian tribes are permitted to exercise their powers as sovereigns, and where state law is generally not applicable. See *infra* notes 269-72 and accompanying text.

102. See *infra* note 181 and accompanying text.

base — and fail to meet the interests of tribes in placing land into trust — to rebuild their identities and communities.

This section examines the legal framework for placing land into trust. It considers the evolution of the IRA and § 465 itself in order to, among other reasons, determine Congress's intent in that important provision. The background and history of the regulatory process is also considered in this section. The existing land-into-trust procedures themselves are then examined in order to ascertain whether Interior has adhered to Congress's § 465 intent. Finally, it addresses some potential problems with § 465 and the regulations at Part 151.

A. The Legal Framework for Placing Land into Trust

Congress possesses plenary authority over all domestic fee, public, and Indian land,¹⁰³ and over the decision to take or guide the taking of land into trust for individual Indians and tribes. Regardless of the specific method used, all land placed into trust for Indians and tribes is placed into trust under the authority of Congress.

Historically, through authorization from Congress, land was often placed into trust for Indians and tribes by treaty¹⁰⁴ and by executive order,¹⁰⁵ both exercised by the executive branch of government, generally through negotiation with, for example, the Interior and signed by the President. The

103. Fee land is land that can be freely alienated at the bequest of the owner, which may be, for example, a private party, governmental body, or Indian tribe. Congress ultimately enjoys plenary authority over private land through its power of eminent domain; the power to take private land for public use in return for just compensation. Public land is land owned by the federal or state governments and which is administered or governed typically by a governmental agency, such as the U.S. Forest Service, the Department of Agriculture, or the Department of Interior. Absent special measures, public land may not be freely alienated. Indian land, as used here, is land owned in trust by an Indian tribe. Technically, this land is owned by the federal government, but held in trust for the benefit of a particular tribe as the beneficial or equitable owner of the land.

104. Land has been taken into trust by treaty between tribes and the federal government countless times, although this method of interaction between the United States and Indian tribes was discontinued in 1871. Until 1871, though, this was the federal government's preferred method of taking land into trust for tribes. The treaty method was used mostly in the Eastern part of the United States, thus the prevalence of so-called "treaty reservations" in that region. In the West, however, many reservations were created by "executive order."

105. The executive order method of trust land acquisition, abolished in 1919, was employed several times to create new reservations as well as to increase the size of existing reservations. 43 U.S.C. § 150 (2000); 25 U.S.C. § 211 (2000).

treaty and executive order methods of placing land into trust for tribes are obsolete in the modern era.

Today, land is placed into trust for Indians and tribes pursuant either to special federal legislation¹⁰⁶ or through Interior's Part 151 regulations, pursuant to congressional authorization provided for in over forty federal statutes, including Section 5 of the Indian Reorganization Act (hereafter § 465).¹⁰⁷ Section 465 and Part 151 are the main focus of this section because, together, they constitute the primary method of placing land into trust for tribes today. To fully understand § 465 and the role it plays in the modern land-into-trust regime, and to determine Congress's intent, it becomes necessary to consider the background and history of the IRA.

1. Allotment and Assimilation

The United States early recognized that the economies, cultures, religions, ceremonies, institutions, i.e., the life-ways, and even the individual and collective health of Indian people and their communities are tied strongly to and dependent upon the existence of tribal land. In the late nineteenth century, in an attempt to undermine this important social and cultural connection to tribal land and promote assimilation into the dominant society, the United States established a plan to diminish and eventually dissolve the Indian land base. This plan involved both a broad, national policy on allotment and assimilation as well as a specific legal scheme giving effect to that policy.

The federal government's national policy on allotment and assimilation was initiated in President Chester A. Arthur's 1881 message to Congress.¹⁰⁸ In his inaugural message to Congress, President Arthur proposed a solution to the "Indian problem:" "to introduce among the Indians the customs and pursuits of civilized life and gradually to absorb them into the mass of our citizens."¹⁰⁹ The purpose of this policy was to assimilate Indian people and tribes into

106. Congress has placed land into trust for Indians and tribes through special legislation since the United States' formation. Such special legislation has taken many different forms, such as direct legislative transfers of title to land in trust and Indian land claim settlement legislation. The degree of congressional control of the land-into-trust process varies depending upon the method used. For instance, Congress exercises a high degree of control where it directly transfers land into trust for tribes. However, where Congress merely authorizes the executive branch to place land into trust for tribes, such authorization is accompanied with sometimes wide discretion, as is the case with IRA Section 5 (§ 465) delegations.

107. 25 U.S.C. § 465 (2000).

108. DELORIA & LYTLE, *supra* note 24, at 8.

109. *Id.*

American society, to dissolve the uniqueness of individual Indians and tribal communities, and to “rescue” Indians and tribes from their “primitive” life-ways.

The 1887 General Allotment Act (Act) reflected the national policy on allotment and assimilation. The Act authorized the President, whenever he thought it advantageous for the Indians, to allot or apportion tribal land to individual Indians in fee ownership. One-hundred sixty acres of land were to be allotted to each head of household, and eighty acres allotted to other individual Indians.¹¹⁰ The United States was to retain title to these newly allotted lands for twenty-five years. Thereafter, under the Act, title was to convert to the individual Indian allottee in fee, with no restriction against alienation, turning previously tribally held land into private property and an easy target of solicitous land settlers. The federal government, as Deloria and Lytle explain, believed that private property “had magical mystical qualities about it that led people directly to a ‘civilized’ state.”¹¹¹ Furthermore, the checkerboard pattern of land tenure resulting from allotment was designed to increase physical and cultural intermingling with non-Indians. Importantly, the Act also authorized the Secretary of the Interior to negotiate with the tribes for the transfer of all “excess lands” — lands not allotted to individual Indians — for the purpose of non-Indian settlement. In short, allotment was intended to decimate both tribally held land (because of its important function in the health of the tribal community and in the perpetuation of tribalism) and the Indian land base in general (to allow for further westward expansion).

The effects of allotment and assimilation were devastating. Allotment reduced the Indian land base from 138 million acres in 1887 to forty-eight million acres in 1934,¹¹² and the value of Indian lands by at least 85%, “with the most valuable land passing into non-Indian ownership.”¹¹³ Due in large part to the significant social and cultural connection between tribes and their

110. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 21 (3rd ed. 1998).

111. DELORIA & LYTLE, *supra* note 24, at 9. This paper, in part, is intended to show that tribally held land has “magical mystical qualities” about it that connects tribal communities together and to their past, promoting a healthy sense of national or tribal solidarity and further advancing the current national policy toward tribes — self-determination.

112. *Id.* at 10.

113. William R. Perry, Comments on Final Rule on Acquisition of Title to Land in Trust, June 15, 2001 (citing Commissioner of Indian Affairs John Collier in *To Grant Indian Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2775 Before the Senate Committee on Indian Affairs*, 73d Cong. 30-31 (1934)) (on file with the Office of Real Estate, Bureau of Indian Affairs) [hereinafter Perry].

land, allotment had an equally, if not more, devastating effect on the health and well-being of the tribal community. For example, allotment often attacked vitally important native modes of territoriality by removing from tribal control and protection sacred sites important in maintaining religious and cultural values underlying the tribal community. Allotment also removed large areas of homeland and nation-state land (land over which the tribe exerted its governmental authority) from tribal control. Additionally, allotment led to the fee ownership of tribal land by non-Indians, a situation that is the foundation for the loss of much tribal governmental authority within Indian country.¹¹⁴

Allotment's impact on communally held land and important sacred and cultural sites opened the door for the eventual destruction of tribal life-ways. According to Washburn,

the blow was less economic than psychological and even spiritual. A way of life had been smashed; a value system destroyed. Indian poverty, ignorance, and ill health were the results. The admired order and the sense of community often observed in early Indian communities were replaced by the easily caricatured features of rootless, shiftless, drunken outcasts, so familiar to the reader of early twentieth century newspapers.¹¹⁵

Allotment not only attacked the sense of community and the importance of sacred-land, homeland, and nation-state territoriality, but impeded tribes' ability to enjoy a "measured separatism"¹¹⁶ so important to tribal communities. As Wilkinson explains,

[a]llotment and the other assimilationist programs that complemented it devastated the Indian land base, weakened Indian culture, sapped the vitality of tribal legislative and judicial processes, and opened most Indian reservations for settlement by non-Indians. Ultimately, it compromised the guarantee of measured separatism by dashing any remaining hopes that traditional Indian societies might remain truly separate.¹¹⁷

114. See, e.g., *Montana v. United States*, 450 U.S. 544, 566 (1981) (holding that non-Indian hunters and fishermen on non-Indian fee land do not subject themselves to tribal jurisdiction). See also discussion *infra* note 274.

115. WILCOMB E. WASHBURN, *RED MAN'S LAND, WHITE MAN'S LAW: THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 75-76 (1971).

116. See *supra* notes 9-17 and accompanying text.

117. WILKINSON, *supra* note 9, at 19.

Even tribes whose land holdings were not allotted under the Act or other similar law felt these effects because all tribes in the United States, and all tribal land bases, were caught in the snare of the broader national policy of assimilation — the significant counterpart to allotment. As such, all tribal land came under attack by assimilation and westward expansion.

The impetus for congressional review and modification of allotment finally came in the form of the “Meriam report.”¹¹⁸ Compiled at the bequest of Congress with the aid and direction of Lewis Meriam, the report concluded that the overall health and standard-of-living in Indian country were in an extremely poor state. Coming six years later, the IRA, including § 465, was intended to reverse this condition.

2. *The Indian Reorganization Act: Congress's Response to Allotment*

The IRA sought to reverse the negative impact of allotment by instituting a comprehensive legal scheme relating to land acquisition (i.e., § 465 discussed herein),¹¹⁹ land consolidation,¹²⁰ the organization of tribal governments,¹²¹ the creation of reservations,¹²² creating Indian preferences under the Bureau of Indian Affairs (BIA) and the Indian Health Service,¹²³ and other provisions.¹²⁴ Passage of the IRA marked a major policy shift from the era of allotment and assimilation. Important here, the IRA ended the allotment of Indian lands. Section 1 of the IRA states: “On or after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or

118. MERIAM REPORT, *supra* note 98, at vii-viii. The Meriam report commented on several important topics within Indian country, such as health, education, general economic conditions, family and community life, assimilation, legal aspects of “the Indian problem,” and missionary activities among the Indians.

119. 25 U.S.C. § 465 (2000) (IRA Section 5).

120. *Id.* § 463e.

121. *Id.* §§ 469, 476, 477. The reorganization of tribal governments was, in fact, an overriding objective of the IRA because allotment had also destroyed traditional tribal governing processes. As Wilkinson explains, “[w]hen the reservations were opened, true traditional governments were essentially doomed in most tribes, and the authority of any form of tribal rule was undermined.” WILKINSON, *supra* note 9, at 21. As a result, Wilkinson notes, “[t]he BIA moved in as the real government.” *Id.* Many of the IRA’s provisions were intended to reverse this condition, and to, in effect, decentralize the power-structure of Indian affairs; to give the administration of Indian affairs back to the tribes.

122. 25 U.S.C. § 467 (2000).

123. *Id.* §§ 472, 472a.

124. *Id.* § 461.

agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.¹²⁵

These changes in federal policy were aimed at reversing the deplorable situation that existed within Indian country (caused in large part by allotment),¹²⁶ and were intended to promote tribal economic and governmental self-sufficiency. This intent is clear from the IRA's overall statutory arrangement and comprehensiveness, the specific language of its provisions, and from its legislative history.¹²⁷ Section 465 was an indispensable part of that goal.

3. Section 465

Section 465 is the leading federal statute granting the Secretary of the Interior [Secretary] discretionary authority to take land into trust for Indians and tribes.¹²⁸ That section states:

The Secretary of Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

4. Congress's Intent in § 465

The intent of § 465 — read in context of the IRA's goal of reversing the effects of allotment — is clear: to provide land for Indians and tribes in order to rebuild the Indian land-base and promote tribal economic and governmental self-sufficiency.¹²⁹ While it is uncontroversial that § 465 was intended to

125. Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984, 984 (codified at 25 U.S.C. § 461 (2000)).

126. See generally ELMER R. RUSCO, *A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT* (2000).

127. See, e.g., Perry, *supra* note 113. See generally RUSCO, *supra* note 126.

128. Section 465 also includes an appropriation provision, which has raised some debate about the amount of money that may be spent on § 465 land acquisitions. It states: "For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year." 25 U.S.C. § 465 (2000). This appropriation has never been held to limit the cumulative amount of money (public and private) that may be spent in any one year on § 465 land acquisitions.

129. See generally RUSCO, *supra* note 126.

promote tribal self-sufficiency, Congress's intent regarding the method of achieving self-sufficiency is more disputed. Some argue that the true intent of § 465 was to provide land solely to landless or near-landless Indians or to Indians exclusively for agricultural or rural purposes.

John P. Guhin, former South Dakota Assistant State Attorney General, argues that the IRA's legislative history shows that Congress intended in § 465 only to provide land to landless or nearly landless Indians.¹³⁰ While this appears to have been one reason for § 465, it does not appear to have been Congress's exclusive intent. Moreover, Guhin fails to address that Congress never included any such restrictive language in the Act itself. Further, it seems clear from the Act's legislative history that members of Congress did in fact discuss that one of the purposes of § 465 was to provide land to landless Indians. If Congress's intent in § 465 was to provide land exclusively to landless Indians, or to Indians solely for rural pursuits, Congress simply would have had to change "for the purpose of providing land to Indians," to, "for the purpose of providing land for now-landless Indians and exclusively for agricultural purposes." Congress's silence in § 465 regarding landless Indians or rural pursuits strongly suggests it never actually intended such a limited construction.

William R. Perry, a Washington D.C. Indian law attorney, argues that the IRA does not limit tribal land acquisitions to landless tribes or to tribes exclusively for agricultural purposes.¹³¹ He maintains that such a narrow interpretation of § 465 "is fundamentally inconsistent with the language of the Act, its broad purposes as reflected in the legislative history, the longstanding administrative construction of § 465, later Congressional action regarding trust land acquisitions, and many judicial rulings on the subject."¹³² Moreover, even if § 465 was ambiguous about its application to non-landless tribes, which it is not, the general Indian law cannons of construction require resolution of ambiguities in favor of Indian interests.¹³³ Finally, it is quite nonsensical to determine that Congress intended to provide land "within . . . existing reservations" solely to landless Indians and tribes. Regardless of the method Congress envisioned for supporting tribal self-sufficiency (i.e., land

130. John P. Guhin, *In Search of a Rationale for the Taking of Land into Trust for Indians and Indian Tribes in the Year 2000* (Apr. 2000) (unpublished paper, on file with author).

131. See Perry, *supra* note 113.

132. *Id.*; see also *Mescalero Apache Tribe v. O'Cheskey*, 439 F. Supp. 1063, 1073 (D.N.M. 1977) (discussing that § 465 was passed to encourage Indian development).

133. See, e.g., *Matz v. Arnett*, 412 U.S. 481, 504 (1973).

to landless tribes or land to all tribes), the goal of §465 is clear: to rebuild the Indian land base and promote tribal self-sufficiency.¹³⁴

B. The Regulatory Framework for Placing Land into Trust

As mentioned,¹³⁵ there are over forty federal statutes that authorize the Secretary to place land into trust for Indians and tribes. Yet, each statute may or may not provide the Secretary with clear standards for placing land in trust. Therefore, Interior promulgated Part 151 to serve as a guideline to the Secretary when acquiring title to land in trust for tribes under a statute lacking clear standards.¹³⁶ Because § 465 is a delegation that fails to provide the Secretary with specific standards¹³⁷ for placing land into trust, acquisitions pursuant to that Section are governed by Part 151. While Part 151 applies to other land-into-trust statutes,¹³⁸ it is most often employed in conjunction with a § 465 acquisition.

