

Fall 1989

Fatally Flawed: State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform

Tim Vollmann

M. Sharon Blackwell

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Tim Vollmann, & M. S. Blackwell, *Fatally Flawed: State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 Tulsa L. J. 1 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol25/iss1/1>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

TULSA LAW JOURNAL

Volume 25

Fall 1989

Number 1

“FATALLY FLAWED”: STATE COURT APPROVAL OF CONVEYANCES BY INDIANS OF THE FIVE CIVILIZED TRIBES—TIME FOR LEGISLATIVE REFORM

Tim Vollmann* and M. Sharon Blackwell† ‡

I.	INTRODUCTION	2
II.	THE HISTORICAL CONTEXT	4
	A. <i>The Allotment of Tribal Lands</i>	5
	B. <i>The 1906 and 1908 Acts</i>	11
	C. <i>The Early Cry for Reform</i>	16
	D. <i>The 1947 Act</i>	20
III.	THE CASE OF AUSTIN WALKER	23
IV.	THE RESPONSE TO <i>WALKER V. UNITED STATES</i>	29
	A. <i>The Role of Private Counsel: The Problem of Dual Representation</i>	30

* B.A., 1968, California State University, Fullerton, California; J.D., 1973, UCLA. Regional Solicitor, Southwest Region, U.S. Department of the Interior, Tulsa, Oklahoma. Formerly Associate Solicitor for Indian Affairs, Washington, D.C. (1984-87).

† B.A., 1964, East Central State University, Ada, Oklahoma; M.A., 1975, University of New Mexico; J.D., 1975, University of New Mexico. Assistant Regional Solicitor (Indian Affairs), Southwest Region, U.S. Department of the Interior, Tulsa, Oklahoma. Ms. Blackwell is Omaha-Creek.

‡ The views expressed in the article are those of the authors, not necessarily those of the U.S. Department of the Interior.

The authors wish to acknowledge the contribution of Jo Vollmann who painstakingly typed several drafts of the manuscript.

B.	<i>The Relationship of the Trial Attorney to Indian Petitioners: The Problem of Fractionated Ownership</i>	36
V.	LEGISLATIVE ALTERNATIVES FOR REFORM	42
A.	<i>Option #1: Legislative Elimination of all Federal Restrictions on the Alienation of Individual Indian Property Interests</i>	42
B.	<i>Option #2: A Return to Administration of Indian Lands by the Bureau of Indian Affairs</i>	45
C.	<i>Option #3: Revisions in the Judicial Approval Process of the 1947 Act</i>	49
D.	<i>Option #4: Administration of Leasing and Conveyancing by the Indian Tribes</i>	54
VI.	CONCLUSION	56

I. INTRODUCTION

The removal of the Five Civilized Tribes from their homelands in Georgia, Tennessee, Mississippi, North Carolina, and Alabama has been described as “the trail of tears” and “the road to disappearance.”¹ This past spring the Five Tribes—Cherokee, Creek, Choctaw, Chickasaw, and Seminole—commemorated the 150th anniversary of the end of the Trail of Tears, their arrival in Indian Territory. The legislative journey from those homelands to courtrooms in forty Oklahoma counties today, where Indians of the Five Tribes witness the approval of oil and gas leases and other conveyances of their lands pursuant to the Act of August 4, 1947,² is no less dramatic in description. It is a journey whose destination was determined by the social, political, and economic elements of the times, having little or no precedent in the common law and virtually no complement in any other federal statutory scheme dealing with lands and resources of Indians of other tribes. Because those elements are capricious at best (and malevolent at worst), the legislative road is difficult to chart, complex to the point of confusion, and like another famous thoroughfare, has been paved with good intentions.

Oklahoma historian Angie Debo spent much of her lifetime documenting the Tribes’ efforts to re-establish and maintain autonomous republics in their new homeland, only to see those tribal governments

1. A. DEBO, *THE ROAD TO DISAPPEARANCE* (1943); A. DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* (1972) [hereinafter DEBO].

2. Act of Aug. 4, 1947, ch. 458, 61 Stat. 731 [hereinafter the 1947 Act]. The entire Act is attached as an appendix to this article.

forcibly disestablished by Congress at the turn of the century. This process culminated in the allotting of sixteen million acres of tribal lands to the individual members of the Tribes, to intermarried whites, and to African-American freedmen. Dr. Debo called the allotment policy “an orgy of plunder and exploitation probably unparalleled in American history.”³ The authors acknowledge their debt to Dr. Debo and dedicate this article to her memory. An Oklahoma legislator recently commented on Dr. Debo’s relative anonymity here in Oklahoma: “She was widely acclaimed—elsewhere. We didn’t know her so well in Oklahoma, but we’re getting to.”⁴

Today, approximately 20,000 tracts of allotted Indian land held by members of the Five Tribes in eastern Oklahoma—covering over 400,000 acres—remain subject to federal statutory restrictions on their alienation. Congress has revised the terms of these restrictions on several occasions, but these laws have not been changed since the Act of August 4, 1947. Under the 1947 Act scheme, allotted lands which have been inherited by Indians of one-half degree or more Indian blood may only be conveyed or leased with the approval of the Oklahoma state district court in the county where the land is situated. Thus, transactions in these remaining restricted lands require an understanding of, and adherence to, what may seem to be anachronistic federal laws. Indeed, the practitioner can hardly prepare a thorough title opinion with respect to real estate in eastern Oklahoma without an understanding of these federal statutes which at one time or another applied to the entire former Indian Territory. The purpose of this article is to outline the statutory framework for the protection of these inherited Indian allotted lands, focusing particularly on the procedures under the 1947 Act for the state court approval of leases and conveyances. We begin with an historical overview of the Five Tribes’ legislative journey, relying as we must on the considerable writings of Dr. Debo. This leads us to the contemporary case of Austin Walker, an Indian landowner whose property interests were not properly protected at an oil and gas lease sale in Creek County District Court, according to a 1987 decision of the United States District Court in Muskogee. The *Walker v. United States*⁵ decision is noteworthy in that it not

3. DEBO, *supra* note 1, at 91.

4. State Senator Penny Williams, “A Tribute To Angie Debo,” remarks to Friends of the Tulsa Public Library (Mar. 27, 1989). For a full introduction to Dr. Debo (1890-1988), the authors recommend viewing *The American Experience: Indians, Outlaws, and Angie Debo* (Public Broadcasting System/WGBH, 1988) (available on videocassette).

5. 663 F. Supp. 258 (E.D. Okla. 1987).

only criticized the conduct of the particular judicial lease sale before the court, but also raised serious questions about the fairness and ethics of the procedures generally employed for such sales which the court called "fatally flawed."⁶

Next, we report on the response of the United States Department of the Interior to the decision in the *Walker* case, which focused on the need to clarify the respective roles of government and private counsel at the judicial conveyance approval proceedings. The federal government had been held liable to Mr. Walker for the malpractice of the Interior Department "trial attorney" at the Creek County proceeding. This 1987 federal court decision led indirectly to the authors' appointments to their current positions, supervising the government trial attorneys who appear in Oklahoma state courts on behalf of the restricted property interests of Indian landowners at proceedings conducted pursuant to the 1947 Act.

It is our conclusion that the procedures under the 1947 Act still fail to meet fully the needs of Indian landowners, that they often produce anomalous results and ethical dilemmas for the attorneys who appear in these judicial proceedings, and that these proceedings are unnecessarily expensive—to the Indian landowner, to the purchaser, and to the taxpayer. Accordingly, we present a variety of alternatives for consideration of federal statutory reform, in the hope that the Oklahoma bar and bench, the leaders of the Five Tribes, and Oklahoma's delegation to the United States Congress will unite in efforts to explore reform of this judicial exercise, which still touches the lives of thousands of Indian citizens and scores of Oklahoma attorneys.

II. THE HISTORICAL CONTEXT

In the years following the removal of the Five Tribes to Indian Territory, three important social, political, and economic forces thrust the rich and enviable lands of the Tribes into the consciousness of a nation whose hunger for land since birth had been insatiable. The Civil War, that great equalizer of wealth in the southern states, had produced a community of restless citizens eager to explore personal opportunities in the West. The opening of the railroad through Indian Territory made the vast expanses of tribal lands accessible, and thereafter changed the complexion of the Tribes' economic fortunes forever. A federal official in

6. *Id.* at 263.

1895 reported that the railway system which linked the Chickasaw Nation to the rest of the world ‘has been fatal to the old order of things, and has forced upon these people much that is found new among them.’⁷ Finally, the single event which may be said to have delivered the *coup de grace* to tribal resistance to white expansion, and with it the inevitable dismantling of tribal land ownership, was the discovery of oil in Indian Territory.

Oklahoma’s first commercial oil well, the Nellie Johnstone in Washington County, was completed on April 15, 1897, drilled after twenty years of negotiations with the Cherokees. The discovery of that well, like the earlier discovery of gold in Georgia which had prompted the national outcry for removal of the Cherokees, marked the beginning of the end of tribal land holdings. Four years later, just before midnight on June 24, 1901, oil was discovered at Red Fork, now west Tulsa, within the Creek tribal lands, and the stampede of fortune seekers, speculators, promoters, and fortune tellers broke into Indian Territory by sundown searching for, lusting after, Indian mineral rights and places to live during the search.⁸

The phenomenon of the quest continues today in the district courts of eastern Oklahoma as recorded by the recent testimony of an aging independent oil man while debating a higher bid for a Seminole mineral lease in Seminole County District Court. Stung by the impertinence of a young, aggressive, nattily-dressed landman who exemplified the new breed of oil questors, the driller-booted, khaki-clad millionaire reminisced to the court and the Interior trial attorney about his life-long search for “grape juice” under the soil, the barrels of Indian juice he had found, and the uncertainty of financial reward in the present economic climate. When it was clear that he was ultimately to be outbid by the young landman, he left the courtroom in an apparent attempt to avoid further loss of face and personal defeat. The judge philosophically observed that those in attendance had witnessed the passing of an era—only to be urged by the landman that he was ready to make payment to the Indian lessor and head out to the field.