1. Background and History

In 1980, Interior officially implemented § 465 through 25 C.F.R. Part 151. These regulations were published to guide the Secretary's discretion under § 465, among other statutes.¹³⁹ Between 1934 (passage of the IRA) and 1980, Interior placed land in trust for Indians and tribes under § 465 unguided by any published process. Rather, an internally developed but unpublished

134. As an aside, it should be noted that the 1983 Indian Land Consolidation Act expressly provides that § 465 is available to all federally recognized tribes, not just to those tribes that chose to adopt the Indian Reorganization Act. 25 U.S.C. § 2202 (2000).

135. See discussion *supra* note 107 and accompanying text.

136. Where the federal statute being invoked provides the Secretary with clear standards for taking land into trust, those standards apply. This is true regardless of whether the statutory standards are more or less demanding than the regulatory standards contained in Part 151. In certain cases, then, there may be no need to comply with or go through the Part 151 process.

137. Section 465 grants the Secretary the authority to acquire land in trust for Indians and tribes "for the purpose of providing land for Indians." 25 U.S.C. § 465 (2000). While Congress's intent in § 465 is clear, the standards guiding the Secretary's § 465 discretion are not so clear. Additionally, the Supreme Court has required Congress to provide agencies with an "intelligible principle" to guide the exercise of their delegated power. *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). However, the modern Court seems reluctant to strike down even vague or standardless delegations on non-delegation grounds. See generally *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001).

138. See *supra* note 107.

139. Land Acquisitions (Nongaming), 60 Fed. Reg. 32,879 (June 23, 1995); Land Acquisitions (Nongaming), 60 Fed. Reg. 48,894 (Sept. 21, 1995) (codified at 25 C.F.R. § 151 (1997)).

process, which evolved over time, guided the process. The promulgation of the 1980 regulations did not, however, mark a significant departure from this pre-1980 process. While the notice and comment process (held in preparation for the 1980 regulations) undoubtedly affected the final form and content of the 1980 provisions, the regulations are, to a large extent, the embodiment of that already-functioning but unpublished process by which Interior placed land in trust.

2. The 1980 Regulations

The Part 151 regulations published by Interior on September 18, 1980, contained twelve sections¹⁴⁰ and applied only to federally recognized tribes and qualified individual Indians.¹⁴¹ Two sections were added to later amendments of the rule to address “off-reservation acquisitions” and “information collection.”¹⁴² The following discussion explains the process as contained in the 1980 regulations, as amended. It should be noted, however, that the existing regulatory process for placing land into trust is precarious, even if currently applicable, because it is presently under reconsideration by Interior.¹⁴³ Therefore, this examination does not provide an in-depth review of the current regulations, but generally describes the regulatory framework and highlights some important provisions of the rule.

Under Interior’s land-into-trust policy, land may be acquired in trust status for a tribe¹⁴⁴ where (1) the property is located within the exterior boundaries

140. Purpose and Scope; Definitions (later amended at Land Acquisitions (Nongaming), 60 Fed. Reg. 32,879 (June 23, 1995)); Land acquisition policy; Acquisitions in trust of lands owned in fee by an Indian; Trust acquisitions in Oklahoma under § 465 of the IRA; Exchanges; Acquisition of fractional interests; Tribal consent for nonmember acquisitions; Requests for approval of acquisitions; On-reservation acquisitions (later amended at *id.*); Action on requests (later amended at *id.*); Title examination (later amended at *id.*); and the Formalization of acceptance (later amended at *id.*).

141. Title 25 C.F.R. § 151.2(c) (2002) defines an individual Indian as (1) any enrolled member of a tribe, (2) any descendent of an enrolled member who in 1934 was domiciled on a federally recognized reservation, or (3) any other person possessing one-half or more degree of Indian blood of a tribe.

142. Land Acquisitions (Nongaming), 60 Fed. Reg. at 32,879.

143. Interior withdrew the 2001 proposed regulations for placing land into trust. Acquisition of Title to Land in Trust, 66 Fed. Reg. 56,608 (Nov. 9, 2001). Interior’s withdrawal and the explanation of that withdrawal, though, make clear that it is still considering a future modification of the land-into-trust regulations. *Id.*

144. Title 25 C.F.R. § 151.3(b)(1),(2)(2002) also allowed individual Indians to acquire trust land where the land was located within the tribe’s reservation, or adjacent thereto, or where the land was already in trust or restricted status.

of a tribe's reservation¹⁴⁵ or adjacent thereto,¹⁴⁶ or within a tribal consolidation area,¹⁴⁷ (2) where the tribe already owns an interest in the land; or (3) where the Secretary determines that the acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing.¹⁴⁸ This latter provision gives the Secretary considerable flexibility in her decision to grant or deny an application. However, the provision aroused considerable disapproval by non-Indian interests opposed to the Secretary's § 465 authority for its arguable lack of objective standards.

The 1980 regulations include a specific provision for "on-reservation" acquisitions,¹⁴⁹ which addresses application and notice procedures, as well as specific criteria used in considering an on-reservation acquisition. The tribe's application need not be in any special form, but must set out the identity of the parties, a description of the land to be acquired, and other information that shows the acquisition falls within the terms of Part 151¹⁵⁰.

Upon receipt of a request, the regulations require the Secretary to allow the interested state and local governments thirty days to respond. Those governments may then respond in writing to the Secretary regarding the acquisition's potential impacts on regulatory jurisdiction, property taxes, and assessments. State and local governments sometimes complain that more time is needed to properly respond to a tribe's on-reservation request and consider the acquisition's impact on state and local authorities. The tribal applicant is then given an opportunity to reply to state and local government comments, if any.¹⁵¹

Part 151 also sets forth specific criteria that must be addressed before approval of an on-reservation acquisition is granted. The main criteria for an on-reservation request are: (1) the need for the additional land; (2) the purpose for which the land will be used; (3) (if the land is in fee) the impact on the

145. "Indian reservation" is defined as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. § 151.2(f) (2002). In Oklahoma, "Indian reservation" generally means "that area of land constituting the former reservation of the tribe as defined by the Secretary." *Id.*

146. Land within a tribe's reservation, or contiguous thereto, is "on-reservation" land under the 1980 rule. 25 C.F.R. § 151.10 (2002).

147. "Tribal consolidation area" is a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for trust land acquisition. 25 C.F.R. § 151.2(h) (2002).

148. 25 C.F.R. § 51.3(a)(3) (2002).

149. 25 C.F.R. § 151.10 (2002).

150. 25 C.F.R. § 151.9 (2002).

151. 25 C.F.R. § 151.10 (2002).

state and its local subdivisions of removing the land from state tax rolls; and (4) the potential jurisdictional problems arising from the acquisition.¹⁵² This provision of Part 151 triggers strong opposition from state and local governments. These parties claim that placing land in trust for Indians and tribes is improper not only because it relieves tribes of state and local tax responsibility with respect to the subject land, but also because it removes the land from state and local control in general.¹⁵³

In 1995, regulations regarding "off-reservation" acquisitions were added to the 1980 rule.¹⁵⁴ Off-reservation land is defined as land located outside of and *noncontiguous* to a tribe's reservation.¹⁵⁵ In addition to the criteria used to process on-reservation acquisitions,¹⁵⁶ the Secretary also considers the location of the off-reservation land relative to state boundaries, and its distance from the boundaries of the tribe's reservation.¹⁵⁷ As distance between the tribe's reservation and the off-reservation land increases, the Secretary's scrutiny of the tribe's purported "anticipated benefits" from the acquisition also increases, as does the Secretary's consideration of state and local governmental concerns.¹⁵⁸ Where the land is being acquired for tribal business purposes, the regulations require the tribe to submit a plan specifying the "anticipated economic benefits" associated with the acquisition.¹⁵⁹

Where tax and jurisdictional concerns are likely to arise, the rule requires the Secretary to notify the appropriate state and local governments once a tribal land-into-trust request is received. Those governments are given thirty days to comment on the acquisition's potential impact on jurisdiction, taxes, and special assessments.¹⁶⁰ The Secretary shall then review all trust land requests and "promptly" notify the applicant in writing of her decision. If the request is to be denied, the Secretary shall notify the tribe of its right to

152. 25 C.F.R. § 151.10(b),(c),(e),(f) (2002).

153. Most fee-to-trust applications involve small parcels of land; thirty acres on average. *Bureau of Indian Affairs, U.S. Dep't of Interior, Annual Report on Indian Lands* (1996). Therefore, the state's loss of jurisdictional and regulatory control per acquisition should be minimal. Further, for on-reservation acquisitions, the tribe is often already exercising some type of governmental authority over the surrounding area, so the state should not generally be concerned that the use of such land will go unchecked or unregulated if placed into trust.

154. Land Acquisitions (Nongaming), 60 Fed. Reg. 32,879 (June 23, 1995).

155. 25 C.F.R. 151.11 (2002).

156. 25 C.F.R. § 151.11(b) (2002).

157. *Id.*

158. *Id.*

159. 25 C.F.R. § 151.11(c) (2002).

160. 25 C.F.R. § 151.11(d) (2002).

appeal.¹⁶¹ If the request is to be approved, the Secretary shall make some public notice (e.g., by publication in the Federal Register), stating the intent to take certain land into trust no sooner than thirty days from the publication date. Other than these provisions, no specified time-table is set forth for the completion of an off-reservation land-into-trust application. Finally, where the Secretary grants a tribe's application to take land into trust, and after an appropriate title examination,¹⁶² formal acceptance of land into trust is finalized by an instrument of conveyance from the Secretary.¹⁶³

Land-into-trust regulations, as amended, have been in effect since 1980. However, they are not immune from tribal criticism. The most significant complaints from tribes have been (1) the absence of specific, understandable application requirements, (2) the increased scrutiny of off-reservation acquisitions (as compared to on-reservation acquisitions), and (3) the timeliness and cost prohibitiveness of the process. As stated, there is no time limit for completion of a land-into-trust application, and tribal applicants complain that the process sometimes takes several years to complete, which can add greatly to the costs of placing land into trust.

In addition to the administrative shortfalls of Part 151, there are also potential legal problems with the process, as well as with § 465 itself.

3. Potential Problems with § 465 and Part 151

The United States Constitution, Article I, Section 1, requires all legislative powers to be vested in the Congress. This provision forms the basis of the non-delegation doctrine — barring Congress from assigning its law-making responsibilities to any branch of government, including Interior through the executive branch.¹⁶⁴ The non-delegation doctrine, in theory, forces Congress to make the tough policy choices, provides the guidance under which agencies must exercise their discretion, and facilitates meaningful judicial review by requiring more definite statutory standards against which reviewing courts can measure the legality of a particular agency action. In 1995, the State of South Dakota, in the so-called *Oacoma* litigation,¹⁶⁵ challenged the Secretary's

161. 25 C.F.R. § 151.12(a) (2002).

162. 25 C.F.R. § 151.13 (2002).

163. 25 C.F.R. § 151.14 (2002).

164. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935) (striking down legislation on non-delegation grounds).

165. *South Dakota v. Dep't of Interior*, 69 F.3d 878, 880 (8th Cir. 1995). The particular ninety-one acre land-into-trust action challenged in this litigation is located in the City of Oacoma, South Dakota, itself a party to the action.

authority under § 465 to place land into trust for Indians and tribes. Specifically, South Dakota claimed that § 465 itself constituted an unlawful delegation of legislative power to Interior.¹⁶⁶

In the *Oacoma* case, the Assistant Secretary approved a ninety-one acre off-reservation land-into-trust request for the Lower Brule Sioux Tribe of South Dakota. The State and Town alleged “that they were aggrieved by the Secretary’s acquisition because it deprives them of tax revenues and may place the land beyond their regulatory powers.”¹⁶⁷ The State and Town first appealed the Secretary’s particular decision to the Interior Board of Indian Appeals (IBIA).¹⁶⁸ The IBIA dismissed the appeal because it had no jurisdiction to review decisions of the Assistant Secretary.¹⁶⁹ The State and City then appealed to the U.S. District Court where their complaint was dismissed on jurisdictional grounds.¹⁷⁰ Notwithstanding the several decades of recognizing the Secretary’s authority to take land into trust for Indians and tribes,¹⁷¹ and notwithstanding the Supreme Court’s longstanding non-delegation jurisprudence,¹⁷² the Eighth Circuit held that § 465 constituted an

166. *Id.* South Dakota also claimed that § 465 was unlawful under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (2000), for failure to provide judicial review. Section 702 of the APA provides a general right of judicial review to parties allegedly injured by agency action (e.g., the decision to place land in trust), except where judicial review is expressly or impliedly precluded by the APA or the organic act (i.e., the IRA) itself. *Id.* § 702. Judicial review of agency action may be precluded by the organic act itself, *id.* § 701 (a)(1), or where agency action “is committed to agency discretion by law,” *id.* § 701 (a)(2).

167. *South Dakota*, 69 F.3d at 880.

168. *See* *South Dakota & Town of Oacoma v. Aberdeen Area Dir.*, BIA, 22 I.B.I.A. 126 (1992).

169. *Id.*

170. Until 1996, it had always been the position of the Department of the Interior that § 465 IRA trust land acquisitions were not subject to judicial review under the APA because such acquisitions are actions “committed to agency discretion by law.” *See* APA § 701 (a)(2). However, the District Court’s decision was based on an alternative jurisdictional bar, the Quiet Title Act, which expressly prohibits challenges regarding title to Indian lands. 28 U.S.C. § 2409(a) (2000). Though dismissed on jurisdictional grounds, the District Court upheld the Secretary’s constitutional authority under § 465 to acquire land in trust for Indians and tribes.

171. *See, e.g.,* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146, 157 (1973); *see also* *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); *Florida v. Dep’t of Interior*, 768 F.2d 1248 (11th Cir. 1985).

172. The Supreme Court has not struck down a federal statute on delegation grounds since 1935. *See* *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *But see* *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001) for the Court’s most recent significant holding on non-delegation, refusing to invoke the non-delegation doctrine to invalidate the Clean Air Act.

unlawful delegation of legislative power, in violation of the non-delegation doctrine.¹⁷³

Specifically, the Eighth Circuit held that § 465's language of "to provide land for Indians" lacks the requisite "intelligible principles"¹⁷⁴ to guide the Secretary's land-into-trust authority. Arguably however, the Eighth Circuit's decision was fraught with its own problems. First, the decision stands in stark contrast to Supreme Court precedent rejecting challenges on non-delegation grounds where the "entity exercising the delegated authority itself possesses independent authority over the subject matter."¹⁷⁵ The Secretary undeniably possesses such independent authority in the more than forty other federal statutes granting her authority to take land into trust for Indians and tribes. Second, several other courts, including the Supreme Court, rejected similar challenges to § 465.¹⁷⁶ Third, the Eighth Circuit's decision was based in part on a hypothetical land acquisition — "the purchase [of] the Empire State Building in trust for a tribal chieftain as a wedding present."¹⁷⁷ And fourth, as noted in the Amici's Brief to the Supreme Court, "the [Eighth Circuit] read § 465 in isolation from the remainder of the Act of which it is a part, without deference to the longstanding administrative practice, and without consideration of the oversight that Congress has exercised with regard to its implementation."¹⁷⁸

173. *South Dakota v. Dep't of Interior*, 69 F.3d 878 (1995). The State parties were represented in this litigation by South Dakota Assistant State Attorney General, John P. Guhin. Guhin wrote a paper entitled "In Search Of A Rationale For The Taking Of Land Into Trust For Indians And Indian Tribes In The Year 2000." Guhin's paper argues, in general, that with very limited exception, no rationale exists for taking land into trust for Indians and tribes in the modern era. See Guhin, *supra* note 130. In large part, Part IV, *supra*, is intended to respond to Guhin's assertions.

174. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

175. *United States v. Mazurie*, 419 U.S. 544, 556-557 (1975).

176. Brief for Amici Curiae at 4, *Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996) (No. 95-1956) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 155-56 (1973)).

177. *South Dakota*, 69 F.3d at 882. It is a fundamental rule of Supreme Court review that, "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . ." See, e.g., *United States v. Raines*, 362 U.S. 17, 22 (1960).

178. Although, arguably there are problems with the Eighth Circuit's decision, the author agrees that § 465 lacks the sort of "canalized" instruction Congress is supposed to provide agencies. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). The author's assertion that § 465 fails to provide meaningful guidance is based on the current 25 C.F.R. § 151 modification process. While recently in Washington D.C., I attended an event at a House office building where several high level Interior officers and members of the House were present. There, it became plainly obvious that the current 25 C.F.R. § 151 modification process is a highly

Interior appealed the Eighth Circuit's decision to the Supreme Court, which, without explanation, vacated the Eighth Circuit's decision and remanded the case to the Secretary for further consideration. In dissent, Justices Scalia, O'Connor, and Thomas suggested that the Court's decision was based on Interior's 1996 "about-face" regarding the availability of judicial review for future land-into-trust decisions.¹⁷⁹ Regardless, for now, § 465 does not violate the non-delegation doctrine and will not likely be struck down on such grounds in the foreseeable future.¹⁸⁰ However, this is not the end of the story.

Interior has, for over two years now, been involved in a reconsideration of the Part 151 land-into-trust process. At this time, no one knows what policies

political one; that Interior is being lobbied by the different interests at work, including different members of Congress; and that Interior — not Congress — has been called upon to make the tough policy choices regarding whether, and to what extent, for instance, Tribal Land Acquisition Areas (TLAAs) are to be accepted or rejected, and whether the interests of states and other non-Indian parties are to be expressed in the new regulations. Moreover, in Interior's August 13, 2001, Federal Register publication issuing its proposed Notice of Withdrawal of the regulations, Assistant Secretary McCaleb announced that Interior needed more time to consider the hundreds of Indian and non-Indian comments supporting and opposing the proposed regulations. This calls for exactly the kind of interest-balancing and consideration of competing public and private concerns that Congress, according to the Constitution, should have addressed in the IRA (or which Congress now should be addressing). The Eighth Circuit is criticized here not because it chose to strike down § 465 on non-delegation grounds, but because of the other enumerated problems associated with its decision.

179. As stated, until 1996, it was Interior's policy that judicial review of the Secretary's decision to take land into trust was not available, under APA § 701(a)(2). However, after the Eighth Circuit struck down § 465 on non-delegation grounds, Interior changed its policy on judicial review. (Some courts hold that the availability of judicial review of agency action is a factor weighing in favor of upholding a statute challenged on non-delegation grounds. See *South Dakota*, 69 F.3d at 882 (citing *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994)). In 1996, prior to the Supreme Court's decision here, Interior promulgated a new rule permitting judicial review before transfer of title to the United States. 61 Fed. Reg. 18,083 (Apr. 24, 1996). After title of land has transferred to the United States on behalf of an Indian or tribe, though, judicial review is precluded by the Quiet Title Act's prohibition against suing the United States over "trust or restricted Indian lands." 28 U.S.C.A. § 2409(a) (2000) (citing 61 Fed. Reg. 18,083 (Apr. 24, 1996)).

180. As suggested earlier, while the availability of judicial review is not enough to thwart a non-delegation challenge altogether, some courts hold that such availability is a factor weighing in favor of upholding a statute challenged on non-delegation grounds. See *South Dakota*, 69 F.3d at 882 (citing *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994)). But see *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001) (unanimously upholding section 109 of the Clean Air Act. The decision suggests that the non-delegation doctrine may be, as a practical matter, unenforceable).

and procedures will be included in any new final rule. Although Interior has indicated through its recent actions¹⁸¹ that it is likely to implement regulations which are more rigorous than the existing regulations, effectively making certain types of acquisitions more difficult for tribes. As such, those within the Indian law community have raised questions regarding, among other issues, whether Interior's new final rule, if more demanding in certain respects than the existing rule, might be challenged for violating the governing statute.

One issue upon which a challenge to any new land-into-trust rule might be based is whether any such new final rule would receive judicial deference, under the *Chevron* doctrine.¹⁸² Under *Chevron*, where a statute resolves a particular question clearly, then "that is the end of the matter,"¹⁸³ i.e., Congress's clearly expressed intent must be followed by the agency (the agency never enjoys discretion to excuse Congress's intent). However, where the governing statute is ambiguous, a reviewing court must defer to an agency's "reasonable" interpretation of that statute.¹⁸⁴ But the question of Congress's clearly expressed intent in § 465 depends on the distinct issue before a reviewing court.

The issue most likely to go before a court with respect to §465, based on Interior's past indications, is the "on-reservation" versus "off-reservation" distinction. The formerly proposed rule, since withdrawn, included a summary of the BIA's new policy for taking land into trust. The summary section clarified that Interior would follow a process reflecting a presumption in favor of on-reservation acquisitions, and a "more demanding standard" for the acquisition of off-reservation land into trust.¹⁸⁵ However, Congress stated in §465 that, "The Secretary . . . is hereby authorized, in his discretion, to acquire, [through various methods], any interest in land, . . . *within or without existing reservations . . .*"¹⁸⁶ On its face, § 465 makes no distinction between on-reservation and off-reservation lands. Moreover, because Congress recognized the existence of both on-reservation and off-reservation areas (it could simply have granted the Secretary authority to acquire interest in land *anywhere the Secretary deems appropriate*), yet failed to make any distinction

181. Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452 (Jan. 16, 2001). The summary section of the now terminated land-into-trust regulations clarified that Interior would follow a process which reflects a presumption in favor of on-reservation acquisitions, and a "more demanding standard" for the acquisition of off-reservation land into trust. *Id.*

182. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

183. *Id.* at 842-43.

184. *Id.* at 844.

185. 66 Fed. Reg. 3452 (Jan. 16, 2001).

186. 25 U.S.C. § 465 (2000) (emphasis added).

whatsoever regarding standards that ought to apply to one area and not the other, no such distinction should be construed.

Should a court determine that Congress's clearly expressed intent in § 465 is that there should be no distinction in standards between on- and off-reservation acquisitions, then "that is the end of the matter."¹⁸⁷ Interior must comply with that intent. Moreover, as concluded earlier,¹⁸⁸ Congress's general intent in §465 is to "provide land for Indians," which precludes the argument that in order to resolve this problem Interior ought simply to eliminate the comparatively relaxed standards in Part 151 for on-reservation acquisitions — making *all* acquisitions equally more demanding. Yet, considering Congress's clear intent in the IRA generally, and § 465 specifically, to rebuild the Indian land base, such an alteration would likely so impair tribes' rights to acquire land in trust as to violate the governing statute.

On the other hand, should a court determine that § 465 speaks ambiguously as to the on-reservation versus off-reservation question, a reviewing court would be required under *Chevron* to defer to an agency's "reasonable" interpretation of that statute.¹⁸⁹ Yet, in light of the Court's recent holding in *American Trucking*,¹⁹⁰ to the extent Interior implements a final rule that makes some acquisitions more difficult, that final rule (not §465 itself) would likely be held "unreasonable" and thus impermissible in the face of Congress's unambiguous mandate to "provide land for Indians." In other words, how is making some acquisitions more difficult meeting the congressional goal of rebuilding the Indian land base? Arguably, the two notions are directly contradictory.¹⁹¹

In conclusion, *American Trucking* might be used to go back and challenge the existing regulations' distinction between on-reservation and off-reservation acquisitions. However, because the Supreme Court has already considered §465 (in the *Oacoma* litigation), and because Interior's new final rule is on the distant horizon, any challenge to Interior's on-reservation/off-reservation distinction will likely be posed with respect to any new final rule, if at all.

187. See *Chevron*, 457 U.S. at 842-43.

188. See discussion *supra* Part III.A.4.

189. *Chevron*, 457 U.S. at 844.

190. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001).

191. Admittedly, § 465 grants the Secretary discretionary authority to accept title to land in trust. From this, some might argue that the Secretary possesses the authority to discriminate between on-reservation and off-reservation acquisitions. Yet, such discretion must be exercised "reasonably," and, as argued, any such interpretation by the Secretary would enjoy no judicial deference under *Chevron*.

IV. The Tribal Perspective on Placing Land into Trust

Part II of this article examined the native modes of territoriality and discussed the special social, cultural, religious, and political connections between native communities and their land. Part III discussed the legal and regulatory framework for placing land into trust. This Part reviews the land-into-trust process from a uniquely tribal perspective, so that the true meaning of the process to tribes — rebuilding not only the Indian land base but the Indian *community* as well — is recognized and achieved; so that the interests of tribes — the federal government's trust beneficiaries — are understood and addressed.

This Part first examines, from a tribal perspective: (1) the standards and policies tribes desire to be included in any new land-into-trust regulations; (2) the tribal benefits and other consequences of placing land into trust; and, (3) the modern tribal justifications for placing land into trust. To add context to this inquiry, this Part offers a case study conducted on one Southern California Indian tribe in need of a stronger land base, which has recently undergone the land-into-trust process.

A. Tribal Aspirations for New Land-Into-Trust Regulations

In 1999, due in part to the *Oacoma* litigation,¹⁹² Interior announced that it was reconsidering the 1980 regulations for placing land into trust,¹⁹³ the first in a series of related announcements and actions. On January 16, 2001, Interior announced the new final rule for trust land acquisitions (the former final rule or final regulations).¹⁹⁴ On February 5, 2001, Interior again extended the effective date of the January 16th regulations to August 13, 2001.¹⁹⁵ Finally, on November 9, 2001, Interior withdrew the proposed regulations, and left in place what it started with over two years ago — the 1980 regulations for placing land into trust. Thus, at present, there are no published proposed regulations and therefore no accurate way to know what any new Interior regulations might look like.

192. See *supra* notes 180-81 and accompanying text.

193. Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574 (Apr. 12, 1999). Along with this announcement, Interior also published a set of proposed rules that became subject to tribal and non-tribal content and that were modified into the final rules, which were eventually withdrawn. The proposed rules may be viewed at *id.* at 17,574-88.

194. Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452 (Jan. 16, 2001).

195. Acquisition of Title to Land in Trust, Delay of Effective Date, 66 Fed. Reg. 8899 (Nov. 2, 2001).

However, in the near future, Interior will most likely reopen the land-into-trust rulemaking process, seek comments from interested parties, and redraft new regulations. The following discussion is intended to provide Interior with guidance regarding any new land-into-trust regulations; to help ensure that those regulations, first, fulfill the objectives of § 465 — to rebuild the Indian land base, and second, respond to the interests of tribes — Interior's trust beneficiaries.

1. Future Land-into-Trust Regulations

This section summarizes the majority tribal view on several key provisions of the formerly proposed regulations and draws on three sources of Indian and tribal input: (1) a section-by-section explanation of the formerly proposed regulations, published in the Federal Register, in which the BIA summarized the responses of tribes to each of the major land-into-trust sections (summaries);¹⁹⁶ (2) the official written comments of several tribes submitted to the BIA during the formerly proposed rules' notice and comment period (comments);¹⁹⁷ and (3) the transcripts of five regional BIA-tribal meetings held in preparation of writing the formerly proposed rules (meetings). As this section summarizes various tribal concerns, it also briefly summarizes the BIA's former final — now withdrawn — regulations in order to display the position of such regulations relative to tribal desires.

a) "On" and "Off" Reservation Acquisition Policy

Tribes are overwhelmingly in favor of making on-reservation acquisitions less burdensome (as compared to the 1980 rule) in almost all respects, because those acquisitions are often related to tribal efforts to reestablish governmental authority over tribal territory. This view is particularly strong within tribes whose reservations were allotted, so that the current land tenure situation on such reservations is checkerboarded and the jurisdictional authority of the tribe incomplete.¹⁹⁸ Making on-reservation acquisitions easier for allotted reservations fulfills tribal objectives of asserting reservation-wide authority over the land and its residents. Tribes also favor making on-reservation

196. A complete transcript of this section-by-section review and summary of tribal responses may be viewed at Acquisition of Title to Land in Trust, 66 Fed. Reg. at 3452-66.

197. In total, comments were received from 342 tribes, 335 individuals, sixty-five state and local governments, nine Congressional offices, and seven federal agencies. *Id.* at 3453.

198. See discussion *infra* note 274 on how *Montana v. United States* and its progeny made some jurisdiction turn on land status and the possible erosion of this distinction after *Nevada v. Hicks*.

acquisitions easier, simpler, and more straight-forward because, in some cases, there may simply be no opposition from local governments.¹⁹⁹

Tribes disfavor any policy making off-reservation acquisitions more difficult (as compared to the 1980 regulations), because such acquisitions are often equally important to tribal economic development as are on-reservation acquisitions.²⁰⁰ Some tribes, for example, occupy land bases that are (because of location, terrain, etc.) unsuitable for many tribal economic development projects, which sometimes rely heavily on their relative distance to urban centers.²⁰¹ Such tribes need to acquire land in trust off-reservation suitable for economic and other development. Further, in some off-reservation acquisitions, as with on-reservation transfers, there may be no opposition from local governments.²⁰²

The former final rule included a summary of the BIA's new policy for taking land into trust. The summary section clarified that Interior would follow a process which reflects a presumption in favor of on-reservation acquisitions, and a "more demanding standard" for the acquisition of off-reservation land into trust.²⁰³ Interior said this would better enable the Secretary to carry out the responsibility of assisting tribes in reestablishing jurisdiction over reservation land, and would more adequately address the concerns of non-Indian governments regarding the potential ramifications of placing off-reservation lands into trust.²⁰⁴ Such a policy, though, runs contrary to tribal desires not to make off-reservation acquisitions any more difficult than on-reservation acquisitions and, arguably, violates § 465 itself. One tribe told the BIA that

off-reservation trust acquisitions under the new regulations are predicated on a balancing process that weighs "meaningful benefits" to the Tribe against "any demonstrable harm to the local community."

....

... We wish to remind the Secretary that the BIA has an obligation, as federal trustee, to protect the interests of tribal trust

199. Interview with Scott McCrea, Mesa Grande Tribal Housing Administrator, in Ramona, Cal. (Sept. 6, 2001).

200. *Id.*

201. *Id.*

202. *Id.*

203. Acquisition of Title to Land in Trust, 66 Fed. Reg. at 3452.

204. *Id.*

beneficiaries in this important regulatory process. The BIA is *not* obligated to protect the interests of state and local governments.²⁰⁵

b) “On-reservation” Standards and Criteria

Tribes generally desire that any standards and criteria used to determine an on-reservation acquisition be as minimally burdensome as possible. In input from tribes during preparation of the former final rule — since withdrawn, some tribes suggested that, regarding information collection for an on-reservation application, there should be no requirement to explain the need or purpose of an acquisition and no requirements for documentation.²⁰⁶ The BIA rejected this suggestion because, it said, the Secretary needs such information to make an informed and supportable decision.²⁰⁷ A few tribes suggested that any on-reservation standards or criteria recognize the importance of acquisitions for cultural, religious, or ceremonial purposes²⁰⁸ — for land valued for its homeland or sacred-land qualities.²⁰⁹ The BIA responded that this final rule continues the existing practice of placing land into trust for these purposes.²¹⁰

In addition, numerous comments were made in preparation of the now withdrawn final rule stating that the rule should require objective standards for the Secretary to use in processing on-reservation applications.²¹¹ The BIA responded that these comments were accepted and the regulation has been amended to provide clearer standards to evaluate on-reservation requests.²¹² The BIA stated that it “will accept title to land in trust on-reservation or inside

205. Letter from Justin Brogan, Attorney, California Indian Legal Services, to Terry Virden, Director, Office of Trust Responsibility, Bureau of Indian Affairs 4, 6 (June 15, 2001) (on file with author). See discussion *supra* Part III.B.3 on the potential problems with § 465 and Part 151.

206. *Id.* See also tribal comments at Acquisition of Title to Land in Trust, 66 Fed. Reg. 3455 (Jan. 16, 2001).

207. *Id.*

208. *Id.* at 3454 cmts.