A. *The Allotment of Tribal Lands*

Any analysis of the legislative treatment of the Five Civilized Tribes

7. A. GIBSON, *THE CHICKASAWS* 283 (1971) (quoting *Report of the Commission to the Five Civilized Tribes for 1895*, 56).

8. R. GREGORY, *OIL IN OKLAHOMA* 1 (1976).

in Oklahoma, as with other federally recognized tribes, may only be pursued against the backdrop of the federal guardian-ward doctrine. The Supreme Court first enunciated the doctrine in 1831 in *Cherokee Nation v. Georgia*.⁹ At issue was the classic struggle between the competing interests of the states, within whose borders Indian tribes reside, to control and acquire Indian lands, and the interests of the Indians to live communally under tribal laws to the exclusion of state regulation. Chief Justice John Marshall identified yet a third, more prevailing interest, that of the federal government to act as a guardian over the Indians and the tribal lands.¹⁰ By the end of the Indian Wars, the proposition that the federal government possessed plenary power over Indian affairs generally, and over Indian lands and resources particularly, was well established.¹¹

The federal interest has been characterized in numerous cases before the Supreme Court as creating a trust relationship between the government and tribal Indians, the parameters of which are defined by treaties, statutes, and executive regulations. The duty of the federal government to act for the protection of Indians lies at the cornerstone of legislation involving the Five Tribes.¹² It is ironic that the federal protective features which form the basis of the doctrine were obtained in litigation initiated by the Cherokee Nation. Yet members of that Nation, and of the other Five Tribes, are the only tribal Indians in the United States whose trust lands and estates are expressly made subject to state court jurisdiction by federal enactments.

From 1885 through 1887, the Five Tribes watched with apprehension as other tribes in Oklahoma were pressured and then compelled to yield their tribal lands to cession and partition by allotment by the federal government. Despite the exclusion of the Five Tribes from the General Allotment Act of 1887,¹³ Congress in 1893 created a commission to negotiate with the Five Tribes for the dissolution of communal, tribal ownership and the allotment of their lands.¹⁴ An historical account of the next five years is succinctly stated in a 1976 federal court decision¹⁵

9. 30 U.S. (5 Pet.) 1 (1831).

10. *Id.* at 17.

11. See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207 (1982).

12. *Tiger v. Western Inv. Co.*, 221 U.S. 286, 315 (1911).

13. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1983 & Supp. 1989)).

14. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645.

15. *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd. sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

concerning the recent re-establishment of the Creek Nation government:

The Commission was headed by Henry Dawes, who by then had retired from the Senate, and it became known as the Dawes Commission. During the next several years the Commission attempted to negotiate the dissolution of the tribes, but had minimal success; as a result they continued to report to Congress and to the public of what they regarded as the pressing need for dissolution of the tribes and allotment of the land. By 1895, the tribes still refused to deal with the Dawes Commission. In that year Congress responded by authorizing a survey of all the Indian land, and in 1896 directed the Commission to make a complete roll of the members of each tribe. Bills were also introduced in Congress each year calling for the forcible abolition of tribal status. In the 1897 Appropriations Act (30 Stat. 62), Congress began to force the issue by subjecting all laws passed by the [Creek] National Council to Presidential veto, with the significant exceptions of resolutions of adjournment and acts relating to negotiations with the Dawes Commission. As a result of all this pressure, and apparently preferring a negotiated settlement to an imposed one, the tribes began to deal with the Commission. By 1898 all five tribes had drawn up compacts with the Commission, and the Seminole Agreement had even been ratified. It appeared likely, however, that the other agreements would not be ratified by the tribes' membership, and on June 28, 1898 Congress enacted the Curtis Act, which provided for forced allotments and the eventual termination of the tribal tenure without the Indians' consent. The Act incorporated the provisions of the tentative agreements with each of the four remaining tribes, providing that if the agreement with any tribe was ratified by the tribe the provisions of the agreement would substitute for the more drastic allotment provisions of the Act. The Creeks did in fact reject their agreement, and the Act went into effect in their country.¹⁶

The Creeks, anxious to be out from under the arbitrary terms of the Curtis Act allotment plan, negotiated an allotment agreement which was adopted by Congress by Act of March 1, 1901,¹⁷ and ratified by the Tribe on May 25, 1901. While each of the Tribes' allotment agreements and supplemental agreements (the Cherokees were the only Tribe to enter into only one agreement¹⁸) differed in limitations with regard to age, citizenship, and race of allottees, as well as other concerns peculiar to the individual Tribes, the placing of restrictions upon alienation was an essential and universal element of all the allotment plans, and were strongly urged by the Tribes. From time immemorial the tribal members

16. *Harjo*, 420 F. Supp. at 1122 (footnotes omitted).

17. Act of Mar. 1, 1901, ch. 676, 31 Stat. 861.

18. Act of July 1, 1902, ch. 1375, 32 Stat. 716.

had lived communally, occupying homesites under the tribal laws which recognized the right of occupancy so long as land was used, after which, title reverted to the Tribe for reassignment.¹⁹ Tribal leaders were well aware that concepts of deeds, mortgages, liens, and other real property instruments were alien to the majority of their members and feared that they would fall prey to sharp dealings and unconscionable practices of the whites within their borders.²⁰

The federal allotment policy with regard to the Five Tribes differed sharply from practices with other tribes allotted under the provisions of the General Allotment Act.²¹ That Act authorized the President to allot tribal lands in designated quantities to reservation Indians, title to be held in trust by the United States for twenty-five years or longer.²² General Allotment Act allottees and their heirs, regardless of blood quantum, hold "trust patents" to their lands, with the legal fee vested in the United States, and the equitable fee vested in the Indians for the period of trust.²³

In contrast, the Five Tribes had received fee simple title to their tribal lands in Indian Territory,²⁴ and, therefore, the allotment patents were made by the principal chief of each Tribe to their allottees, conveying all the right, title, and interest of the respective Tribe in the land. Members of the Five Tribes hold "restricted patents" as opposed to "trust patents." The distinction is largely an academic one, however, as the federal government's interest, as guardian of the Indian lands and resources, is virtually identical in both classes of allottees. The distinction becomes germane when a Five Tribes allotment passes from the original allottee into the hands of the Indian heirs, as described hereinafter.

Although all the Five Tribes' allotment agreements were substantially similar in approach, in detail they were significantly dissimilar, exemplifying the various concerns of each Tribe with regard to the

19. R. STRICKLAND, *FIRE AND THE SPIRITS* 95 (1975).

20. DEBO, *supra* note 1, at 36.

21. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1983 & Supp. 1989)).

22. *Id.* § 5, 24 Stat. at 389.

23. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 615-18 (1982).

24. Creek and Seminole Treaty of Jan. 4, 1845, 9 Stat. 821; Choctaw Treaty of Jan. 17, 1837, 11 Stat. 573; Cherokee Treaty of Dec. 29, 1835, 7 Stat. 478 (1836); Creek Treaty of Feb. 14, 1833, 7 Stat. 417 (1834); Choctaw Treaty of Sept. 27, 1830, 7 Stat. 333 (1831). *See also* W.F. SEMPLER, *OKLAHOMA INDIAN LAND TITLES* 3-17 (1952).

protection that Tribe believed necessary for its diverse population of full-bloods who were unable to speak and write English, African-American freedmen, and whites who had become members of the Tribes by marriage or adoption. "Between th[o]se extremes, were persons of every degree of Indian blood."²⁵ All agreements made allotment provisions for two classes of land: homestead, which was typically 40 acres (except for the Choctaws and Chickasaws who were allotted 160 acres of homestead), and surplus, comprising minimally 70 acres in the case of the Cherokees to as much as 160 acres to the Choctaws and Chickasaws.

The homestead lands were restricted against alienation during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment for the Cherokees, Choctaws, and Chickasaws, twenty-one years from the date of the patent for the Creeks, and twenty-one years from the date of the deed for allotment for the Seminoles.²⁶ The agreements variously provided for alienation of the surplus lands within five years, except for the Seminoles whose surplus became alienable upon the expiration of the tribal government.

The restrictions embraced by the allotment agreements quickly became the subject of agitation and opposition on the part of land speculators and the growing community of white citizens in the Indian Territory who desired statehood and an unencumbered land base to support the local governments which would follow. Complete removal of all restrictions on Indian lands was urged by various interest groups. A general convention of these groups, representing virtually all non-Indian segments of the Territory—ministers, educators, business owners—was held in January 1904 in Okmulgee. Resolutions were circulated urging that the Indians be accorded the same freedom in transacting business as other persons and that all restrictions be removed from the conveyancing of Indian lands.²⁷ The convention resolutions were taken to Congress by a man of the cloth, Reverend A. Grant Evans, president of Henry Kendall College, a Presbyterian institution in the Territory.²⁸ Notwithstanding the negotiated protective provisions in the tribal agreements which had prohibited alienation of all allotments regardless of class for a period of time to permit adjustment to private ownership, the lobby effort

25. L. MILL, *LANDS OF THE FIVE CIVILIZED TRIBES* § 159 (1919).

26. *Id.* §§ 26, 66, 134, 150.