209. The BIA suggested that it would consider incorporating such a request into any new regulations. Several non-Indian comments argued that tribes should have to address the effects of on-reservation acquisitions on local governments; that tribes should be required to make “payments in lieu of taxes,” because land taken in trust is removed from state and local tax rolls; and that tribes should have to submit land use plans and explanation of need for on-reservation land. The BIA rejected these and similar comments. These, and other decisions, said the BIA, are “matter[s] for the tribe, not the United States.” 66 Fed. Reg. 3455 cmts. (Jan. 16, 2001).

210. *Id.* at 3454.

211. *Id.*

212. *Id.*

a TLAA if the application facilitates the tribal self-determination, economic development, Indian housing, land consolidation, or natural resource protection.²¹³ However, the BIA stated that “it will deny applications to accept on-reservation lands in trust if the acquisition will result in severe negative impact to the environment or severe harm to the local government. Evidence of such harm must be clear and demonstrable and supported in the record.”²¹⁴

c) Tribal Land Acquisition Areas

A TLAA, as defined in the former final rule, is an area of land approved by the Secretary and designated by a tribe within which the tribe plans to acquire land over a twenty-five-year period of time.²¹⁵ This would have allowed a tribe to acquire TLAA land under the on-reservation standards and criteria, which, in the former final rule, were much less burdensome than the off-reservation standards and criteria. Several tribes commented that TLAAAs should be available both to tribes without a trust land base and to tribes that have a trust land base incapable of being developed in a manner that promotes tribal self-determination and economic self-sufficiency. In addition, at least one tribe suggested that lands placed into trust via the TLAA process should automatically acquire “reservation” status; however, the BIA rejected this comment as not within the scope of the rule and governed by principles of Indian law.²¹⁶ Finally, a few tribes suggested that any TLAA provision allow sufficient time (e.g., twenty-five years or more) to purchase or acquire land and go through the Part 151 process before the TLAA designation lapses; the BIA accepted this comment.²¹⁷

d) Definition of “Off-reservation” Land

In their comments to the BIA, tribes suggested that “off-reservation” lands should be defined to include only lands that are outside of and non-contiguous to an existing reservation; that it should not include lands contiguous to a reservation.²¹⁸ This definition allows tribes to acquire contiguous lands under

213. *Id.*

214. *Id.*

215. Acquisition of Title to Land in Trust, 66 Fed. Reg. 3453 (Jan. 16, 2001).

216. Acquisition of Title to Land in Trust, 66 Fed. Reg. at 3456.

217. *Id.* The first draft of the former regulations only allowed TLAA applicants ten years to acquire land and complete the fee-to-trust process. The BIA amended the TLAA terms to twenty-five years.

218. *Id.* at 3453.

the less burdensome on-reservation standards.²¹⁹ Often, contiguous lands are lands that once belonged to a tribe and to which a tribe has a continuing cultural (homeland) and religious (sacred-land) attachment. The earlier proposed rule defined “off-reservation” lands to include lands contiguous to a tribe’s reservation — different from the 1980 rule.²²⁰ The BIA rejected these comments and stated that the rule remains as proposed (i.e., lands contiguous to a reservation are “off-reservation” for purposes of Part 151), but that a tribe will receive more favorable consideration the closer the off-reservation land is to the tribe’s reservation.²²¹

e) Off-reservation Standards and Criteria

Some tribes desire that any off-reservation standards and criteria recognize the benefits of off-reservation acquisitions.²²² The Pueblo of Acoma stated its desire that the off-reservation regulations consider “historical ties” to land and the “aboriginal occupancy of the tribes.”²²³ Additionally, the Hopi stated:

[t]ribes must and will do all they can to develop existing land and resources, but should not be required to limit their need, desire, and ability to participate in a broader economy beyond existing trust boundaries. Tribes should be encouraged to move out into the regional economies and to acquire land and resources necessary for economic development and there be free from the threat of death by taxation or discriminatory zoning policy.²²⁴

Interior, however, created off-reservation standards and criteria that were much more burdensome than either the earlier proposed on-reservation

219. *Id.* at 3452-53.

220. The 1980 regulations, as amended, defined “off-reservation” land as land “located outside of and noncontiguous to the tribe’s reservation” and “on-reservation” land as land located within and contiguous to the exterior boundaries of a reservation. On-Reservation Acquisitions, 25 C.F.R. § 151.10 (2003); Off-Reservation Acquisitions, 25 C.F.R. § 151.11 (2003).

221. Acquisition of Title to Land in Trust, 66 Fed. Reg. at 3453.

222. *Id.* at 3455.

223. The National Congress of American Indians (NCAI), Resolution No. PSC-99-027 (Oct. 1999), available at http://www.ncai.org/data/docs/resolution/1999_annual_session/PSC99.027.htm.

224. Letter from Wayne Taylor, Jr., Chairman, Hopi Tribe, to Gale Norton, Secretary of the Interior 5 (June 15, 2001) (on file with author).

standards²²⁵ or the off-reservation standards contained in the 1980 rule,²²⁶ intensifying the scrutiny of off-reservation applications.

In addition in their comments to the BIA, tribes supported objective standards for the Secretary to use in making decisions to place off-reservation land in trust.²²⁷ The BIA accepted those comments, but created a final rule containing a presumption against the acceptance of off-reservation land in trust. In its former final rule, Interior announced that it would approve an off-reservation request *only* if the applicant showed (1) that the acquisition was *necessary* to facilitate tribal self-determination, economic development, Indian housing, land consolidation, or natural resource protection; and (2) if the BIA determined that the acquisition provided “meaningful benefits” to the tribe that outweighed any demonstrable harm to the local community.²²⁸ These two demanding conditions set up a significant burden for tribes to overcome in their struggle to place off-reservation land into trust — a burden not contained in the IRA.

f) Definition of “Reservation”

Several tribes suggested that “reservation” ought to be defined the same as the statutory term “Indian country.”²²⁹ Other tribes argued that the term should remain unchanged from its definition in the 1980 rule.²³⁰ Yet other tribes suggested that “reservation” include a provision for the Pueblo land grants²³¹ and for interests in land pursuant to hunting and fishing treaty qualifications.²³² The proposed rule defined “reservation” as that area of land set-aside or acknowledged as having been set aside by the United States for the use of the tribe, the exterior boundaries of which are more particularly defined in a final treaty, Federal agreement, Executive or Secretarial order or proclamation, United States patent, Federal statute, or final judicial or

225. Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,585 (Apr. 12, 1999).

226. See 25 C.F.R. § 151.11 (2000).

227. Acquisition of Title to Land in Trust, 66 Fed. Reg. 3455 (Jan. 16, 2001).

228. *Id.*

229. *Id.* Bringing the definition of “reservation” in Part 151 in line with the definition of “Indian country,” in 18 U.S.C. § 1151 (2000), would add great clarity and certainty to this process because the latter is defined by statute and has been examined by several courts.

230. Acquisition of Title to Land in Trust, 66 Fed. Reg. at 3453.

231. See National Congress of American Indians (NCAI), Resolution No. PSC-99-027 (Oct. 1999), available at http://www.ncai.org/data/docs/resolution/1999_annual_session/PSC99.027.htm.

232. Acquisition of Title to Land in Trust, 66 Fed. Reg. at 3453. The BIA incorporated some of these tribal concerns in the proposed definition of “reservation.”

administrative determination; and included special qualifications of this definition for land within the State of Oklahoma and for land of the New Mexico Pueblos.²³³ This definition, though, arguably is narrower than the previous regulations' definition of reservation.²³⁴

g) Land-into-Trust in Alaska

Several tribes, especially those in Alaska, desire that future land-into-trust regulations allow for acquisitions of trust land in the State of Alaska. Tribes that support trust land acquisitions in Alaska note that, in 1936, Congress expressly extended § 465 authority to the Secretary for lands in Alaska.²³⁵ Tribes also note that Congress failed to repeal that extension when it repealed other sections affecting Indian legal status in Alaska. Taking land into trust in Alaska, though, requires a policy change within Interior, which currently maintains that it does not have such authority, except for the Metlakatla community.²³⁶ Interior is reviewing this important issue.

h) Scope of Regulations

Tribes generally claim that Part 151 land-into-trust regulations ought to apply only to transactions that remove land from state and local control and place it under tribal control,²³⁷ i.e., those transactions that arguably affect or impact local governments, namely fee-to-trust, fee-to-restricted fee, and land exchanges involving fee simple land. For these same reasons, several tribes suggested that Part 151 not apply to transfers from a federal agency to the BIA or a tribe.²³⁸ The original, formerly proposed rule covered a very broad range of transfers,²³⁹ including, among other things, trust-to-trust, restricted fee-to-restricted fee,²⁴⁰ and restricted fee-to-trust and land exchange acquisitions,

233. *Id.* at 3459.

234. Definitions, 25 C.F.R. § 151.2 (2003). Subpart (f) of the existing 1980 rule defines reservation as:

that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C.F.R. § 151.2 (2003).

235. *See* 25 U.S.C. § 473a (2000).

236. *See* Acquisition of Title to Land in Trust, 66 Fed. Reg. at 3454.

237. *Id.* at 3453.

238. *Id.* The former final rule incorporated these tribal suggestions.

239. *Id.*

240. *Id.* at 3459. "Restricted fee land" is land already owned in fee by an individual Indian

even though these transfers do not impact state and local governments.

i) Timing of Acquisitions

Tribes made several comments regarding the timing of taking fee land into trust status.²⁴¹ Because the application process under the 1980 rule sometimes took years to complete, tribes argue that they should be notified when the application is considered “complete” by the BIA, and that once notified, should have a decision from the BIA within 120 working days.²⁴² The BIA’s former final rule met tribal desires in this respect.

j) Mandatory Acquisitions of Title

Several tribal comments suggested that the term “mandatory acquisition”²⁴³ should be broadened to include all on-reservation and TLAA acquisitions.²⁴⁴ Further, some tribes recommend that the rule ought to allow tribes to appeal a decision whether a particular acquisition is or is not mandatory.²⁴⁵ Finally, a few comments argue that tribes ought to be exempted from the Department of Justice’s title evidence standards for on-reservation acquisitions.²⁴⁶

2. Interior’s Response to the Proposed Rule

On August 8, 2001, Assistant Secretary McCaleb and Interior announced two separate actions. The first action was to again extend the effective date of the January 16, 2001, final regulations to November 10, 2001.²⁴⁷ The second action was to issue a “Notice of Proposed Withdraw” (NPW) of the final regulations to seek comments on whether the same should be modified in whole or in part or withdrawn in whole or in part and a new rule promulgated, which better addresses the public’s continued concerns

or tribe which was conveyed with a restriction against alienation, prohibiting the sale or transfer of such land without the approval of the Secretary.

241. *Id.* at 3453.

242. *Id.* at 3454.

243. *Id.* at 3455. “Mandatory acquisitions” of title are those that Congress has directed the Secretary to complete by removing any discretion in the administrative decision making process. Section 465, in contrast, is discretionary in that the ultimate decision of whether to accept land in trust is left to the Secretary of the Interior.

244. *Id.* The BIA rejected this recommendation.

245. *Id.* The BIA amended the rule to reflect this desire.

246. *Id.* The BIA rejected these suggestions.

247. Acquisition of Title to Land in Trust, Delay of Effective Date, 66 Fed. Reg. 42,415 (Aug. 13, 2001).

regarding taking land into trust.²⁴⁸ In his announcement, Assistant Secretary McCaleb said that, "Secretary Norton and I recognize that the land-into-trust process is critically important to helping tribes regain lost lands, but that it also has a major impact on state and local governments."²⁴⁹ He stated further that, "[t]hrough this action, all tribes, as well as state and local governments and communities and individuals affected by the land-into-trust requests, will have an opportunity to improve the regulations in a way that makes the trust acquisition application process more efficient, open and fair for everyone."²⁵⁰ However, Interior already underwent a two-year notice, comment, and revision process in which all interested parties, Indian and non-Indian, were given an opportunity to improve the regulations.

The NPW was based on, and discussed, four main concerns — all concerns raised by non-tribal parties. Interior failed to address almost any of the issues raised by the tribal parties in their technical and general comments submitted during the first comment period. The four main concerns discussed were: (1) applications for individual acquisitions for housing or home-site purposes; (2) land use issues; (3) the purported lack of standards contained in the formerly proposed rule; and (4) the length and availability of public comment and review.²⁵¹ Interior stated that it was taking this action (i.e., considering modification or withdrawal) "for the best interests of the constituencies served by the rule."²⁵² But by addressing almost none of the hundreds of tribal comments and concerns submitted to the BIA in connection with these issues, the Department revealed that it was more interested in addressing the *public's* concerns rather than tribal concerns about the manner in which land is taken into trust. This is problematic in that the BIA is charged with "fulfill[ing] its trust responsibilities and promot[ing] self-determination on behalf of the Tribal Governments, American Indians and Alaska Natives."²⁵³

Despite serious objections to some of the rule's specific provisions,²⁵⁴ many

248. Acquisition of Title to Land in Trust, 66 Fed. Reg. 42,474 (Aug. 13, 2001).

249. Press Release, United States Department of the Interior, Assistant Secretary McCaleb Extends Effective Date for Land-to-Trust Regulations (Aug. 10, 2001) available at http://209.217.226.34/documents/assistant_secretary_McCaleb_exte.htm (last modified Aug. 10, 2002).

250. *Id.*

251. Acquisition of Title to Land in Trust, 66 Fed. Reg. at 42,474.

252. *Id.*

253. BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, STRATEGIC PLAN FY 2000-FY 2005, at 8 (2000).

254. See, e.g., Navajo Nation, Technical Comments on Proposed Revisions to 25 C.F.R. pt. 151 (Nov. 12, 1979) (on file with Office of Trust Responsibilities, BIA).

tribes wrote to the Secretary in favor of immediately implementing that rule. The National Congress of American Indians (NCAI) called the regulations a “mixed bag,” yet argued for implementation. Tribes desired implementation, not because the rule was satisfactory in every regard, but because they thought the rule struck an acceptable balance between the Indian and non-Indian interests involved, and because they did not want to go through another long and contentious notice and comment process.

The hundreds of tribal comments submitted to the BIA in support of the regulations covered a variety of justifications and took on many different forms — from the Navajo Nation’s forty-six page set of technical comments and nineteen page redline version of the rule, to several California tribes’ call for the creation of California specific regulations,²⁵⁵ to the anonymous party’s single page comment reading only “RETURN STOLEN INDIAN LANDS!”²⁵⁶ The majority of tribes, though, shared the opinion that the regulations should have taken effect because they advanced three fundamental purposes:

First, the regulations carry out the purposes of the Indian Reorganization Act and recognize the critical role that land restoration must play in the fostering [of] tribal self-sufficiency. Second, the final regulations implement clear standards for taking lands into trust which provide guidance to the Department in the exercise of its authority, and ensure basic fairness to all parties in connection with the trust application process. Third, the final regulations facilitate fair consideration of appropriate factors and a timely decision on trust land applications.²⁵⁷

In spite of an overwhelming belief by its trust beneficiaries in immediate implementation, on November 5, 2001, the BIA withdrew the final regulations.²⁵⁸ The final regulations were withdrawn, in part, because no balance of viewpoints was reached on five issues referred to in the August 5, 2001, NPW.²⁵⁹ It stated:

255. Letter from Justin Bogan, Attorney, California Indian Legal Services, to Terry Virden, Director, Office of Trust Responsibilities, Bureau of Indian Affairs 1 (June 15, 2001) (on file with author).

256. BIA Document No. 534708.

257. Letter from Ivan Makil, President, Salt River, Pima-Maricopa Indian Community, to Gale Norton, Secretary of the Interior 1 (June 14, 2001) (on file with author).

258. *See* Acquisition of Title to Land in Trust, 66 Fed. Reg. 56,608 (Nov. 9, 2001) (to be codified at 25 C.F.R. pt. 151).