27. DEBO, *supra* note 1, at 137.

28. DEBO, *supra* note 1, at 137-38.

was somewhat successful. A provision was included in the Indian Appropriations Act of 1904²⁹ which removed restrictions on surplus lands of all adult non-Indians and further gave discretion to the Secretary of the Interior to remove restrictions on all adult Indian allottees' surplus lands. Minors' surplus lands became alienable upon attainment of majority. In the three years following the Appropriations Act, approximately six thousand adult Indians secured removal of restrictions on their surplus lands, making the lands freely alienable.³⁰

Only six days later another important piece of legislation was passed which served to lay the foundation for the present district court jurisdiction over inherited restricted property. The Act of April 28, 1904,³¹ gave the federal territorial courts full and complete jurisdiction over the settlement of estates and the guardianship of minors and incompetents—Indian, freedmen, or otherwise—and extended the laws of Arkansas in the federal courts over all persons and estates. Prior to this time, Indian probate and guardianship jurisdiction had historically been vested in the tribal courts.³² In 1897, Congress had passed legislation granting jurisdiction to the federal territorial courts over civil and criminal cases in the Territory and extending the laws of Arkansas and the federal laws over everyone “irrespective of race.”³³ Thereafter, in 1898, the tribal courts were abolished to a large degree³⁴ and the pending cases in the tribal courts were transferred to the federal territorial courts, including probate and guardianship matters. Dr. Debo poignantly recounts the abuses and fraudulent practices investigated by a Senate committee in 1906, which had resulted from territorial court jurisdiction over guardianship matters:

The guardianship method was worked out most systematically in the making of agricultural leases. One man secured the appointment as guardian of a large number of children; he then leased the land at a very small figure to a real estate dealer with whom he was in collusion; and the real estate dealer subleased it to farmers at an enormous profit. The real estate dealer thus continued to control large tracts of land under the same conditions of inadequate rental as he did before the

29. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 204.

30. DEBO, *supra* note 1, at 90.

31. Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573.

32. R. STRICKLAND, *FIRE AND THE SPIRITS* 96-102 (1975).

33. Act of June 7, 1897, ch. 3, 30 Stat. 62, 83.

34. Curtis Act, ch. 517, § 28, 30 Stat. 495, 504-05 (1898); *see also* Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1442 (D.C. Cir. 1988).

guardianship was established. The guardian through various legal fictions involving expenses, charges for his services, etc., managed to retain the rental paid him by the real estate dealer; and although the amount in each case was small he received a large sum in the aggregate. The child received nothing for his allotment; he was supported by his parents if they were living, or he was maintained by the tribe in an orphan asylum if they were dead. The guardians almost invariably considered themselves agents of the lessees rather than officers of the court; legal leases could not be made without a guardian, and in most cases the appointment had been made solely for that purpose.³⁵

Such guardianship abuses are still being discovered today. Recently a Creek man recalled his experience as an orphaned teenager. A local attorney was appointed as his guardian to manage the sizable monthly oil royalties which he inherited. Although he lived with his grandmother on her allotment, during football season he made arrangements to stay in town with a team member's family. The only bad part of the arrangement was that he was "required" to have Sunday dinner with his guardian. The guardian was prudent with the young Creek man's estate, denying his request for a letter jacket as being too expensive and not necessary clothing. Years later, in reviewing the old court records, the Creek man learned that the guardian had charged his usual fee for the two hour Sunday dinners, the cost of which each week far exceeded the purchase price of the letter jacket.

B. *The 1906 and 1908 Acts*

The clamor for statehood intensified after the 1904 legislation. The Tribes remembered all too well this alarming sound which only two generations past had set in motion the events which led to their removal from their ancestral homelands. This time, armed with the solemn promises in their removal treaties that no territorial or state government would be placed upon them without tribal consent, they passed resolutions opposing statehood in Oklahoma, and in the fall of 1904 they appealed to President Theodore Roosevelt that Congress was preparing to violate the treaties. Dr. Debo's research reveals that the resolutions and the appeal were disregarded.³⁶ The ultimate legislative answer was first the Act of April 26, 1906,³⁷ and, two months later, the Oklahoma Enabling Act.³⁸

35. DEBO, *supra* note 1, at 106-07.

36. DEBO, *supra* note 1, at 162.

37. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

38. Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).

The 1906 Act was the first major piece of federal legislation to supplant the tribal agreements and make uniform all restrictions as to Five Tribes allotments. Ironically, this genesis of a complicated federal statutory scheme for alienation of restricted land was designed "to provide for the final disposition of the affairs of the Five Civilized Tribes."³⁹

In response to the Sooner lobbyists' demands for free alienation of all Indian lands in both Indian Territory and Oklahoma Territory, the Act did remove restrictions on additional classes of allotments; however, the 1906 Act *reimposed* restrictions on other classes of lands. Specifically, the Act placed an unqualified restriction upon the sale of allotments belonging to full-blood allottees for a period of twenty-five years, or until April 26, 1931.⁴⁰ Section 22 of the Act permitted adult full-blood members to sell or otherwise convey inherited property, but only with the approval of the Secretary of the Interior.⁴¹ The restrictions upon inherited lands in the tribal agreements had been less limiting, as in the Creek agreements which restricted alienation only for a term of five years.

The constitutionality of this imposition of restrictions upon inherited lands was later challenged but was sustained in *Tiger v. Western Investment Co.*,⁴² wherein the Supreme Court concluded that Congress

has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees; . . . that it rests with Congress to determine when its guardianship shall cease, and while it still continues, it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.⁴³

However, only full bloods who inherited allotted lands were deemed by Congress to be in need of federal protection of their lands. In contrast, under the General Allotment Act other Indian lands in Oklahoma were subject to federal restrictions against alienation without reference to the blood quantum of the Indian owners.

Two months later the Oklahoma Enabling Act⁴⁴ granted the Sooners' long expressed desires for admission to the Union. The victory was not complete, however, as section 1 of the Act prohibited any proposed

39. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

40. *Id.* § 19, 34 Stat. at 144.

41. *Id.* § 22, 34 Stat. at 145.

42. 221 U.S. 286 (1911).

43. *Id.* at 316.

44. Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).

state constitution from limiting or impairing the personal or property rights of the Indians residing within the new state or from limiting or affecting the authority of the United States to make laws and regulations respecting the Indians, their lands, property, or other rights secured by treaties, agreements, and laws.⁴⁵ Section 13 of the Act placed in effect the laws of the Oklahoma Territory throughout the new state, and section 19 declared that the state courts would succeed to the original jurisdiction of the territorial courts.⁴⁶ In accordance with the terms of the Enabling Act, the Oklahoma Constitution, ratified in 1907, included a provision in which the people disclaimed all right and title to all lands owned or held by any Indian.⁴⁷

One common issue—the call for removal of restrictions on Indian land and state superintendence over Indian affairs—had united all political factions during the constitutional debates, and that issue continued to dominate the new state's immediate attention. Once again the fears of the Five Tribes had been realized: the state government would seek to regulate their property and affairs. The strongest advocate of removal of restrictions and state superintendence was the newly-elected senator from eastern Oklahoma, Robert L. Owen, a one-sixteenth blood enrolled Cherokee originally from Virginia.⁴⁸ Less than two weeks after the inauguration of the new state government, Owen presented such a plan to the Trans-Mississippi Commercial Congress which was convened in Muskogee and was attended by the governors of Oklahoma, Kansas, Arkansas, and the Territories of New Mexico and Hawaii. The Indian sentiment with regard to Senator Owen and his plan was eloquently expressed by Moty Tiger, Chief of the Creeks, who gave the welcoming address. Dr. Debo quoted Tiger's address and described Owen's response:

'As a part of the new state into which we shall merge, there lies a path new and full of uncertainties upon which, however, we enter with a hope that the burden which we shall share with our white brother shall not be too heavy for our untrained shoulders. We have been admonished to look with hope upon this inevitable destiny and I assure you that whatever sorrows and trials it may bring, will be borne with resignation and unflinching fortitude.'

[Tiger] said that the question of the removal of restrictions would probably come before the meeting, and he earnestly requested that no

45. *Id.* § 1.

46. *Id.* §§ 13, 19, 34 Stat. at 275, 277.

47. OKLA. CONST. art. I, § 3.

48. DEBO, *supra* note 1, at 174.

declaration of policy be made, that the question be left with the Indians and the Government. Owen sat on the platform immediately behind him in the full glory of his triumphant career, handsome, dominating, one of the ablest men ever produced by the state of Oklahoma. The audience understood that the Chief referred directly to him when he said: 'The polished and educated man with the Indian blood in his veins who advocates the removal of restrictions from the lands of my ignorant people, apart from governmental regulations, is only reaching for gold to ease his itching palms, and our posterity will remember him only for his avarice and his treachery.' He said that many fullbloods were incompetent, and as for the removal of restrictions, 'It is a fight between greed and conscience with this great government as arbiter, and upon the decision rests for generations, the fate of these untutored children of nature.'

Owen for once lost the poise that made him such a master of argument. When his turn came on the program, he discarded his set speech and defended himself in fiery language that made a great impression upon his sympathetic audience. At a later session he introduced a resolution by which the meeting would commit itself in favor of the removal of restrictions and would ask the Senators and Representatives from the participating states to carry out the program. Of Tiger's speech he said, 'It is the federal official drawing a salray [sic] that puts the words in the mouths of the men in this territory,' and cited the Shakespearean reference to the 'itching palms' as proof that it did not originate in the mind of the untutored fullblood. He read a draft statute, which he said he had drawn up with the approval of Governor Haskell, for protection of the Indians by the state courts. The state of Oklahoma, he said, had no desire to exploit the full bloods, for if they were reduced to pauperism who would take care of them?—'Will it be the interior department [or] will it be the generous hearted sons of Oklahoma who will take care of their own defectives? They are our children and we want to take care of our own children and we don't want any stepmother.'⁴⁹

The Oklahoma delegation, unified on the issue of removal of restrictions and headed by Senator Owen, moved into the congressional sanctuary. Despite the promise of the 1906 Act to dispose of all affairs touching the Five Tribes, Congress enacted the Act of May 27, 1908,⁵⁰ the provisions of which still apply to certain Indian lands today.

The 1908 Act, like its predecessor the 1906 Act, sought a balance between the manifest duty to protect unsophisticated Indians in maintaining their homesteads and the compelling need of the new State of

49. DEBO, *supra* note 1, at 172-73.

50. Act of May 27, 1908, ch. 199, 35 Stat. 312.

Oklahoma for tax revenues⁵¹ which would result from the release of restrictions on Indian lands and the inevitable sale of those lands to non-Indians. Having looked to blood quantum as a measuring device for determining the competency and sophistication of the Indian landowners in the past, Congress once again resorted to the laboratory to define the federal government's guardian role. The result was that all restrictions imposed under the allotment agreements and statutes were removed on the homestead and surplus lands of allottees who were less than half blood, and on the surplus lands of Indians who were at least half blood but less than three-quarters blood.⁵² The effect of the Act was to release 12,002,897 acres of land from restriction and subject it to state taxation and sale.⁵³ Restrictions were reimposed on homesteads of half-blood Indians and homesteads and surplus lands of three-quarter-blood Indians.⁵⁴ Such lands were not "subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to [April 26, 1931] . . ."⁵⁵

Section 9 of the 1908 Act had an even more profound effect on the status of Indian land holdings. As to inherited lands, the statute provided in substance that the conveyances by full-blood heirs were subject to the approval of the probate courts of Oklahoma having jurisdiction of the settlement of the estate of the deceased allottee.⁵⁶ This jurisdiction has remained unchanged to date, although the blood quantum of the Indian heir was to be later amended to impose probate court restrictions to half-blood heirs by the Act of 1947.⁵⁷

Although the desires of the Oklahoma delegation had not been completely fulfilled by the legislation, the probate courts of the State of Oklahoma assumed immediate administrative responsibility for a significant amount of Indian lands and inevitable future control of all lands in eastern Oklahoma belonging to members of the Five Tribes. In the exercise of this jurisdiction, the district courts, which were formerly designated as the probate courts, act as a federal instrumentality in the conveyancing process⁵⁸ and presumably may be held to the same standards as the Secretary of the Interior.

51. DEBO, *supra* note 1, at 164.

52. DEBO, *supra* note 1, at 179.

53. DEBO, *supra* note 1, at 180.

54. DEBO, *supra* note 1, at 179.

55. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312.

56. *Id.* § 9, 35 Stat. at 315.

57. Act of Aug. 4, 1947, ch. 458, § 3(a), 61 Stat. 731, 733.

58. *Springer v. Townsend*, 336 F.2d 397, 400 (10th Cir. 1964); *see also United States v. Gypsy Oil Co.*, 10 F.2d 487, 492 (8th Cir. 1925).

C. *The Early Cry for Reform*

While Congress was debating the question of what restrictions should remain on the sale of allotted lands, the "orgy of plunder" described by Dr. Debo had already begun. Land companies even imported Choctaws from Mississippi, packing them in boxcars like cattle so that they would be allotted prime land and then divested of it.⁵⁹ The new legislation hastened this process of exploitation. In Seminole County,

[w]hen the law of 1908 released 255,246 additional acres, the saturnalia of sales by adult allottees was matched only by the notices that filled the newspapers as guardians hastened to unload the land of Negro and mixed-blood children through the county court. It was also reported that speculators flocked to the premises when an Indian was known to be dying, and crowded the church and cemetery during his funeral until it was difficult to conduct the services; and that several Seminole freedmen who had been tricked into giving deeds under the impression that they were signing other instruments had helplessly remained in their old homes and had been arrested and placed in jail for trespass.⁶⁰

Although Congress acceded to many of the wishes of the Sooner lobbyists in 1908, it was nonetheless sensitive to the pleas of other American citizens, including righteous Oklahomans, to address the worst of the land frauds. It is within the provisions of the 1908 Act that the concept of the trial attorneys, employed today by the Regional Solicitor's Office in Tulsa, Oklahoma, was first addressed by Congress. Section 6 of the 1908 Act conferred jurisdiction over the person and property of minor allottees to the state probate courts. It further empowered the Secretary of the Interior to appoint local representatives to inquire into and investigate the conduct of guardians, report misconduct to the proper probate court and, if necessary, prosecute civilly or criminally to preserve the minors' estates.⁶¹

59. DEBO, *supra* note 1, at 97-98.

60. DEBO, *supra* note 1, at 218.

61. Additionally, the representatives were:

further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Act of May 27, 1908, ch. 199, § 6, 35 Stat. 312, 314 (1908).

These “representatives” were at first not required to be attorneys. It was not until the Indian Appropriations Act of 1913 that express provision was made in the federal statutes for the employment of “attorneys” in probate matters of the Five Tribes.⁶² The term “probate attorney” appears several times in the 1947 Act, the modern authority for the representational activity of the Regional Solicitor’s trial attorneys.

Section 6 of the 1908 Act also contained an appropriation for any expenses incidental to suits brought by the Department of Justice at the request of the Secretary of the Interior in the United States District Court for the Eastern District of Oklahoma in the prosecution of actions where conveyances had been made contrary to law. In the years following the 1908 Act, extensive litigation was undertaken by the federal government to rectify illegal land transactions which had occurred prior to statehood. The Department of Justice instituted what was referred to as the “Thirty Thousand Land Suits” in the federal court. Some 301 suits naming 16,000 defendants were brought pursuant to the 1908 statute to invalidate 27,517 conveyances involving 12,500 tracts of land comprising 3,842,553 acres.⁶³

In *Heckman v. United States*,⁶⁴ an action brought by the Department of Justice to cancel conveyances of full-blood Cherokee allottees’ surplus lands made in violation of the 1906 Act’s prohibitions against alienation, the Supreme Court found that section 6 of the 1908 Act granted capacity to the United States to prosecute the actions without the joinder of the Indian grantors as parties. The Court specifically held that it was not necessary for the Indian grantors to make equitable restoration of the consideration paid for the invalid conveyances because

it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute.⁶⁵

62. Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95.

63. DEBO, *supra* note 1, at 205.

64. 224 U.S. 413 (1912).

65. *Id.* at 446-47.

The "Thirty Thousand Land Suits" and the *Heckman* decision may have saved hundreds of Indian allottees from ruination, but they also created a renewed impetus for stabilization of land titles in eastern Oklahoma. In 1925, a delegation of attorneys from Oklahoma appeared before the Subcommittee of the Committee on Indian Affairs, House of Representatives, to press the need for legislation which would impose state statutes of limitations on restricted Indian lands for purposes of finally settling title issues and which would clarify conflicting judicial interpretations of section 9 of the 1908 Act.⁶⁶

The remedial legislation, the Act of April 10, 1926,⁶⁷ sanctioned all the previous orders of the county courts regarding conveyances of full-blood heirs' interests and declared that county court approval of a full-blood heir conveyance is conclusive as to the jurisdiction of the court. Section 2 of the 1926 Act provided extraordinary relief to the proponents of the Act. That section made the statutes of limitations of the State of Oklahoma applicable to all restricted Indians and their heirs and grantees against all rights and causes of action which had accrued to any such Indians, heirs, or grantees.⁶⁸ Section 3 set forth the procedure whereby the United States, through the Superintendent of the Five Civilized Tribes (now the Area Director, Muskogee Area Office, Bureau of Indian Affairs) is to receive notice of any pending action to which a restricted member, heir, or grantee is made a party and which involves an interest in allotted lands, including the proceeds, issues, rents, and profits derived from the allotted lands. The United States is afforded the right to appear in the case or to remove the case to the federal district court within twenty days after notice. Such notice serves to bind the United States and the parties to the action to the same extent as if no Indian land or Indian question is involved.⁶⁹

66. A later federal court decision summarized the testimony before the Subcommittee:

Briefly stated, the necessity was due to the fact that no statute of limitations was applicable to restricted Indians under the decisions of the court, and a judgment against an Indian, involving restricted lands, was not binding upon either him or the United States Government, the result being that there was no such thing as a good title derived from a restricted Indian. The other involved the uncertainty as to the proper County Court for the approval of a deed by a full-blood Indian heir.

In re Micco's Estate, 59 F. Supp. 434, 438 (E.D. Okla. 1945).

67. Act of Apr. 10, 1926, ch. 115, 44 Stat. 239 (amending Act of May 27, 1908, § 9, 35 Stat. 315).

68. *Id.* § 2, 44 Stat. at 240.

69. *Id.* § 3, 44 Stat. at 240-41; see also *Butler v. Denton*, 150 F.2d 687, 689 (10th Cir. 1945); *House v. United States*, 144 F.2d 555, 559 (10th Cir. 1944), *cert. denied*, 323 U.S. 781 (1944).