259. Acquisition of Title to Land in Trust, 66 Fed. Reg. 42,475 (Aug. 12, 2001). Those five issues were: (1) housing/home-site applications; (2) land use plans for off-reservation and

The Department finds that it is impracticable and inefficient to repeal only part of the final rule as the Bureau of Indian Affairs needs clear direction and standards to process land into trust applications. Considering the variety of comments received, the Department has decided to withdraw the final rule in whole to address these specific areas of concern in a new rule. Consistent with the Departmental policy to consult with federally-recognized Indian tribes on proposed Federal actions that impact Indian tribes, the Department will conduct consultation with Indian tribes on the following areas in its efforts to promulgate a new rule²⁶⁰

For now, the 1980 rule for placing land into trust for Indians and tribes remains in effect. However, in order to understand what any new rule ought to look like from a tribal perspective, it is important to probe deeper into the modern tribal justifications for placing land into trust through Part 151.

B. Tribal Justifications for Placing Land into Trust

Incorporating the material covered in Parts II and III, this section examines several issues regarding the importance to tribes of taking land from fee to trust status. In short, from a tribal perspective, there are substantial legal, jurisdictional, economic, political, and cultural (i.e., "modal") benefits to placing land into trust status.

1. Consequences of Placing Land into Trust Through Part 151

Section 465 of the IRA explains the effects of taking land into trust under this Section. It states:

Title to any lands or rights acquired pursuant to [this title] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.²⁶¹

First, placing land into trust under § 465, and hence under Part 151, shields the transferred land from state and local taxation.²⁶² This is often a major benefit to tribes, especially where trust land is located in areas with high real-

TLAA applications; (3) clarity of the standards contained in the final rule; (4) the availability of judicial review, and (5) the use of technology in the application process. *Id.*

260. See Acquisition of Title to Land in Trust, 66 Fed. Reg. at 56,609.

261. 25 U.S.C. § 465 (2000).

262. *Id.*

estate values where yearly property taxes can be substantial. Further, land placed into trust under § 465 and Part 151 becomes property of the United States, and the tribe becomes the beneficial owner of the land.²⁶³ This transfer of title activates a restraint against alienation — the Indian or tribe must obtain Secretarial approval prior to any sale, lease, grant, or other alienation of such trust land. While at first, this may appear burdensome — which it sometimes is²⁶⁴ — overall, it is beneficial to tribes because it ensures the continued tribal ownership of the land, thus satisfying the modal values of collectivity and perpetuity.

a) “Indian Country”

Whether land taken into trust under Part 151 constitutes “Indian country”²⁶⁵ is of paramount importance to tribes. The United States Code offers the most widely accepted definition of Indian country at 18 U.S.C. § 1151:²⁶⁶

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or

263. *Id.*

264. The downside to this restraint is that Secretarial approval is also required before placing any other incumbrance on trust land, as in securing a mortgage, deed of trust, or other loan the security of which is the real property. Approval of Mortgages and Deeds of Trust, 25 C.F.R. § 152.34 (2002). Because an institutional lender cannot generally repossess land owned by the United States, the restraint against alienation has the sometimes unfortunate effect of frustrating or altogether preventing tribal economic development financing.

265. “Indian country” is a term dating back to the Proclamation of 1763, “by which the Crown tried to prevent unrestrained encroachment on Indian lands by designating the land west of the crest of Appalachians as Indian country protected from colonial settlement.” ROBERT N. CLINTON, *AMERICAN INDIAN LAW, CASES AND MATERIALS* 108 (1991). At one time, Indian country was simply “that part of the United States west of the Mississippi, not within certain states, to which Indian title has not been extinguished.” *Id.* (citing *Bates v. Clark*, 95 U.S. 204 (1877)). But, with the rapid expansion of White settlement across North America, the exact boundaries of Indian country became unclear. The courts, then, called upon to resolve land disputes, “began to treat Indian country as a generic term encompassing land areas in which Indian autonomy was protected rather than an area subject to precise geographic description.” *Id.* In the modern era, however, Indian country has increasingly taken on a more precise definition, as is included in 18 U.S.C. § 1151 (2000).

266. Although this definition comes from the United States criminal code, it has been held to apply to civil jurisdiction as well. *DeCoteau v. Dist. County Court*, 420 U.S. 425 (1975).

without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Thus, Indian country includes not only reservations, but patents and rights-of-way through reservations, as well as dependent Indian communities and Indian allotments.²⁶⁷ Although some debate may have existed early on, today it is clear that land placed into trust pursuant to § 465 and through Part 151 is Indian country.²⁶⁸ The benefits of Indian country are numerous.

Most importantly, "Indian country," which includes all fee and tribal land within a reservation,²⁶⁹ enjoys a unique jurisdictional status within our federal, tribal, and state legal systems. The general rules hold that Indian country, while still subject to federal jurisdiction in most respects, is free from state and local criminal and civil jurisdiction.²⁷⁰ However, many distinctions and exceptions to these general rules have been recognized and applied by the courts. In terms of criminal jurisdiction within Indian country, for instance, tribes retain inherent criminal jurisdiction over Indians, but not non-Indians.²⁷¹ The Supreme Court then carved out an exception for civil jurisdiction over fee land within the reservation. Tribes retain jurisdiction over members, but,

267. For a more complete examination of "Indian country," see DELORIA & LYTLER, *supra* note 24; see also Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 507-13 (1976).

268. For instance, John P. Guhin, Assistant State Attorney General of South Dakota, argues that Part 151 trust land is not Indian country because it does not meet the definition of a reservation, a dependent Indian community, or an Indian allotment. Guhin, *supra* note 130, at 6. But the Supreme Court has recently determined that land held in trust for a tribe is an "informal reservation," and thus "Indian country." *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993); see also *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) (holding land taken into trust is Indian country), *cert. denied*, 529 U.S. 1108 (2000). *But see United States v. Stands*, 105 F. 3d 1565 (8th Cir. 1997) (mildly suggesting that land merely taken into trust under Part 151 may not be Indian country).

269. See 18 U.S.C. § 1151(a) (2000); see also *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962).

270. See generally COHEN, *supra* note 92. However, some states possess otherwise federal criminal jurisdiction over Indian country pursuant to Public Law 280. 67 Stat. 588 (1953). Generally, Public Law 280 transferred broad criminal and limited civil jurisdiction to five, later six states. Doing so, however, did not remove the inherent criminal jurisdiction of tribes over Indians. 18 U.S.C. § 1162 (2000); see Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975). For a thorough examination of Public Law 280, see CAROLE GOLDBERG, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997).

271. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

because of their unique status as “domestic dependent nations,” tribes lack the power to exercise most regulatory or judicial jurisdiction over non-members on non-Indian owned fee land, even where that land is within the reservation and is “Indian country.”²⁷²

According to some,²⁷³ the status of Indian country to tribes is devalued by the Court’s recent treatment and diminishment of that designation.²⁷⁴ However, Indian country is still a highly coveted status to tribes because absent the Indian country designation, federally recognized Indian tribes generally possess only the powers of a landowner over land. In other words, tribal sovereignty means very little without a recognized domain within which to exercise that sovereignty. In addition, besides the jurisdictional benefits applicable to Indian country, there are other important jurisdictionally related benefits associated with that designation, namely, the powers of a sovereign over land as compared with the powers of a landowner.

*b) Powers of a Sovereign Versus Powers of a Landowner*²⁷⁵

As sovereign or “quasi-sovereign” entities over land, tribes retain several affirmative rights — rights that they may impose upon occupants or entrants into Indian country. For instance, tribes possess the right to exclude, as does the landowner. However, the tribal power to exclude is greater than the

272. See *Montana v. United States*, 450 U.S. 544, 564 (1981). The Court, however, has recognized two exceptions to this rule (the so-called “Montana exceptions”): (1) where non-Indians enter into a “consensual relationship” with the tribe or its members, or (2) where non-Indian conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 465-66. Although *Montana* addressed only the narrow issue of *regulatory* jurisdiction of hunting and fishing by non-Indians, the Court extended this holding to the area of tribal *adjudicatory* jurisdiction as well. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). For an exception, see *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

273. As Canby states, “while non-Indian fee lands within the reservation remain Indian country, that fact seems to have lost much of its significance for purposes of civil jurisdiction over nonmembers.” See CANBY, *supra* note 110, at 115.

274. Most recently, the Court has dealt seemingly severe blows to tribal efforts to assert civil jurisdiction over non-Indians on non-Indian owned fee land within the reservation. In *Atkinson Trading Co. v. Shirley*, the Court held that the Navajo Tribe lacked the authority to impose a tribal tax upon non-member guests of a hotel on non-Indian fee land within the reservation. 532 U.S. 645 (2001). And, in *Nevada v. Hicks*, the Court held that the Fallon Paiute-Shoshone Tribe lacked the civil adjudicatory authority to hear tort claims arising from a state official’s execution of process on tribal lands. 533 U.S. 353 (2001). Besides having no clear majority, the Court’s decision in *Hicks* is arguably limited to the unusual and specific facts of the case.

275. This discussion is not intended to be an exhaustive examination of all powers of a sovereign versus a landowner, but is intended to highlight some key differences.

landowner's power to exclude because, combined with the federal-Indian trust relationship, the tribe may call upon the federal government to help protect tribal trust land against trespass.²⁷⁶ A landowner, by comparison, enjoys ordinary common law protections against trespass, which he alone must seek to enforce.

More importantly, tribes generally possess governmental authority over Indian country. Tribes exercise this sovereign right via the imposition of legislative, regulatory, and adjudicatory jurisdiction, including the right to tax, within the reservation or other tribal trust land.²⁷⁷ Therefore, entrants and occupants of Indian country must adhere to tribal codes, traffic ordinances, business and environmental regulations, and similar laws. By comparison, landowners may form private associations, which may own lands in fee and even impose certain burdens or rules upon occupants and members. But landowners are not vested with the power to create and maintain legitimate governments, possessing an officially recognized government-to-government relationship with the United States. Nor are landowners vested with the authority to enforce private laws or to adjudicate disputes within their fee land that are entitled to recognition by the state and federal governments.²⁷⁸

Pursuant to tribal regulatory authority over trust land and Indian country, tribes possess the power to tax,²⁷⁹ whereas landowners have no such legitimate, officially recognized power.²⁸⁰ The power to tax derives both from the tribe's power to exclude non-members from the reservation and "from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services."²⁸¹

Additionally, in accordance with the IRA, tribes generally retain the power to conduct Indian gaming within Indian country, incident to their exemption

276. See, e.g., *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941) (where the Attorney General, as guardian of the Indians of the Hualapai Tribe, brought suit to enjoin a railroad from trespassing on land possessed and occupied by the Tribe).

277. These rules, though, have arguably been diminished by recent treatment in the courts. See *infra* note 274.

278. Pursuant to the doctrines of "full faith and credit" and "comity," tribes are in some cases entitled to full recognition of their tribal court judgments in state courts. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *In re Lynch's Estate*, 377 P.2d 199 (1962). Conversely, some tribal courts also grant recognition of state court judgments.

279. But see *Atkinson*, 532 U.S. at 653. Even after *Atkinson*, it still seems clear that tribes retain the power to impose taxes upon member Indians within tribal and fee land.

280. Although, in theory, a landowner (pursuant to the right to exclude) could impose an admission fee upon entrants to fee land.

281. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

from state law, as long as the state in which the gaming is located does not prohibit such activity as a matter of law.²⁸² The landowner, by contrast, is generally prohibited from conducting gambling on fee land. Similarly, tribes — incident to their status as sovereigns — enjoy exclusive aboriginal hunting, fishing, trapping, and gathering rights within their trust domain, unless those rights have been surrendered by treaty or modified by act of Congress.²⁸³ Impermissible use of Indian lands for any of these purposes is a federal crime.²⁸⁴ By contrast, private landowners enjoy the right to hunt and fish on their fee land, but are constrained by state and local fishing and hunting regulations, and must, in the event of an unlawful use of their land, employ ordinary civil processes (e.g., a civil suit in trespass) to protect their rights; no special federal statute protects the hunting and fishing rights of private landowners.

In short, there are significant differences between the powers of a sovereign within Indian country and the powers of a landowner over fee land. Simply put, tribes may exercise their sovereign governmental powers only within trust land or other Indian country. Therefore, tribes desire to place land into trust through Part 151 to avoid the imposition of state and local controls, and exercise their legislative, regulatory, and adjudicatory sovereign powers to exist not only as a common people, but as an authoritative nation as well.

2. Political Effects of Placing Land into Trust Through Part 151

Beyond the legal and jurisdictional benefits of placing land into trust through Part 151, there may also be numerous political effects on the surrounding non-Indian governments and communities, what this author calls the “fear factor.” State and local governments generally fear losing control over land placed into trust. While this is a reality, the lost control is typically minimal because most trust land acquisitions total thirty acres on average.²⁸⁵ Another “fear” often perceived by surrounding non-Indian communities is that land is being acquired in trust by tribes for Indian gaming purposes. This has

282. Indian Gaming Regulatory Act of 1988, § 2710(d)(6) (2000); *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

283. *See* Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918); *see also* COHEN, *supra* note 92. Sometimes, tribes enjoy these rights even outside of their boundaries. For example, native attachments to off-reservation ancestral lands and places are sometimes recognized in the many off-reservation fishing and hunting rights reserved in the treaties of the Pacific Northwest and in the Great Lakes region.

284. 18 U.S.C. § 1165 (2000).

285. *See* BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, ANNUAL REPORT ON INDIAN LANDS (1996) (on file with author).

been the focus of many battles around the country. But opponents of fee-to-trust acquisitions misunderstand that several obstacles must be overcome before land taken into trust through Part 151 may be used to host Indian gaming.²⁸⁶ Besides, Indian gaming is heavily regulated by federal and tribal law, which if known would likely alleviate many non-Indian concerns related to fee-to-trust acquisitions.

Finally, some non-Indians and non-Indian communities believe placing land into trust is unfair and that it constitutes unlawful racial discrimination because only qualified Indians and tribes may place land into trust. As stated earlier,²⁸⁷ § 465 was passed to rebuild the Indian land base and to encourage tribal self-sufficiency and development;²⁸⁸ it lacks the intent to discriminate commonly associated with impermissible discriminatory legislation. Moreover, qualification to apply for land into trust is not based strictly on race, but based on the unique political classification of Indians and tribes.²⁸⁹

286. The 1988 Indian Gaming Regulatory Act (IGRA) regulates Indian gaming and established the National Indian Gaming Commission to oversee Indian gaming businesses. Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701-2721 (2000)). Importantly, § 2719(a) prohibits Indian gaming on any land acquired in trust for an Indian or tribe after October 17, 1988, unless certain conditions are met. 25 U.S.C. §2719(a)(2000). First, the new trust land must be either “within or contiguous to” an existing Indian reservation. *Id.* § 2719(a)(1). Or, if the tribe has no reservation and is located in the State of Oklahoma, the land must either be “within the boundaries of the Indian tribe’s former reservation,” as defined by the Secretary, or contiguous to other land held in trust or restricted status by the United States.” *Id.* § 2719(a)(2)(A). If the tribe has no reservation and is located in a state other than Oklahoma, the land must be “within the Indian tribe’s last recognized reservation within the State or States where the Indian tribe is presently located.” *Id.* § 2719(a)(2)(B). However, subsection (a) does not apply to lands taken into trust as part of an Indian land claim settlement, the initial reservation of a tribe recognized under the “federal acknowledgment process,” or lands taken into trust as part of a restoration of federal recognition. *Id.* § 2719 (b)(1)(B). The IGRA does not clearly address whether land placed in trust pursuant to a non-restoration Congressional recognition is also exempt from subsection (a). Section 2719 provides limited exceptions to certain lands of the St. Croix Chippewa Indians of Wisconsin and the Miccosukee Tribe of Indians of Florida. *Id.* § 2719 (b)(2).