Notwithstanding the fact that the 1926 Act did not contain any authority for the release of restricted lands as previous statutes had, the incorporation of the Oklahoma statutes of limitations into the federal scheme for alienation of those lands continues to serve as the basis for the vast amounts of Indian-owned tracts being set over to non-Indian adverse possessors.

As April 26, 1931, drew near—the time for the expiration of the restrictions on alienation of allotments held by full-blood allottees, the homesteads of half-blood allottees, and the homestead and surplus lands of three-quarter-blood allottees—“[f]or the first time systematic attempts were made to discover the actual condition of the Indians and to enact legislation upon the basis of that knowledge.”⁷⁰ The Institute for Government Research warned in 1922 that a “carnival of dissipation, fraud, and oppression” would occur at the expiration of the trust period in 1931, and a survey made by the Department of the Interior in 1927 advised extending the trust period.⁷¹ As a result of those findings, the Act of May 10, 1928, was enacted to extend the trust period twenty-five years, or until April 26, 1956.⁷²

By the time of the Act of January 27, 1933,⁷³ it was apparent that not only the attention, but the sympathy, of Congress had been captured by the reports of the eroding land base of the members of the Five Tribes which had left thousands of Indians in a destitute state at the hands of grafters. The 1933 Act gave the probate attorneys, for the first time, the right to appeal from the action of a county court approving an Indian conveyance.⁷⁴ The Act incorporated by reference certain procedural rules governing county court proceedings which had been adopted by the Oklahoma Supreme Court on June 11, 1914,⁷⁵ at the urging of Commissioner of Indian Affairs Cato Sells, and which became effective July 15, 1914.⁷⁶ The Rules provided protection to Indian heirs whose lands were subject to the county courts' jurisdiction. Among those protections were that certain days were to be set aside in each county for the sale of land,

70. DEBO, *supra* note 1, at 354.

71. DEBO, *supra* note 1, at 358.

72. Act of May 10, 1928, ch. 517, 45 Stat. 495. Thereafter restrictions were continued indefinitely by the Act of Aug. 11, 1955, ch. 786, § 3, 69 Stat. 666, 668.

73. Act of Jan. 27, 1933, ch. 23, 47 Stat. 777.

74. *Id.* § 8, 47 Stat. at 779.

75. Rules of Procedure in Probate Matters Adopted by the Justices of the Supreme Court of Oklahoma, — Okla. — (1914) (revised version at 47 Okla. xiv (1917)).

76. The procedural requirements later set forth in § 1 of the Act of Aug. 4, 1947, ch. 458, 61 Stat. 731, were developed with reference to the July 15, 1914, rules. Semple, *The Stigler Bill*, 19 OKLA. BAR J. 93, 95 (1948).

notice was to be given to the probate attorneys ten days prior to the sale, the land was to be appraised, and all expenses were to be borne by the grantee. Oil and gas leases of minors and incompetents were to be sold to the highest bidder in open court.

In addition to the protective features for county court approvals, the 1933 Act created a new class of restricted Indian lands. Section 1 of the Act provided that lands would remain restricted when the entire interest in restricted and tax exempt land was acquired by inheritance, devise, purchase, or gift, by or for "restricted Indians."⁷⁷ That section was interpreted in 1934 by the Solicitor of the Department of the Interior, Nathan Margold, to preserve any existing restrictions in whatever form they may be on the property so long as the entire interest was held by restricted Indians.⁷⁸ Solicitor Margold found that the term "restricted Indians" "obviously embraces Indians of one-half or more Indian blood."⁷⁹ The clear implication of the Margold opinion was that the Secretary was empowered to approve or disapprove conveyances of lands of the class described when the heirs or devisees were one-half or more Indian blood of the Five Tribes. This notion was later affirmed in a 1940 federal court decision.⁸⁰

For the first time since 1908, an opportunity was provided in the 1933 Act whereby the federal government could exert a greater influence over the rapid loss of Indian lands. However, notwithstanding this important purpose, the language of the 1933 Act gave rise to a host of conflicting judicial interpretations, particularly with regard to the proper forum for approval of Indian conveyances. Once again, titles in eastern Oklahoma became uncertain, and an outcry for legislative reform was sounded.⁸¹

D. *The 1947 Act*

The Act of August 4, 1947,⁸² was the legislative solution. This time, however, as a result of the increased involvement on the part of the federal government in approving conveyances after the 1933 Act, and particularly the involvement of the probate attorneys, the proponents of the legislation received a mixed blessing: the Act finally determined that the

77. 47 Stat. 777, § 1.

78. 54 I.D. 382, 385 (1934).

79. *Id.*

80. *Burgess v. Bosen*, 31 F. Supp. 352, 353 (N.D. Okla. 1940).

81. *Simple*, *supra* note 76, at 94.

82. Act of Aug. 4, 1947, ch. 458, 61 Stat. 731.

county courts were vested with jurisdiction to approve all heirs' conveyances. However, an even greater class of protected restricted members was included in the legislation.

In the manner which had become acceptable for legislation dealing with the Five Tribes, the principal drafter of the 1947 Act was an attorney from Tulsa who was chief counsel for Deep Rock Oil Corporation and the spokesman for the Midcontinent Gas and Oil Association, W. F. Semple. The testimony before a House subcommittee on May 2, 1947,⁸³ classically exemplifies the now age-old conflicts which exist between the federal government, charged with the moral and legal duty to protect the resources of the members of the Five Tribes from improvidence, and private industry and non-Indian interests who advocate exploitation of those valuable resources. Representative George B. Schwabe recommended to the subcommittee that the provisions in the draft legislation imposing restrictions on the lands of half-blood members be amended to apply to full-blood members only. Representative Carl Albert of Oklahoma testified that he had grown up among Indian people, and his "experience with the average member of these tribes [was] that nine or about nine out of ten are able to take care of their affairs as anybody, and more often than not more able. That is particularly true of those of less than full-blood."⁸⁴ He further advocated complete removal of restrictions on all lands as soon as possible. Honorable Earl Welch, Justice of the Supreme Court of Oklahoma, former Oklahoma Senator Thomas P. Gore, Representative William G. Stigler of Oklahoma, and Ben Dwight, Choctaw National Attorney, testified that no protections were needed for any but full-blood members.

Floyd Maytubby, Governor of the Chickasaw Nation of Oklahoma, testified that while he was not an attorney and not in a position to analyze "these law bills," he had confidence in Congressman Stigler and in his friend W. F. Semple, both of whom were authorities on Indian law, and in reading the bill that morning, he did not see anything in it that would jeopardize or interfere with any Indian.⁸⁵ Only William F. Zimmerman, Jr., Assistant Commissioner, Bureau of Indian Affairs, testified that the proposed Schwabe amendment was imprudent. He stated:

83. *Restrictions Applicable To Indians of the Five Civilized Tribes of Oklahoma, and For Other Purposes, 1947: Hearings on H.R. 3173 and H.R. 149 Before the Subcomm. on Indian Affairs of the House Comm. on Public Lands, 80th Cong., 1st Sess (1947).*

84. *Id.* at 43 (statement of Rep. Carl Albert of Oklahoma).

85. *Id.* at 53-54 (statement of Floyd Maytubby, Governor, Chickasaw Nation).

I should like to comment briefly on the proposed amendment by Mr. Schwabe.

It distresses me a little to have the representatives in Congress from Oklahoma urge, in effect, that the process which has been going on for forty years, should be hastened by the proposed amendment.

Even under existing law, the Indians of the Five Tribes have lost 90 per cent of their estate. The procedure is almost automatic. It has been and will continue to be.

Ultimately, these lands will all be unrestricted. Even under present law, restrictions may be removed at the discretion of the Secretary.

I am in no position to express the views of the Department, but I express my own view that it would be unfortunate to jeopardize the passage of this bill which is needed by adding to it an amendment which would materially change existing law.

That amendment proposed by Mr. Schwabe is not curative, as I see it, in the sense in which this proposed bill now before you is.⁸⁶

The Schwabe amendment was not adopted by the subcommittee.

The legislative history of section 1 of the 1947 Act makes it clear that the Act is a remedial and clarifying statute. It unquestionably extends federal protection to a much greater class of members of the Five Tribes than that provided for in all previous legislation, contrary to the understanding implicit in Mr. Zimmerman's statement. Such protection embraces all inherited restricted lands, both homestead and surplus, held by members of the Five Civilized Tribes who are half blood or more. To ensure that the federal protections are accorded by the county courts—now district courts—the presence of the government probate attorney (the trial attorney), at any conveyance proceeding is mandated by the implicit terms of the statute: the trial attorney must be given at least ten days notice of the conveyance approval proceedings; no interest of an absent Indian landowner may be conveyed in court without the trial attorney's consent; and the trial attorney is expressly reserved the right to appeal from any order approving the Indian lease or conveyance.⁸⁷ Furthermore, established principles of statutory construction require that any ambiguities or procedural imperfections in the statute must be resolved, as a matter of federal law, in favor of protection of the Indians' interest.⁸⁸

Section 4 of the 1947 Act confirms the guardianship interest that the

86. *Id.* at 59-60 (statement of William F. Zimmerman, Assistant Commissioner, BIA).

87. Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731.

88. *See* *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation."). *See, e.g., Choate v. Trapp*, 224 U.S. 665, 677 (1912).

federal government has in matters pertaining to restricted (half-blood or more) members of the Five Tribes. That section authorizes the government trial attorneys to appear and represent restricted members in the courts of the State of Oklahoma in any matter in which the restricted Indian may have an interest. Since 1947, the trial attorneys have regularly appeared to represent restricted members in trespass, quiet title, partition, guardianship, and probate actions in the state courts. It is against this backdrop that Austin Walker and his government trial attorney appeared in Creek County District Court in October, 1983.