287. See *supra* notes 128-34 and accompanying text.

288. See *Mescalero Apache Tribe v. O’Chesky*, 439 F. Supp. 1063 (1977).

289. *Morton v. Mancari*, 417 U.S. 535 (1974). In *Mancari*, a group of non-Indian employees challenged the BIA’s “Indian preference” in BIA hiring, claiming unconstitutional “racial discrimination.” The Court held, though, that, “[t]he preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. . . . In this sense, the preference is political rather than racial in nature.” *Id.* at 554 n.24. Further, the Court stated that, “[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities” *Id.* at 554. Justice Blackmun’s majority opinion noted other areas of Indian affairs where the

3. Modern Tribal Justifications for Placing Land into Trust

Because significant legal, jurisdictional, and economic benefits flow from the existence of Indian country, many tribes strongly support placing land into trust through Part 151.²⁹⁰ But tribes are interested also in the cultural or modal benefits of trust land. As Deloria and Lytle explain, “[i]n its original meaning, as a location where Indian jurisdiction and self-government reign supreme, Indian country will probably continue to be cited in those instances where Indian lands and population predominate.”²⁹¹ They continue that

more is at stake in this instance than simply a legal doctrine. Traditional life with its ceremonial and ritual richness is partially dependent upon the continuation and strengthening of tribal governments since without a protective shield [tribal trust land] preventing intrusions, many Indian communities would not be able to practice their customs on terms satisfactory to them.²⁹²

In short, because Indians and their tribes are so strongly tied to the land, especially tribal trust land, land placed into trust under Part 151 creates a special domain where tribal identity and community can prosper.

Earlier in this article, the native modes of territoriality established that Indians and tribes are attached to land in a complex variety of ways, as homeland, sacred land, and as nation-state land.²⁹³ These different connections demonstrate how native people and their communities value the tribal homeplace and, implicitly, reveal why the Part 151 process is so important, and why tribes today seek to place land into trust — to ensure survival of their way of life.

Court “specifically has upheld legislation that singles out Indians for particular and special treatment.” *Id.* at 554-55. See, e.g., *Okla. Bd. of County Comm’rs v. Seber*, 318 U.S. 705 (1943); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973) (federally granted tax immunity); *Simmons v. Eagle Seelatsee*, 384 U.S. 209 (1966), *aff’g* 244 F. Supp. 808 (E.D. Wash. 1965) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams v. Lee*, 358 U.S. 217 (1959) (tribal courts and their jurisdiction over reservation affairs).

290. See *Acquisition of Title to Land in Trust*, 66 Fed. Reg. 56,609 (Nov. 9, 2001) (stating that ninety-three comments were received by tribes regarding implementation of the (now withdrawn) final rule). Those comments, reviewed by this author, were supportive of placing land into trust through part 151.

291. DELORIA & LYTLE, *supra* note 24, at 78.

292. *Id.* at 79.

293. See *supra* Part II.

In other words, the modern tribal justifications for placing land into trust are created and shaped by the strong connection between native communities and their tribal homeplaces, and the important role which a protected land base serves in ensuring survival of the contemporary Indian community.

4. Modal Justifications for Placing Land into Trust

To gain a more complete understanding of native connections to place in the modern era and the modern tribal justifications for acquiring land in trust through Part 151, the following section offers the input of different tribes regarding their unique motivations for placing land into trust. Conveniently, some of the input fits neatly into one or more of the modes of territoriality. Some of the input, though, does not correspond precisely with the modes, yet remains helpful in understanding native connections to place and contemporary justifications, from a tribal perspective, for using Part 151 to place land into trust.

a) Homeland Territoriality

The San Manuel Band of Mission Indians stated in its Part 151 comments to the BIA:

[t]he Band's ability to buy back its own traditional and surrounding lands is key to fulfilling critical tribal governmental purposes and restoring a community which had existed for so long, thus it [trust land acquisition] is essential for the continued self-sufficiency, dignity, and success of the Tribe and many others.²⁹⁴

The tribe also stated that, "[t]he Band is planning for additional housing, a health clinic, [tribal] governmental offices, and a child care center."²⁹⁵ The San Manuel's desire to acquire additional trust land is also motivated by the small size of its reservation, which the tribe desires to turn into a home and a community for its people. But the band requires more land to achieve these goals. San Manuel's motivations for placing additional land into trust are consistent with the homeland mode of territoriality, i.e., in its desire for tribal housing, providing essential tribal services, and, ultimately, in the desire to support the tribal community.

Other tribes expressed their values for the different attributes of homeland territoriality. For instance, the Yavapai-Apache Tribe, in its application for

294. Letter from Deron Marquez, Tribal Chairman, San Manuel Band of Mission Indians to Gale Norton, Secretary of the Interior (June 15, 2001) (on file with author).

295. *Id.*

additional trust land, explained to the BIA the importance of trust land to the tribe and its future generations. One member of the Yavapai-Apache Nation said the new land will be “my kid’s future home”²⁹⁶ (an expression of the homeland attribute of perpetuity).

The Viejas (Barona Long) Group of Capitan Grande Band of Mission Indians touched on many of the different homeland attributes in its Part 151 BIA comment letter. It explained that the tribe was relocated to its current reservation in the 1930s as a result of the forced sale and construction of a city reservoir over its aboriginal homeland. It told the BIA that the tribe’s current reservation is an “insufficient tribal land base to support the Viejas Band and its growing tribal culture, population, and economy.”²⁹⁷ It also said that it “cannot maintain its cultural identity and meet the land needs of its members, without the addition of trust land in the vicinity of the Reservation.”²⁹⁸ Here, the Viejas declare their cultural, physical, and identity-based dependence on the land, consistent with homeland territoriality. Additionally, the Viejas claim:

[t]o an Indian tribe, there is no substitute for trust land. Terminated tribes from the 1950s bear testament to the fact that short term financial gain in no way can compensate a tribe for the eventual loss of tribal identity and culture that accompanies a lack of tribal trust land.”²⁹⁹

Some modern tribal justifications for placing land into trust are consistent with the homeland attribute of a *culturally preservative region*. The Viejas, for instance, stated that it is seeking additional trust land in order to “proactively insulate its tribal community from the cultural erosion that is the inevitable by-product of a lack of sufficient tribal land.”³⁰⁰ Here, the Viejas clearly voices its understanding of the connection between a *culturally preservative region* and building and maintaining a tribal homeland. This conclusion is unavoidable considering the tribe’s claim that, “[t]he most important element needed for the Viejas community revitalization effort is

296. Telephone Interview with Thomasene Cardona, Yavapai Apache Nation employee (Feb. 14, 2001).

297. Letter from Steven TeSam, Tribal Chairman, Viejas Band of Kurneyaay Indians to Terry Virden, Director, Office of Trust Responsibilities, Bureau of Indian Affairs 2 (June 14, 2001) (on file with author).

298. *Id.* at 4.

299. *Id.* at 2.

300. *Id.*

additional trust land.”³⁰¹ The Hopi assert that, “[h]istorically, Indian culture has survived only within the defined and protected political boundaries of Indian country.”³⁰² While many tribes express the values of homeland territoriality, other tribes express values closely associated with sacred-land territoriality as a justification for placing land into trust via Part 151.

b) Sacred-land Territoriality

The Salt River Pima-Maricopa Indian Community stated in a recent Tribal Resolution concerning the Part 151 regulations that, “trust land acquisitions are important to tribes for a broad range of purposes, including preservation of sacred or culturally significant sites”³⁰³ Further, the Hopi told the BIA that, “[t]o Indian people land is life, both physical and spiritual.”³⁰⁴ Further showing the diversity of tribal justifications for the land-into-trust process, the Hopi explained:

[N]umerous ruins, shrines, and other sites are located far beyond the boundaries of the Tribe’s current trust lands, all of these sites are of extreme importance to the Tribe culturally and as a matter of social cohesion. These places serve to knit together the fabric of Hopi life. They have past, present, and future significance.³⁰⁵

Interestingly, while reviewing several letters to the BIA and several BIA-tribal meeting transcripts, relatively few expressions were made relevant to the sacred-land mode of territoriality. This may be explained by the general reluctance of tribes to reveal the existence and location of sacred sites to which they are connected. In addition, the paucity of sacred-land expressions may be explained where sacred-land values are buried in statements which express the value of tribal land for its general “cultural” or “traditional” worth.

c) Nation-state Territoriality

Other tribal input regarding the modern justifications for placing land into trust through Part 151 reflect the nation-state mode of territoriality, and that mode’s attributes of clear-boundedness and self-determination. The Soboba

301. *Id.*

302. Letter from Wayne Taylor, Jr., to Gale Norton, *supra* note 224, at 5.

303. Salt River Pima-Maricopa Indian Community Resolution No. SR-2094-2001 ¶ 7 (June 13, 2001).

304. Letter from Wayne Taylor, Jr., to Gale Norton, *supra* note 224, at 2.

305. *Id.* at 4.

Band of Luiseño Indians and the Twenty Nine Palms Tribe³⁰⁶ both intimated that the exercise of tribal governmental authority over tribal land is important to self-determination, and serves as a justification for placing land into trust through Part 151. They stated that “[a] tribe must have its land in trust in order to exercise its jurisdiction over tribal members.”³⁰⁷ Further, the tribes drew a connection between the exercise of tribal jurisdiction and self-determination when they stated that “[l]and into trust is a critical part of addressing tribal needs to build self-sustaining communities.”³⁰⁸ Similarly, the Hopi stated that “[e]xtending the tribal land base into former territory or other additional needed territory serves the goal of protecting tribal autonomy and fully realizing the purposes of Indian self-determination.”³⁰⁹ The Quechan Nation said that acquiring trust land is a “necessary component of the Self-Determination Policy which calls for renewed tribal control over tribal affairs. Establishing adequate land bases over which a tribe can exercise its governmental authority is crucial to self-determination and tribal sovereignty.”³¹⁰ The Three Affiliated Tribes expressed the values of nation-state territoriality in suggesting that trust land is needed to “rebuild their Nation,” and to “reacquire control of lands once reserved for them ‘as long as the grass grows and the water flows.’”³¹¹

Other tribes express their own nation-state territoriality by focusing more narrowly on the jurisdictional aspect of tribal sovereignty (which is tied strongly to the notion of tribal self-determination). The Soboba Band of Luiseño Indians, for example, said that “[a] tribe must have its land in trust in order to exercise its jurisdiction over tribal members.”³¹² Another tribal comment noted that “[e]stablishing adequate land bases over which a tribe can

306. The two tribes submitted separate comments which were substantially similar. See Letter from Dean Mike, Chairman, Twenty-Nine Palms Band of Mission Indians to Gale Norton, Secretary of the Interior (June 5, 2001) (on file with author).

307. Letter from Robert Salgado, Sr., Tribal Chairman, Soboba Band of Luiseño Indians to Gale Norton, Secretary of the Interior (June 6, 2001) (on file with author); Letter from Dean Mike to Gale Norton, *supra* note 306, at 2.

308. Letter from Robert Salgado, Sr. to Gale Norton, *supra* note 307.

309. Letter from Wayne Taylor, Jr., to Gale Norton, *supra* note 224, at 5.

310. Letter from Mike Jackson, Sr., President, Quechan Indian Tribe, to Terry Virden, Director, Office of Trust Responsibilities, Bureau of Indian Affairs 2 (June 15, 2001) (on file with author).

311. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, LOST LANDS AND LOST COMMUNITIES — REBUILDING A NATION: A BRIEF HISTORY OF THE LANDS OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION 1851-2000, at 2 (n.d.) [hereinafter LOST LANDS] (on file with author).

312. Letter from Robert Salgado, Sr. to Gale Norton, *supra* note 307.

exercise its governmental authority is crucial to self-determination and tribal sovereignty.”³¹³

Tribes, then, seek to place land into trust both for self-determination and jurisdictional reasons — to self govern. As a representative of the Yavapai-Apache Tribe explained, the tribe needs to acquire more trust land so that “we can make our own decisions.”³¹⁴

d) Multi-modal Expressions

Much of the tribal input collected for this paper fits cleanly within either the homeland, sacred-land, or nation-state modes of territoriality, as discussed. Some tribal input, though, simultaneously expresses more than one mode of territoriality, and sometimes several of the different values underlying those modes. The NCAI, for example, in attempting to answer the question of “*Why is land so important to Indian tribes?*” offers that, “[l]and is of great spiritual and cultural significance to Indian tribes, and many Indian communities are still [living] upon the land for subsistence through hunting, fishing, gathering or agricultural [purposes.] Moreover, Indian lands are critical for the existence of tribal self-governance and self-determination.”³¹⁵ This statement reflects all three modes of territoriality. As well, the Viejas Nation told the BIA that the land to be acquired in one of its fee-to-trust applications would be used to meet “future tribal housing, natural and cultural resource, governmental, and economic development needs, in an effort to continue revitalization of a tribal community that has historically struggled for its survival.” These statements, revealing a connection to land because of its spiritual significance, its cultural and physical provision, its economic role, its ability to maintain a tribal identity, and its association with self-determination, represent values contained in all three modes of territoriality.

The Three Affiliated Tribes, in their comments to the BIA entitled “Lost Lands and Lost Communities — Rebuilding A Nation,” explained the history of its land loss since European contact.³¹⁶ The Tribe claimed that it has struggled to remain a nation (in both the *community* and *nation-state* senses of that term) in the face of immense land loss.³¹⁷ It concluded that the tribe

313. Letter from Mike Jackson, Sr. to Gale Norton, *supra* note 310, at 2.

314. Telephone Interview with Thomasene Cardona, *supra* note 296.

315. National Congress of American Indians, *Land Into Trust*, available at http://www.ncai.org/main/pages/issues/governance/land_into_trust.asp (last visited Mar. 30, 2003).

316. See LOST LANDS, *supra* note 311.

317. *Id.*

must be able to take additional lands into trust in order to “rebuild itself.”³¹⁸ The Three Affiliated Tribes rest the motivation for taking land into trust through Part 151 on the reconstruction of its nationhood, consistent with both homeland and nation-state territoriality.³¹⁹

Further, the Hopi Tribe commented that the value of tribal trust land, and hence the justification for placing more land into trust, lies in its permanency (perpetuity) as tribal homelands, and because it is a place where Indian people

can live under governmental and social systems of their own choosing, where they can preserve their culture and practice their religion largely free of outside interference, where they can build economies which suit their needs, and where they can raise their families and build a way of life as they see fit.³²⁰

The Hopi continued that, “[t]rust status serves to preserve Indian land as a means of furthering tribal values and objectives, including homeland, culture, and self-determination.”³²¹ “Simply put,” the Hopi said, “Indian people have a deep desire to maintain their separate culture, their independence, and their self-government.”³²² The statements of the Hopi also symbolize all three native modes of territoriality, and the values of perpetuity, economic dependence on the land, cultural separateness and preservation, religiosity, and self-determination, which underlie the different modes. These statements embody one or more of the different modes of territoriality and stand as tribal justifications for placing land into trust through Part 151. However, some modern tribal justifications for placing land into trust do not correspond directly with the different modes of territoriality.

e) Extra-modal Expressions

Most tribal input collected here falls within the structure of the modes of territoriality. Some input, however, offer extra-modal expressions — expressions (both for the value of tribal land and as modern tribal justifications for placing land into trust) that do not fit within the general framework provided by the modes. They are, nevertheless, compelling reasons, from a tribal perspective, for using Part 151 to place land into trust status in the modern era. Generally, these extra-modal expressions are tied to:

318. *Id.* at 11.

319. *Id.*

320. Letter from Wayne Taylor, Jr., to Gale Norton, *supra* note 224, at 1.

321. *Id.*

322. *Id.* at 1-2.

(1) remedying the effects of the allotment and termination era policies specifically, (2) remedying the effects of past injustices in general, and (3) the recovery of lost or stolen lands for recovery sake.