III. THE CASE OF AUSTIN WALKER⁸⁹

On September 16, 1983, Austin Walker, a forty-three-year-old man of seven-eighths Creek-Cherokee blood, graduated from Oklahoma State Technical School in Okmulgee. He lacked a job, money, a vehicle, and a place to live, as he was then required to move out of the school's dormitories. He hitch-hiked to Muskogee to visit the Area Office of the Bureau of Indian Affairs (BIA) to see if he had received any rentals from the grazing lease on the allotted land he had inherited from his Creek grandmother, Jeanetta Yahola. There he was asked if he had received any oil and gas royalties from the lease on his land. This was the first time he had heard that his allotment had been leased for oil and gas production.

Months earlier, on February 10, 1983, a hearing had been held in the Creek County District Court, Proceeding No. FB-83-5, to award an oil and gas lease on Austin Walker's allotment pursuant to the 1947 Act. The Act requires that the Indian lessor be present at the lease approval hearing unless the lessor and the Interior Department trial attorney both consent in writing to his or her absence.⁹⁰ An imposter, also named Austin Walker, was present at that hearing. The prospective lessee's landman had found his name in a Sapulpa telephone directory and had unwittingly identified him as the landowner. The Sapulpa Austin Walker was offered the lease which he accepted and signed. The attorney retained by the prospective lessee prepared and filed the lease petition, holding himself out as "Attorney for Petitioner" as is the custom at such proceedings. In accordance with the 1947 Act, notice of the hearing was sent to the Interior Department trial attorney who also attended

89. Unless otherwise noted, this account is taken from the published decision in *Walker v. United States*, 663 F. Supp. 258 (E.D. Okla. 1987), and from depositions and testimony in those proceedings. Many of these facts were in material dispute at trial.

90. Act of Aug. 4, 1947, ch. 458, § 1(b), 61 Stat. 731-32.

the hearing. Apparently no one present at the hearing, save the imposter, knew that the Austin Walker who owned the land was not there. The lease was awarded for a \$4,000 bonus plus a three-sixteenths royalty for a term of three years. This matched the terms of the BIA appraisal which had been obtained for purposes of advising the landowner. The bonus was paid to the imposter.

A few weeks later the attorney for the lessee oil company—the same attorney who had filed the lease approval petition for the Sapulpa Austin Walker—filed a quiet title action in Creek County District Court to adjudicate the validity of the recently approved lease.⁹¹ This is a common technique for oil and gas developers in Oklahoma, anxious to attract investors in the anticipated development. The real Austin Walker was not served with any papers in this quiet title action, and judgment was entered without opposition, decreeing that the parcel of land was subject to an approved oil and gas lease.

Soon thereafter, the lessee drilled four wells on the property, the last of which was completed on August 14, 1983. By the time the true Austin Walker discovered the lease in September 1983, the proceeds of production were \$363,693.23. However, Austin Walker apparently was not told of this at any time in the following weeks.

Walker contacted BIA officials in Muskogee, and they referred him to a government trial attorney in the Regional Solicitor's Office in Tulsa. He hitch-hiked there that same day. The trial attorney asked for his identification and then escorted him across the hall to meet with an assistant United States attorney. Walker was told that the matter would be investigated, and he departed. The trial attorney then called the Creek County district judge who approved the oil and gas lease on February 10 and advised him that the lease approved in No. FB-83-5 was probably invalid. The judge called the law firm which had filed the lease approval petition, and they in turn called the government trial attorney to ascertain how to locate the true Austin Walker.

Three days later the lessee's landman found Walker in Okmulgee and gave him a check for \$500 to sign a lease identical to that signed by the imposter eight months before. He signed the lease and, after checking with the trial attorney in Tulsa who told him it was okay, cashed the check. The trial attorney also told Walker that he would have to reimburse the lessee if the lease was not approved by the state court. On

91. *Bristow Resources, Inc. v. Unknown Successors of John Toney*, No. C-83-43 (Dist. Ct. Creek Co. Okla. 1983).

September 22, the landman approached Austin Walker again, this time at his cousin's home in Gore, Oklahoma. The landman was accompanied by an attorney who had formerly been a government trial attorney in the Muskogee Field Solicitor's office which had been closed five months earlier. The attorney had been retained as co-counsel by the lessee. He asked Austin Walker to complete an application for removal of restrictions which, if approved by the BIA, would make his lands freely alienable and would make the state court lease approval process unnecessary.⁹² Austin Walker refused. On October 4, 1983, the landman approached Austin Walker a third time and asked him to sign the lease approval petition to the Creek County District Court. This petition was prepared and filed as Proceeding No. FB-83-30 by the same attorney who filed the petition in FB-83-5. The hearing in FB-83-30 was scheduled for October 20, 1983.

Meanwhile, the trial attorney telephoned an appraiser retained by the BIA to obtain an appraisal of Austin Walker's property. The accepted procedure for trial attorneys required that they obtain a realty appraisal for every oil and gas lease approval hearing.⁹³ The trial attorneys utilize these appraisals to determine whether the price offered for a lease in court is adequate, and thus whether to object to lease approval by the court. However, the appraiser advised the trial attorney that since the land was producing oil and gas, it would take longer to prepare an accurate appraisal, apparently not in time for the October 20 hearing.

Although no current appraisal had been obtained by the trial attorney, the hearing was conducted anyway. The landman drove to Gore to pick up Austin Walker and deliver him to the district court in Sapulpa on the hearing day. At the hearing, in response to the trial attorney's questions, which were leading in nature and designed to elicit affirmative responses, Austin Walker testified to his ancestry, his ownership of the land, and his desire to lease it. No evidence was introduced regarding the substantial production of oil and gas from the land. Indeed, no mention was made, in so many words, of the four wells which had already been drilled. There was no competition in the courtroom for the lease, and it was approved on the same terms that Austin Walker had signed for, namely a \$4,000 bonus and a three-sixteenths royalty for a term of three years.

After the hearing Austin Walker was driven to the lessee's office in

92. See Act of Aug. 11, 1955, ch. 786, § 2, 69 Stat. 666, 667; see also 25 C.F.R. § 152.13 (1988).

93. Walker v. United States, 663 F. Supp. 258, 263 (E.D. Okla. 1987).

Bristow, Oklahoma, where, he had been told, he would be able to cash his bonus check. He was also asked to sign a "Bill of Sale," which by its brief and cryptic terms transferred to the lessee all rights to pre-existing production from the lease in consideration for the return to Walker of a three-sixteenths share of that production. The Bill of Sale contained no dollar figure or statement about the amount of production involved. However, Austin Walker was told that if he signed the Bill of Sale, he would receive a substantial royalty check before Christmas. The trial attorney was not present. No mention of the Bill of Sale had appeared in the lease approval petition in FB-83-30, nor was it mentioned in the court proceedings.

The following year, suspicious that he had not been treated fairly, Austin Walker retained a new attorney who filed a tort claim against the Department of the Interior, alleging legal malpractice on the part of the government trial attorney in Proceeding No. FB-83-30. This claim was administratively denied, primarily on the assertion of the trial attorney that Austin Walker had known of ongoing oil production on his land and that he had knowingly agreed to the lease and had otherwise waived his rights at the court approval hearing. Suits were then filed in both the Creek County District Court⁹⁴ and the United States District Court⁹⁵ against the lessee, the landman, and the private attorneys in both proceedings, and against the United States in the federal court proceeding. The private parties were dismissed from the federal proceeding on May 28, 1986. The court noted the pendency of the suit against the private parties in state court and exercised its discretion to exclude matters within the pendent jurisdiction of the federal court. Trial of the claim against the United States alone was held in the United States District Court in Muskogee on January 5-7, 1987, and judgment was rendered by United States District Judge H. Dale Cook on March 19, 1987.

Judge Cook found that the government trial attorney was negligent in failing to represent Austin Walker adequately. He specifically found that the trial attorney failed to advise Walker of the substantial oil and gas production on his land, failed to procure an independent appraisal for use at the state court lease approval proceedings, failed to seek a continuance of the state court hearing in order to obtain an appraisal, and failed to inform the state court fully of all relevant information regarding

94. Walker v. Elias, No. C-84-942 (Dist. Ct. Creek Co. Okla. filed Dec. 17, 1984).

95. Walker v. United States, No. 85-547-C (E.D. Okla. filed Aug. 30, 1985).

the proposed lease, including the fact that there were wells already engaged in substantial production of oil and gas from the land. Judge Cook further found that Austin Walker had no knowledge of the substantial oil production from his land at the time of the state court proceeding. Relying on the testimony of the former Regional Solicitor and other government trial attorneys at the trial, Judge Cook held that the failure of the trial attorney to obtain an up-to-date appraisal violated accepted procedures of the Regional Solicitor's Office. The court awarded the plaintiff \$685,368.00 in damages resulting from this negligence.

Of broader significance were Judge Cook's comments on the process of lease approval itself. He held that the procedure whereby the attorney for the prospective lessee prepares and files the lease approval petition on behalf of the Indian landowner "represents a complete breakdown in the fundamental principles of legal representation . . . This recognized and customary procedure for commencing approval hearings creates an inherent conflict of interest by the attorney's apparent dual representation."⁹⁶ He concluded:

The Court finds that the procedural aspects of the state court approval process are fatally flawed. There is no justification for the Department of the Interior to permit this type of procedural masquerade wherein the government's trial attorneys know first-hand that the private attorneys filing these petitions are bought and paid for by the Indian's adversary, i.e. the private attorneys' fiduciary client. Simultaneously the same private attorneys appear to be representing the Indian. The unsophisticated Indian would be justifiably confused and would justifiably rely to his detriment on any guidance from the adversarial private attorney It is the Department of Interior's responsibility to change this procedure. Until such time, the trial attorneys within the Office of the Solicitor cannot and must not solely rely upon representations made to them by the private attorneys to the exclusion of their independent judgment and responsibilities. To do so is negligence and a breach of their statutory duty to represent the best interests of their client—Indians within the Five Civilized Tribes who are title-holders of restricted Indian lands.⁹⁷

This indictment of a judicial procedure authorized by federal statute obviously has significance beyond the role and conduct of the government trial attorney. However, because the private attorneys and the oil and gas lessee were no longer parties to the federal court suit, Judge

96. *Walker*, 663 F. Supp. at 262.

97. *Id.* at 263.

Cook's findings of fact and conclusions of law pertained only to the responsibility and liability of the federal government. He specifically declined to rule on any duties or liabilities of anyone other than the United States.⁹⁸

With regard to the Bill of Sale executed after the state court proceeding, Judge Cook found that the United States was not liable because the trial attorney's duty to appear and represent the Indian landowner did not extend to any transactions that are outside the courtroom and not a part of the state court approval proceeding.⁹⁹

Austin Walker's claims against the other parties, including a malpractice claim against the private attorney and a claim to rescind the Bill of Sale, remained pending in Creek County District Court after the conclusion of the federal court proceedings. On December 20, 1987, Austin Walker's attorney served formal notice on the BIA Area Director in Muskogee of the pendency of these proceedings pursuant to section 3 of the Act of April 10, 1926.¹⁰⁰ This provision permits the United States to remove state court proceedings involving lands of the Five Tribes to the United States District Court, even though the federal government is not a party to the initial state court proceeding. On the recommendation of the Department of the Interior, the United States Attorney for the Northern District of Oklahoma did remove the case to the federal court in Tulsa on March 22, 1988.¹⁰¹ Consequently, the United States was then in the posture of supporting Austin Walker in his claims against the third parties. The case was ultimately settled, and did not, therefore, result in any rulings—parallel to those in *Walker v. United States*—on the duties and potential liabilities of private counsel in the representation of members of the Five Tribes at state court approval proceedings under the 1947 Act.

The initial case, however, received national publicity¹⁰² and was the subject of an October 26, 1987, oversight hearing of a subcommittee of the Committee on Appropriations of the United States House of Representatives.¹⁰³ This publicity, along with other adverse publicity on the federal administration of Indian affairs, also led to the creation of a new

98. *Id.* at 265-66.

99. *Id.* at 267, 268.

100. Act of Apr. 10, 1926, ch. 115, § 3, 44 Stat. 239-40; see also *supra* text accompanying note 69.

101. *Walker v. Elias*, No. 88-C-284-C (N.D. Okla. filed Mar. 22, 1988).

102. See *Indian's Oil, Identity Stolen*, Arizona Republic, Oct. 5, 1987, at A1; *Protection Fails While Oil Gushes*, Tulsa Tribune, Nov. 9, 1987, at A1, col. 1.

103. See *Dep't of the Interior and Related Agencies Appropriations for 1988: Hearings before a*

special investigative subcommittee of the Select Committee on Indian Affairs in the United States Senate.¹⁰⁴

IV. THE RESPONSE TO *WALKER V. UNITED STATES*

Judge Cook's criticism of the conveyance approval process centered on the role of the government trial attorney. This criticism is understandable since the United States was the only defendant remaining before the court, and federal liability hinged on the conduct of the trial attorney. For example, Judge Cook focused on the importance of the government's appraisal, a self-imposed management control to which the federal statute makes no reference, when he found that the failure of the trial attorney to obtain an appraisal prior to the lease approval hearing in FB-83-30 violated existing guidelines of the Solicitor's Office.

But it is evident from the language of Judge Cook's opinion and the transcript of the trial that he was troubled by more than the role and conduct of a single attorney. He took a broad look at the entire lease approval procedure, imposing the "responsibility" on the Interior Department to change the judicial procedure whereby attorneys for the prospective grantee file conveyance approval petitions on behalf of the Indian grantor.¹⁰⁵

At first blush, such a responsibility seems impossible to undertake. Certainly it is not customary to view federal executive branch officials as having any power to change state court procedures. Nothing in the 1947 Act or its precursors give federal officials that degree of authority, though clearly the Solicitor's Office could and should play an important *initial* role in reforming these processes. Judge Cook admonished the Department's trial attorneys that, until the procedure is in fact changed, they "cannot and must not solely rely upon representations made to them by the private attorneys to the exclusion of their independent judgment and responsibilities."¹⁰⁶ Immediately after the *Walker* decision, the Department's Solicitor sent a memorandum to the trial attorneys in the Regional Office reminding them: "In counseling the Indian owner, establishing the value of land involved, confirming the Indian owner's understanding of the transaction, and other issues in the proceedings, our

House Subcomm. of the Comm. on Appropriations, Part 12—Bureau of Indian Affairs, 100th Cong., 1st Sess., 21-25, 34-49 (1988) [hereinafter *House Hearings*].

104. S. RES. 381, 100th Cong., 2d Sess. (1988).

105. *Walker v. United States*, 663 F. Supp. 258, 263 (E.D. Okla. 1987); see *supra* text accompanying note 97.

106. *Walker*, 663 F. Supp. at 263.

staff serves as the attorney for the Indian owner and as the Indian's advocate in the proceedings."¹⁰⁷ Subsequently, after an extensive review of the judicial approval procedures, the new Regional Solicitor¹⁰⁸ sent a letter dated November 2, 1987, to each of the associate district judges in the forty Oklahoma counties where these proceedings are conducted, recommending a variety of changes in the manner in which conveyance approval is handled and advising the judges of the policies which will guide the conduct of the government trial attorneys.¹⁰⁹

A. *The Role of Private Counsel: The Problem of Dual Representation*

The letter to the judges focused first on Judge Cook's findings regarding the legal representation of the interests of the Indian landowner. While the government trial attorney ultimately holds that responsibility insofar as the scope of the conveyance approval petition is concerned, Judge Cook was greatly troubled by the local custom which permitted the prospective grantee's lawyer to file the petition on behalf of the Indian grantor, leading him to rely on that lawyer's counsel, possibly to his detriment.

Oil and gas leasing of inherited Indian lands of members of the Five Tribes, like the leasing of non-Indian lands, is initiated by a lawyer, landman, or other representative of the prospective developer, seeking out the landowners and attempting to persuade them to sign leases. Sometimes the Indian landowners receive earnest money, or "good faith" money, at the time of lease signing. But whether they receive such early remuneration or not, they must await district court approval of the lease before full payment of the negotiated lease bonus can be had. Correspondingly, the signed lease is unenforceable until court approval.¹¹⁰ Thus, in anticipation of the full bonus payment, the Indian landowner often becomes an advocate in favor of the lease: persuading other family members, who are tenants in common, to sign the lease and taking any

107. *House Hearings, supra* note 103, at 47. Meanwhile, the trial attorney in the *Walker* case resigned. The position of Regional Solicitor, which had been vacant for nearly a year, was filled on a temporary basis by Tim Vollmann, the Associate Solicitor for Indian Affairs in Washington, D. C., co-author of this article. The position of Chief Trial Attorney was filled by M. Sharon Blackwell, also co-author of the article.

108. Tim Vollmann was permanently assigned to the position of Regional Solicitor on August 31, 1987. Because of the dual authorship of the article, and for simplicity's sake, he will be referred to in the third person.

109. *See, e.g., House Hearings, supra* note 103, at 40-46.

110. *Springer v. Townsend*, 336 F.2d 397, 400 (10th Cir. 1964).

other steps necessary to speed the approval process and subsequent receipt of the lease bonus.¹¹¹

This advocacy then legitimizes, in the eyes of many Indian landowners, the ostensible representation of their interests by the attorney for the prospective lessee. After all or most of the Indian landowners have signed leases, they are approached by the lessee's attorney who has prepared the necessary petitions seeking court approval. This attorney obtains the landowners' signatures on the petitions; the landowners thereby become "petitioners" seeking approval of the lease. The attorney then customarily files the petition as "Attorney for Petitioners," promptly serving it on the government trial attorney with notice of the date of the anticipated approval hearing.¹¹² The 1947 Act requires that written notice of the hearing "shall be given to the probate attorney . . . at least ten days prior to the date on which the petition is to be heard."¹¹³ This notice is ordinarily the first time that the government trial attorney learns of the proposed lease or sale of Indian land. These notices are routinely received less than thirty days before the hearing date—since the district courts hear these matters on a once-monthly basis—and more often closer to the ten-day statutory time minimum.

It is impossible to ascertain how often the filing attorney discloses his or her representation of the lessee's interests to the Indian landowners as required by the Oklahoma Rules of Professional Conduct.¹¹⁴ However, the experience of the government trial attorneys is that many Indian landowners claim not to be aware of this conflict of interest. Indeed, some private attorneys have asserted in open court that they truly are the Indians' counsel under the procedures dictated by federal law.

The Regional Solicitor's letter advised the judges that, as a necessary

111. One step is to write to a member of Congress to seek assistance in pressuring the trial attorney to acquiesce in the lease terms already negotiated. *See infra* text accompanying note 146; *see also* letter from Ralph W. Tarr, Solicitor, U.S. Dep't of the Interior, to Senator David L. Boren (June 23, 1988) (response to Congressional inquiry regarding a trial attorney's advocacy for higher lease terms, despite the desires of one Indian landowner).