The Soboba Band of Luiseño Indians, in its comments to the Secretary, argue that the federal government's allotment of Indian lands and later termination policy toward Indian tribes justify placing land into trust for tribes today. After giving a brief history of these policies, the tribe stated that "[t]he remaining tribal lands were discontinuous, fractioned, and difficult to use for any economically productive purpose. The effects were devastating to tribal communities, economically and socially . . . and the effects continue to this day."³²³ These statements, while not inconsistent with the modes of territoriality, focus more specifically on the remedial effects of placing land into trust through Part 151.³²⁴

The San Manuel Tribe expressed similar concerns in its Part 151 land-into-trust comments to the BIA. It stated that "[t]he Band's ability to reasonably acquire trust lands . . . is essential to rectifying the effects of the past treatment by the United States and State of California, and to the future development and strength of its tribal government and the health and welfare of its members."³²⁵ Here, the tribe views the taking of land into trust today as a remedy for past injustices, independent of the allotment and assimilation era policies.

In a similar vein, several tribal comments to the BIA summarily justify placing land into trust through Part 151. The Pueblo of Acoma, in its Part 151 comments to the BIA, tells a short history of its land loss and explained that, "even as the United States confirmed land for the Pueblo of Acoma, most of its aboriginal land was taken by acts of the federal government and Acoma has been in a recovery program since 1877 and has taken seventeen actions to regain its land."³²⁶ The Acoma also explained that it continues to reacquire lost aboriginal lands and continues to request the United States to place land

323. Letter from Robert Salgado, Sr., to Gale Norton, *supra* note 307 (emphasis added). This statement is also consistent with homeland territoriality.

324. The modes of territoriality, though, were not offered in and of themselves as modern tribal justifications for placing land into trust. Rather, they were offered as a means of understanding the connection between native people and their land in order to better understand the justifications, put forth by tribes, for placing land into trust today through Part 151.

325. Letter from Deron Marquez to Gale Norton, *supra* note 294, at 1.

326. The National Congress of American Indians (NCAI), Resolution No. PSC-99-027 (Oct. 1999), available at http://www.ncai.org/data/docs/resolution/1999_annual_session/PSC99.027.htm.

into trust on its behalf.³²⁷ The Hopi noted that tribes seeking to acquire land that was a part of their aboriginal land base “might feel it their solemn duty to bring these lands back within the direct stewardship of tribal responsibility.”³²⁸ This same justification was offered by many tribal representatives at the various meetings across the United States. One letter to the BIA, from an unidentified source, read simply, “RETURN STOLEN INDIAN LANDS!”³²⁹ But this justification, the recovery of lost lands, is not expressly based on the important cultural, religious, and governmental connections between native people and their land, as captured, for example, in the modes of territoriality. Rather, it is more simply based on the fundamental property-law maxim of *first in time, first in right* (i.e., it was our land from time immemorial, you took it, and we want it back). This justification is further supported by the equitable notion of preventing unjust enrichment.

In conclusion, some modern tribal justifications for placing land into trust through Part 151 appeal to the important cultural, religious, and governmental connections between native people and their land — the modal connections. However, some modern tribal justifications rest more in the goals of contemporary tribes to correct allotment, remedy past injustices, and recover lost or stolen lands. Many different justifications exist, from a tribal perspective, for taking land into trust through Part 151. Further, those justifications vary somewhat from tribe to tribe because they are unavoidably tied to the unique history and circumstances of the tribe to which they are attributed. For example, some removed tribes appeal to the goal of recovering lost lands as a justification for placing land into trust, while some non-removed tribes appeal to the important cultural, religious, economic or governmental role of land in the tribal community as a justification for Part 151. Justifications, in short, are tribal and context specific. It would be helpful, then, in further understanding the contemporary justifications for placing land into trust, to isolate and review in detail one tribe’s narrative as it relates to land-loss and the effort to (re)acquire trust land.

5. *The Mesa Grande Band of Mission Indians: A Case Study*

The Mesa Grande Band of Mission Indians is a small, 600 member tribe, located fifty miles north-east of San Diego, California.³³⁰ The Mesa Grande

327. *Id.*

328. Letter from Wayne Taylor, Jr. to Gale Norton, *supra* note 224, at 4.

329. BIA Doc. No. 534708 (on file with author).

330. The tribal administration comes under the Tribal Board of Directors, including Tribal Chairman Howard Maxcy, Vice Chairman Michael Linton, Environmental Officer Darrel

Reservation was originally created in 1875 by executive order, the actual trust patenting of the reservation, though, not occurring until 1892.³³¹ However, the events leading up to the creation of the tribe's Reservation and trust patenting resulted in the *loss* of 5000 acres of aboriginal Mesa Grande land. A quick background of Southern California Indian land tenure provides a broad understanding of the Mesa Grande's history and land struggle experiences.

Through a series of early federal legislative moves, Mesa Grande land (and the lands of other Mission Indians) became federal lands. Some of those previously tribal lands were thereafter opened up to homesteading by settlers and eventually lost to or encroached upon by non-Indians. Up to 1865, some tribes living in the Southern California mountains still occupied their aboriginal or ancestral lands.³³² But after 1865, thousands of settlers desiring agricultural and farmland flooded into Southern California.³³³ As one author recounts:

Inasmuch as Indian-occupied lands were technically public lands open to preemption and homestead settlement, settlers began taking the best, well-watered Indian farmland and dispossessing the Indians, even taking their adobe homes. Through the efforts of friends and sympathizers who publicized this shoddy treatment of farming Indians, the president was persuaded to establish, by executive order, reservations at San Pasqual and Pala that were intended for all the Southern California Indians and some Indians from northern California.³³⁴

As Shipek explains, though, “[m]uch of this reserved land was rocky and rugged, not particularly good even for grazing, much less as farmland for *all* the Indians of Southern California.”³³⁵ The lands designated to be set aside as a pan-Indian reservation were only adequate for the then-existing Indian villages — one of which was the Mesa Grande village.³³⁶ Many Indians of Southern California objected to this reservation scheme³³⁷ as they, naturally, were connected to and did not want to be dispossessed of their ancestral homelands. The reservation plan, however, was promoted by (non-Indian)

Langley, and Tribal and Housing Administrator Scott D. McCrea.

331. SHIPEK, *supra* note 28, at 98.

332. *Id.* at 34.

333. *Id.*

334. *Id.*

335. *Id.* at 35.

336. *Id.*

337. *Id.*

rancho grant owners who wanted the Indians out of the way, but still locally available as a cheap source of labor.³³⁸ Even some Indian “sympathizers” supported the plan, and felt that a “combined reservation would provide a safe haven for Indians.”³³⁹ Though the plan was eventually discarded, waves of settlers kept coming to Southern California, and “the eviction of Indians from their farms proceeded at a more rapid pace.”³⁴⁰ Shipek says that, “Indians petitioned the General Land Office for land rights, but according to this office the laws providing for the settlement of public lands through preemption and homestead claims contained no provision allowing Indians to file claims”³⁴¹ As massive land losses continued, a number of Southern California Mission Indians began filing for individual lands under the Indian Homestead Act of 1883 and the 1887 Public Domain Allotment Act.³⁴² Many Indians, though, chose not to seek land recovery under these acts because the acts conditioned recovery upon separation from the tribal group,³⁴³ a condition most Indians were unwilling to accept.

After continued publicity about the mistreatment and dispossession of Southern California Indians, in 1891 Congress passed the “Act for the Relief of the Mission Indians in the State of California.” Under the act, a commission was appointed to “investigate and determine the actual extent of the lands used and occupied by each band of Mission Indians.”³⁴⁴ The commission’s task, however, was destined for trouble as the whole system of Indian land tenure in Southern California had been decimated over the past hundred years. The tribes of that region (i.e., the Mission Indians) are thus sometimes referred to as “scattered” rather than “removed.”

In 1875, before the President signed the executive order creating the several Indian reservations in what is now San Diego County,³⁴⁵ the federal

338. *Id.*

339. *Id.*

340. *Id.* at 36.

341. *Id.*

342. *Id.* at 37.

343. *Id.*

344. *Id.*

345. San Diego County is home to twenty Indian reservations, more than any other county in the United States. Those are the Pala, Pauma, La Jolla, Rincon, San Pasqual, Los Coyotes, Inaja, Cosmit, Barona, Capitan Grande, Viejas, Laguna, Sycuan, Jamul, Cuyapaipe, La Posta, Manzanita, Campo, Santa Ysabel, and Mesa Grange. *Id.* at 61. There are also several reservations in adjoining Riverside County: the Pechanga, Cahuilla, Torres-Martinez, Santa Rosa, Ramona, Augustine, Cabazon, Agua Caliente, Soboba, Morongo, and Mission Creek. TILLER’S GUIDE TO INDIAN COUNTRY (Veronica E. Tiller ed., 1999).

government sent out the Smiley Commission (under the above act) to survey and recommend land for executive order reservations in that region.³⁴⁶ The Commission, however, had an “incomplete knowledge of the area, the band territories, and the political organization of the Indians of Southern California.”³⁴⁷ As a result, it mistakenly designated several hundred acres of aboriginal Mesa Grande land to the nearby Santa Ysabel Band.³⁴⁸ The Santa Ysabel villages, though, were located fifteen miles to the east of the Mesa Grande villages, and the two villages of each band were distinct and separately identified in many mission records.³⁴⁹ Thus, the Mesa Grande lost most of its aboriginal lands to the Santa Ysabel Band. As Shipek explains:

While the records of the Smiley Commission and various officials, special commissioners, and Indian agents who had visited, inspected, or supervised the reservations all indicated they recognized and dealt with the two bands, Santa Ysabel and Mesa Grande, as separate independent entities, the trust patents of [the three tracts in dispute] were issued in the name of the Santa Ysabel, ignoring the Mesa Grande Band’s rights to [two of the three tracts]. Instead, the small, isolated 120-acre Indian homestead of one man was trust patented as the Mesa Grande Reservation (citations omitted).³⁵⁰

346. This was a common practice, and also occurred, for example, with the Pueblo Indians in what is now New Mexico. Confusion and mistakes about the proper size and boundaries of a tribe’s land, however, were not uncommon.

347. SHIPEK, *supra* note 28, at 97.

348. *Id.* Shipek explains:

[o]ne possible cause for the original errors in the 1875 executive order was that the Indian agents and surveyors were still recognizing and dealing with the tribal officials identified as “generals,” and who were able to call most of the band “captains” and members to special meetings. The San Luiseno general was Oligario Calac, a resident of Rincon who frequently dealt with Indian agents and surveyors and who represented and spoke for all the captains of the neighboring San Luiseno Bands. The northern Kumeyaay or Diegueno “general” was resident at Santa Ysabel and frequently spoke for the assembled captains of the surrounding Diegueno bands, such as Mesa Grande

Id. at 101.

Thus, Shipek admits, there was at least some justification for the errors made by the Smiley Commission. But the Smiley Commission’s mistakes were not limited to the Mesa Grande Band. *See, e.g., id.* at 91-105.

349. *Id.* at 99.

350. *Id.* Shipek relays why the Mesa Grande have not seriously sought rectification of this mistake, until recently. She says:

Despite this sad history of mistake and legislatively ratified land loss, the reacquisition of tribal land, from a Mesa Grande perspective, is not primarily about compensating for past injustices, although that consideration is certainly on the minds of the Mesa Grande people.³⁵¹ Reacquisition is more about correcting the Smiley Commission's errors which dispossessed the Mesa Grande of their aboriginal land. The current land-into-trust process at Part 151 is an opportunity for the Mesa Grande Indians (and Indians and tribes elsewhere) to recover what was lost, or simply to establish a land base essential to the survival of the contemporary Indian community.

Various trust land acquisitions in 1883, 1893, and 1925³⁵² expanded the Mesa Grande Reservation from its originally recognized 120 acre parcel to its current size of 920 acres.³⁵³ This land is largely undeveloped, mountainous, and generally inaccessible.³⁵⁴ Economic and other development, therefore, is difficult if not impossible on most of the tribe's current land base.³⁵⁵

[m]odern development programs that began after 1968 were the first that required that the band be organized and also have a clear legal title to its land for participation in the programs. Bureau records indicate that its officials had been aware of the situation for many years but that they had never bothered to clear the title to the lands. Some of the Mesa Grande Band leaders were aware of the situation and occasionally asked to have the title cleared but were never able to get bureau [BIA] action. In 1970, the Mesa Grande Band elected a committee that had instructions to seek a solution and attempt to get clear title to the land they had traditionally occupied.

Id.

Eventually, the Department of the Interior investigated the matter in preparation for a hearing in front of the Bureau, which held against the Mesa Grande. *Id.* at 99-100. Administrator McCrea stated that over the past few years, the tribe has consulted various Indian law attorneys and Indian rights groups, but have found no one to take this case. In part, he said, most lawyers and organizations have been unwilling to pursue this matter because it would be an "Indian versus Indian" dispute. He added that the Bureau, too, has been unreceptive to this situation. Interview with Scott McCrea, *supra* note 199.

351. Interview with Scott McCrea, *supra* note 199.

352. SHIPEK, *supra* note 28, at 190.

353. *Id.*

354. *Id.*

355. During the course of this research, I met with Mesa Grande Tribal leaders to conduct personal interviews. Our meetings often occurred at restaurants in nearby Ramona and Temecula because the tribe's reservation is both remote and difficult to access. The Tribal Administrator, Scott McCrea, told me that there is only one access road to the reservation, which is a twisted, mountainous, and dangerous dirt-road where many head-on automobile accidents have occurred. Therefore, the tribe often holds its council meetings in a local church or at the Sizzler restaurant in Ramona. Interview with Scott McCrea, *supra* note 199.

Because the Band suffered significant land losses in the past, and because it realizes the importance of Part 151 trust land acquisition to Indian country in general, it was strongly in favor of implementing the formerly proposed land-into-trust regulations. The Band, in its official Comments to the BIA regarding implementation of the formerly proposed Part 151 regulations, like many tribes, advanced the three popular principles for implementing the formerly proposed rule.³⁵⁶ But how is tribal land, and the recovery of lost tribal land, important to the Mesa Grande specifically? How was their land used in that past? What are the Band's plans for future land use that make the acquisition of land in trust through Part 151 so important to the Mesa Grande tribal community?

The Mesa Grande Tribal land base is important to the Band in many respects and is used for several different purposes. For instance, the Tribal Housing Department builds and manages HUD (Housing and Urban Development) low-income housing for tribal members. Fourteen Mesa Grande housing units were built under the HUD-Tribal program, and ten more such units are under construction. The tribe also operates its own Fire Department, run by former Chairman Maxcy, a former captain with the California Department of Forestry.³⁵⁷ The new Tribal Fire Department, created in 1999, owns one engine, and employs one captain and three fire fighters per shift.³⁵⁸ The tribe also operates a Tribal Water Department. In operation since 1970, the Water Department oversees two community water systems.³⁵⁹ Additionally, Mesa Grande runs a community van service, which began in 1991.³⁶⁰ In vans donated by local residents, the van service transports school-children to the nearest bus-stop, five miles away, and transports senior citizens to various appointments and errands.³⁶¹ The tribe is

356. Those are:

First, the regulations carry out the purposes of the Indian Reorganization Act and recognize the critical role that land restoration must play in the fostering [of] tribal self-sufficiency. Second, the final regulations implement clear standards for taking lands into trust which provide guidance to the Department in the exercise of its authority, and ensure basic fairness to all parties in connection with the trust application process. Third, the final regulations facilitate fair consideration of appropriate factors and a timely decision on trust land applications.

Letter from Howard Maxcy, Chairman, Mesa Grande Band of Mission Indians to Gale Norton, Secretary of the Interior 2 (June 15, 2001).

357. Interview with Scott McCrea, *supra* note 199.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

also planning to create an adult education program, to help people earn their GEDs. This program, funded in part by educational grants, will be located in a trailer donated by a local church and will be open to both Mesa Grande and Santa Ysabel Tribal members.³⁶² With all of the community-based projects the Band undertakes on its reservation, it requires more land, and that land must be in trust so that the Tribal Administration, not the State of California or the San Diego County government, decides how best to use that land — so that the Mesa Grande can self determine.³⁶³

In its effort to obtain more trust land, the Mesa Grande recently purchased 880 acres of undeveloped rural land in eastern San Diego County.³⁶⁴ The new lands, made up of seven different tracts, were purchased in fee status and require the payment of \$16,000 per year in state property taxes.³⁶⁵ However, because a \$16,000 recurring debt is difficult for this small and financially poor tribe to pay, it seeks to put the lands in trust, which would make the land free of state tax liability.³⁶⁶ The tribe also seeks to develop the lands economically. Importantly, though, the tribe wishes to take these lands into trust for more than tax and economic reasons. Some of the newly acquired lands are aboriginal tribal “homelands” and tribal “sacred lands” lost as a result of the Smiley Commission’s errors, noted above.³⁶⁷ Some of the newly acquired lands were previously Mesa Grande *national* lands, or lands over which the tribe exerted a certain amount of governmental authority before they were lost.³⁶⁸ Even after the lands were lost to the Santa Ysabel Tribe, that tribe respected the fact that these were Mesa Grande homelands. The Santa Ysabel, in fact, while not conveying the lands back to the Mesa Grande, have not developed the lands themselves. Santa Ysabel has even gone so far as to allow the Mesa Grande to use its lost lands (now part of the Santa Ysabel Reservation) for Mesa Grande sacred, cultural, and other purposes.³⁶⁹

362. See *Mesa Grande Band of Indians*, available at <http://www.orangebook.com/julian/mesa.php3> (last visited Mar. 30, 2003).

363. As discussed above, tribes need their land bases to be in trust, rather than in fee, so that the land attains the status of “Indian country.” This designation allows the tribe to exercise its governmental authority over its land base and avoid state and local constraints, avoid the regulation of certain activities, avoid zoning laws that confine what the tribe can do on and with its land, and enable the tribe to exercise its own taxing authority over on-reservation activities.

364. Interview with Scott McCrea, *supra* note 199.

365. *Id.*

366. *Id.*; see also 25 U.S.C. § 465 (2000).

367. Interview with Howard Maxcy, Tribal Chairman, Mesa Grande Band of Mission Indians, in Oceanside, Cal. (Oct. 2, 2001).

368. *Id.*

369. *Id.* Over the years, according to both Chairman Maxcy and Administrator McCrea, the

In addition to the prior and continuing uses of the Mesa Grande Reservation, the Band also has plans for future use. For example, the Band has discussed the possibility of building and operating a conference and/or entertainment facility, which would host conventions, parties, weddings and the like. The Band has also considered opening a golf-course. Additionally, the Mesa Grande have discussed operating an Indian gaming facility on any new land that it acquires. However, for mainly feasibility reasons, they have chosen not to pursue this line of development. As noted, San Diego County is home to nearly twenty Indian reservations, and nearby Riverside County is home to eleven others. Many of the nearby reservations already operate successful Indian gaming facilities. The tribe concluded that it must pursue other means of economic stimulation.³⁷⁰ All of these plans, though, require additional trust land; which is more accessible and suitable for development.

The Mesa Grande's most serious economic development venture currently under consideration is a tribally owned-and-operated buffalo ranch.³⁷¹ For this, though, vast amounts of tribal trust land are required. The Band began this venture with the purchase of a few head of buffalo, which the tribe maintains on some of its recently acquired 880 acres of fee land. The buffalo, it is thought by former Chairman Maxcy and Administrator McCrea,³⁷² will provide individual tribal members with jobs and the tribe, collectively, with a source of income. Currently, the tribe's buffalo count is low, but it plans on obtaining more as time passes and as the tribal land-base increases in size. Eventually, Mesa Grande plans on selling some of its buffalo for a profit.³⁷³

Aside from its buffalo ranch, the Band has an immediate and significant need for more tribal housing. This was one of the tribe's principal reasons for acquiring the additional lands, which it desires to place in trust.³⁷⁴ As with many contemporary Indian communities, tribal housing is extremely important

Smiley Commission's mistake has caused varying amounts of friction between the two tribes. This is a very sensitive issue, even to the present day, because the Mesa Grande and Santa Ysabel Bands are intertwined in many respects, including, for instance, several inter-tribal marriages. Interview with Scott McCrea, *supra* note 199; Interview with Howard Maxcy, *supra* note 367.

370. Interview with Scott McCrea, *supra* note 199.

371. Interview with Howard Maxcy, *supra* note 367.

372. *Id.*; Interview with Scott McCrea, *supra* note 199.

373. Currently there are four or five other buffalo ranches in Southern California, and the demand for buffalo meat and buffalo related products is increasing. Interview with Howard Maxcy, *supra* note 367.

374. The Band purchased the 880 acres with the intent of placing those lands into trust status. Interview with Scott McCrea, *supra* note 199.

to the Mesa Grande because it allows the people to live together again, and allows the tribal community to exist and grow on its own terms. According to Administrator McCrea, the tribal housing issue directly and significantly affects native perspectives on, as he put it, "quality of life."³⁷⁵ The Mesa Grande people place a high value on the ability to live in close proximity to one another on *tribal* land, within its protected territory, where the people know they are under the authority of the tribal government, not the state or local governments.³⁷⁶ For the Mesa Grande, Administrator McCrea suggested, the house "spacing" issue is directly tied to the notion of building and maintaining a nation.³⁷⁷

The Band, however, cannot pursue its future economic ventures and advance the very important community goal of providing tribal housing to Mesa Grande members on its existing reservation. And it cannot pursue either of these interests on its own terms (i.e., consistent with self-determination) if the land remains in fee status. Therefore, the land must be in trust status.

Aside from these specific economic and housing needs, what other justifications do the Mesa Grande people and their leaders advance for taking land into trust through Part 151? And how do those justifications align with the modes of territoriality, if at all? Here, the perspectives of Mesa Grande Tribal members are offered in their own words. This section draws on personal and phone interviews conducted with Mesa Grande Tribal leaders, newspaper and other media reports on the Band's recent land acquisition experiences, as well as previously conducted historical and anthropological work relevant to the Band.

In a letter to the BIA, the Band said that, "[w]e must provide houses, community facilities, education, infrastructure and economic means to pay for many services."³⁷⁸ The letter also stated that, "[i]n order to provide essential governmental services to our tribal members, we need land."³⁷⁹ In addition, former Chairman Maxcy states that the Band is acquiring land with the hopes of putting it in trust because they are trying to think "long term." The Band, in other words, desires a place where the tribal community can exist today, tomorrow, and long into the future. The Band wants land in trust rather than in fee because, "[w]e don't want to be in a position where someone sells the

375. *Id.*

376. *Id.*

377. *Id.*

378. Edward Sifuentes, *Mesa Grande Tribe Granted Additional Land*, N. COUNTY TIMES, Sept. 16, 2001, available at <http://www.nctimes.com/news/2001/20010916/60109.html>.

379. *Id.*

land.”³⁸⁰ While the Mesa Grande seek control over their homelands, they also seek retention of their independence, their autonomy, and their community — they seek a culturally preservative domain. It was suggested to the Band, in their pursuit to recover lost lands, to simply merge with the Santa Ysabel Band.³⁸¹ After all, in addition to being familiar with one another, the two Bands are intertwined in many ways and are culturally similar in some of their traditions and practices.³⁸² In spite of these factors, though, the Mesa Grande strongly desire to retain their independence and understand the connection between the existence of tribal trust land, autonomy, and community.³⁸³ The Mesa Grande refuse to merge with the Santa Ysabel Band.³⁸⁴ This fact conveys Mesa Grande’s value for homeland and that mode’s attributes of perpetuity (the inalienability of tribal trust land) and retention of their community and their nationhood.

When asked what the tribe’s most important goals are with respect to acquiring land in trust rather than in fee, former Chairman Maxcy responded that the number one priority is to provide Band members with Tribal housing. He said, “There’s a lot of people moving back to the reservation. As tribal chairman, I have an obligation to assist them in any way I can, by getting more land, and hopefully by getting HUD grants to build homes.”³⁸⁵ Chairman Maxcy said the second priority or justification for trust land acquisition is tribal “economic development, to get these people to work.”³⁸⁶ He continued, “We don’t have a bus stop down the street. We don’t have five or six factories and if you do get a job, you need transportation. You need childcare. We just don’t have that on the reservations.”³⁸⁷ Many of the Band’s goals and priorities in acquiring additional trust land through Part 151 are related to the homeland mode of territoriality, and the attributes of perpetuity and dependence upon the land (i.e., tribal housing and economic development).

However, some of the Band’s goals and priorities (i.e., justifications) for placing land into trust through Part 151 are related to the sacred-land and nation-state modes of territoriality. During an interview, Administrator McCrea explained that one reason for the tribe’s recent acquisitions is that the new lands contain what he called “old fiesta sites,” sacred to the Mesa Grande

380. *Id.*

381. Interview with Scott McCrea, *supra* note 199.

382. *Id.*

383. *Id.*

384. *Id.*

385. Interview with Howard Maxcy, *supra* note 367.

386. *Id.*

387. *Id.*

people. He also revealed that the acquisitions contain sacred graveyards previously used by the tribe. Former Chairman Maxcy also alluded to the existence of Mesa Grande sacred sites located on the newly acquired lands.³⁸⁸

Additionally, in responding to San Diego County's concerns over the recent acquisitions, the Band said it has "a responsibility to its people and 'chooses to exercise jurisdiction over its lands,'"³⁸⁹ which is consistent with the Band's values for nation-state territoriality. Further, consistent with both the nation-state mode of territoriality and the goal of recovering lost lands, former Chairman Maxcy suggested that the land-into-trust issue, for tribes, is all about control. He said that "we want to control lost land."³⁹⁰ The land lost to the Santa Ysabel by the Smiley Commission is still used, to a large extent, by the Mesa Grande, and is also part of the Mesa Grande's homelands. Former Chairman Maxcy said that the people of Mesa Grande are still attached to that land, as it was and is culturally and spiritually significant to them.³⁹¹ However, that land is part of the Santa Ysabel's current Reservation, and is, therefore, tribal trust land. As such, it is trust land protected against alienation in perpetuity, which is one major justification, in and of itself, for placing land into trust through Part 151. But that land is not under the control of the *Mesa Grande* Tribal government. Nevertheless, the Mesa Grande would ideally like to have that land back in their control.

The Mesa Grande's goals and priorities in acquiring trust land go beyond the basic structure of the three modes of territoriality. Their justifications are also tied to the notion that the federal government must honor its relationship with the tribe and must advance the government's current policy of self-determination. In another letter to Interior urging implementation of the Part 151 land-into-trust regulations, the Band stated that "[a]s Secretary of the Interior, you have a trust responsibility to Indian tribes, and we believe that the Department of Interior has an obligation to further that relationship by removing obstacles to tribal self-government and self-determination."³⁹²

In sum, for the Mesa Grande Band and its people, the acquisition of additional trust land through employment of Part 151 is important in several respects. It is about the Band's meaningful homeland, sacred-land, and nation-state connections to its land. But it is also about the recovery of lost

388. *Id.*

389. Sifuentes, *supra* note 378.

390. Interview with Howard Maxcy, *supra* note 367.

391. *Id.*

392. Letter from Howard Maxcy to Gale Norton, *supra* note 356, at 2.

lands. "A long time ago, it was our land."³⁹³ "All that land was our home."³⁹⁴ It is about the inadequacy of the current land base. "And as time goes on, people have kids, and tribes grow. And the land base they gave us in the beginning is not sufficient."³⁹⁵ It is about the government's trust responsibility to Indian tribes. "[T]he Department of Interior has an obligation to further [the trust] relationship by removing obstacles to tribal self-government and self-determination."³⁹⁶ It is about the control over their land and their future. "We want to control lost land."³⁹⁷ "I think its an obligation for [the U.S.] to let us put it in trust, let it become ours."³⁹⁸ It is about the survival of their tribal community. "They pushed us into the mountains, thinking we wouldn't survive, and we survived."³⁹⁹ It is about giving back to the Band what was theirs from time immemorial. "It's not ours if it's not held in trust."⁴⁰⁰ And finally, as Shipek explains, it is about their long-time struggle for equity. "The Mesa Grande Band plans to continue its fight for justice and a recognition of its land rights."⁴⁰¹ For the Mesa Grande people and its community, the justifications for placing land into trust through Part 151, are, in short, complex and varied, and tied to the Band's specific land history and particularized set of needs, desires, and unique *homeland*, *sacred-land*, and *nation-state* connections to its land.

V. Conclusion

In the related goals of discovering the cultural significance, explaining the process, and uncovering the modern justifications for placing land into trust for Indians and tribes through 25 C.F.R. Part 151, this article examined three principal topics. Part II discussed the important and complex connections between American Indian communities and their land through a discussion on native modes of territoriality.

Part II explained that *homeland* is a place of prolonged tribal occupation, embodying the promises of perpetuity and collectivity, valued for its role in protecting and promoting a tribal identity and the native community.

393. Interview with Howard Maxcy, *supra* note 367.

394. *Id.*

395. *Id.*

396. Letter from Howard Maxcy to Gale Norton, *supra* note 356, at 2 (emphasis added).

397. Interview with Howard Maxcy, *supra* note 367.

398. *Id.*

399. *Id.*

400. *Id.*

401. SHIPEK, *supra* note 28, at 100.

However, homeland is also a place upon which contemporary Indian communities live and depend, through its role in supporting tribal economies, education, housing, social systems, and much more.

The native modes of territoriality also revealed a spiritual or sacred relationship between Indians and their land. *Sacred-land* territoriality demonstrated that sacred land is a spiritual and religious resource to the tribal community, and a place that defines and educates a particular native community about the unique culture of their home-place. Finally, *nation-state* territoriality showed that Indians and tribes are connected to their land because it is a place within which tribes can exist as nations, exercising sovereign, governmental rights over land, which ordinary landowners may not exercise. In short, both native individuals and tribal communities are tied to and depend for their survival, sense of community, and identity upon the existence of a protected tribal land base. Therefore, in an effort to reacquire land lost during colonization, allotment, termination, and other eras of dispossession, modern Indian communities are earnestly seeking to place land into trust through Part 151.

Part III examined the Part 151 process in order to understand how land is placed into trust, but, more importantly, to determine whether that process is consistent with Congress's intent in Part 151's governing statute, the Indian Reorganization Act (IRA) of 1934. Part III explained that Congress's clear intent in the IRA was to aid tribal communities in recovering from the earlier period of allotment — to rebuild the Indian land base. Further, Part III showed that the existing Part 151 regulations are arguably consistent with the IRA, but that a future Department of the Interior modification making the regulations more rigorous for tribal applicants may prove to be inconsistent with the IRA's goals.

Finally, Part IV illustrated — from a tribal perspective — that placing land into trust through Part 151 is important to tribes in several respects, each of which is best understood from within a particular contextual setting. First, Indians and tribes are historically, culturally, spiritually, and politically connected to tribal land and cannot continue to exist as communities and nations without it. Second, the Part 151 process is a necessary step in helping tribal communities recover from the drastic effects of Congress's allotment of Indian lands. Third, the Part 151 process is required to offset the current rate at which tribal trust land is lost or placed back into fee status. Without such an offset, tribal trust land, and the protected Indian land base, may someday cease to exist. Fourth, the Part 151 process is needed to ensure the reacquisition of lost, stolen, or otherwise dispossessed tribal land. And fifth,

tribal self-determination depends to a large extent on the existence of a tribal trust land base.

In conclusion, tribes offer diverse and complex justifications for placing land into trust through Part 151. Each justification must be examined in light of a specific context, or with respect to a particular tribal applicant; no one justification applies to all tribes, and not all justifications apply to any single tribe. However, most tribes agree that the primary justification for placing land into trust through Part 151 in the modern era is that Part 151 is an integral tool in achieving the true meaning, to tribes, of both the Indian Reorganization Act and the contemporary national policy of tribal self-determination — to rebuild the Indian land base and ensure survival of tribal communities.