112. Each of the 40 district courts who hear these approval petitions has a set day each month for approval hearings. This is in part to facilitate the appearance of the government trial attorney since appearance conflicts in more than one court might otherwise be common. This procedure also serves the local Indian landowners who thus know when the trial attorney will be in town to answer questions regarding their restricted lands. The procedure derives from rules for county court proceedings adopted by the Oklahoma Supreme Court on June 14, 1914. *See supra* note 75 and accompanying text.

113. Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731.

114. OKLA. STAT. tit. 5, ch. 1, App. 3-A, Rule 1.7 (Supp. 1988); *see infra* text accompanying note 118.

result of the pre-petition transaction, the initial task of the government trial attorney is to disabuse the Indian "petitioners" of any idea that the filing attorney has an unimpaired, full attorney-client relationship with them. This is not a simple task, as the hearing date is imminent, and the trial attorney has in most instances not spoken to the Indian landowners before. Indeed, it was the trial attorneys' experience until recently that, when they received formal notice of the hearing, they often received no information on the whereabouts of the Indian petitioners, whom Judge Cook described as their "clients."¹¹⁵ Thus, the first opportunity, if any, that the trial attorneys have to confer in person with the petitioners is outside the courtroom on hearing day, usually only minutes before the scheduled hearing. Those hurried minutes are filled with a discussion of who actually represents the Indian petitioners' interests, a review of the BIA appraisal and a discussion of the value of the property, the resolution of disagreements among members of the landowning Indian family (not infrequent, given the lack of opportunity to discuss the transaction beforehand), and an explanation of the courtroom procedures, including the anticipated testimony of the Indian petitioners regarding the devolution of the estate from the original Indian allottee.

This cloakroom conference obviously falls far short of ideal attorney-client communications. Accordingly, the Regional Solicitor recommended to the judges that a partial solution to this problem would be for the court to require (1) that the filing attorney advise the Indian petitioners in writing that their interests would be represented by a government trial attorney, and (2) that the addresses and phone numbers (if any) of the Indian petitioners should be provided to the trial attorney by private counsel along with service of the petitions.¹¹⁶ A number of the judges adopted these procedures, and information on the whereabouts of the Indian petitioners has usually been made available to the trial attorneys since that time. Meanwhile, the trial attorneys have been instructed by their supervisors to seek continuances and object to hearings if they have not had an opportunity to communicate with an Indian petitioner "client" either by letter or by telephone prior to hearing day.

One may reasonably ask, as did Judge Cook,¹¹⁷ why a judicial procedure, whereby counsel for a prospective grantee is permitted to file pleadings nominally on behalf of an Indian grantor seeking approval of

115. *Walker v. United States*, 663 F. Supp. 258, 263 (E.D. Okla. 1987).

116. *House Hearings*, *supra* note 103, at 43.

117. *Walker*, 663 F. Supp. at 262-63.

the conveyance, is allowed to continue. The new Oklahoma Rules of Professional Conduct state: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not affect the relationship with the other client; and (2) each client consents after consultation."¹¹⁸

Full disclosure to informed Indian landowners, however, will not eliminate the conflict that such dual representation entails. Judge Cook also questioned whether the ostensible conflict of interest at Indian conveyance approval proceedings could be cured. He noted that it was the Indian landowner's objective to obtain the highest possible price in consideration for the alienation of his or her land, while it is the prospective grantee's objective to acquire the land at the lowest possible cost.¹¹⁹ Since it is a lawyer's obligation to represent a client competently¹²⁰ and to "exercise independent professional judgment and render candid advice,"¹²¹ Judge Cook's skepticism is undoubtedly justified.

In the aftermath of the *Walker* decision, some private attorneys have protected themselves from complaints of unethical conduct by announcing at the conveyance approval proceeding that, although they have filed the petition for the Indian landowner, they represent only the prospective grantee. Implicit in such an announcement is the expectation that the government trial attorney will represent the Indian landowner's interests. If the Indian landowners have previously been advised of this when they reviewed and signed the petitions prepared by private counsel, this announcement in open court is facially unobjectionable. However, it is the collective experience of the trial attorneys that this courtroom proclamation is sometimes offered to justify private counsel's previous efforts to undermine competition for the purchase of the Indian property interest at a higher price. Such efforts include scheduling the hearing on an irregular date,¹²² recording a "lien" on the property on behalf of the prospective grantee, publication of the proceedings in a newspaper not commonly circulated in the community—and therefore unlikely to engender the readership necessary to produce economic competition in the courtroom—and a variety of other efforts which may have

118. OKLA. STAT. tit. 5, ch. 1, App.3-A, Rule 1.7(a) (Supp. 1988); *see also supra* note 114.

119. *Walker*, 663 F. Supp. at 262.

120. OKLA. STAT. tit. 5, ch. 1, App. 3-A, Rule 1.1 (Supp. 1988).

121. *Id.* at Rule 2.1.

122. *See supra* note 112.

been undertaken by private counsel to obtain a low price for his true client, the purchaser.

Competition at a courthouse auction is the key to the fairness of the conveyance approval proceedings when they involve arms-length transactions such as oil and gas leases. Section 1 of the 1947 Act requires that notice of the petition and hearing be published "in at least one issue of a newspaper of general circulation in the county where the land is located,"¹²³ and provides that at the hearing "competitive bidding may be had and a conveyance may be confirmed in the name of the person offering the highest bid therefor"¹²⁴ The courts have construed the statutory competitive bid procedure to be optional.¹²⁵ Consequently, Indian petitioners have sometimes been asked to waive competitive bidding, as in the case of Austin Walker.¹²⁶ When any of these irregularities occur and competition might otherwise be a possibility, the trial attorneys have been instructed to seek a continuance of the hearing in order for BIA officials to run an advertisement in an industry publication which is more likely to stir interest in the minerals underlying the tract.¹²⁷

It is important to note that there is nothing in the 1947 Act which expressly requires counsel for the prospective grantee to file the lease or conveyance approval petition on behalf of the Indian landowner. The common authority in this area of practice, Semple's *Oklahoma Indian Land Titles Annotated*,¹²⁸ does not specifically state that the grantee's counsel should file the petition.¹²⁹ But, should the *government trial attorney* file the petition on behalf of the Indian landowner? This would provide ample opportunity for objective client communication, but it could also slow the whole transaction, arguably subjecting it to the burdened mechanics of the federal bureaucracy and making Indian tracts less attractive for oil and gas development. More importantly, such a procedure cannot be what Congress intended; the 1947 Act requires that notice of the petition and hearing "*be given to the probate attorney . . . at*

123. Act of Aug. 4, 1947, ch. 458, § 1(b), 61 Stat. 731.

124. *Id.* § 1(d), 61 Stat. at 732.

125. *See, e.g.*, Springer v. Townsend, 336 F.2d 397, 401 (10th Cir. 1964).

126. Walker v. United States, 663 F. Supp. 258, 264, 267 (E.D. Okla. 1987).

127. *See House Hearings, supra* note 103, at 46.

128. W.F. SEMPLE, OKLAHOMA INDIAN LAND TITLES ANNOTATED (1952) [hereinafter SEMPLE].

129. *Id.* § 138.

least ten days prior to the date [of the hearing.]”¹³⁰ Perhaps it was expected that Indian landowners would file their petitions *pro se*. However, the Act provides that “attorney fees and court costs, must be borne by the grantee.”¹³¹ This fuels the notion that Congress actually intended that a prospective grantee’s attorney should have the responsibility to file the Indian grantor’s petition. Although the 1947 Act procedures derive from 1914 Oklahoma Supreme Court rules,¹³² those rules shed no further light on the curious procedure whereby the grantee’s attorney files the conveyance petition on behalf of the Indian grantor.

The results can be anomalous. When a courtroom auction results in the sale of an Indian lease to a new bidder, unsuccessful bidders who originally retained private counsel to file the Indian petition have been heard to complain in the courtroom that they have gotten nothing for their expenditure of money, which frequently includes costs for title examination, geologists and other experts, and sometimes even their filing attorney’s retainer. Yet their erstwhile attorney is guaranteed payment of his or her fees from the successful bidder. (The courts have required the ultimate grantee to reimburse the initial bidder for those fees.) Correspondingly, the trial attorneys may face the courtroom opposition of their Indian clients who have the expectation of receipt of a bonus payment on the hearing day and are not impressed by advocacy which is seen as prolonging the proceedings.

An alternative within the literal reading of the federal statute would be for the Indian petitioners to retain private counsel to file the petition and advocate on their behalf, presumably side-by-side with the government trial attorney. If the prospective grantee also wants to be represented by private counsel, then there are at least three attorneys in the courtroom. This does happen on rare occasion, but both private attorneys should be paid by the ultimate grantee, according to the statute. This increases the cost of the process, and raises the question: Why would Congress have required that the Indian landowner be represented by *two* attorneys? The history of Indian land dealings in Oklahoma and the involvement of private attorneys who ostensibly “represented” the best interests of those landowners suggest that Congress did not intend such a result. Certainly, if there is a substantial disagreement between the government trial attorney and the Indian landowner’s private counsel

130. Act of Aug. 4, 1947, ch. 458, § 1(b), 61 Stat. 731 (emphasis added).

131. *Id.* § 1(c), 61 Stat. at 732.

132. *See supra* note 76 and accompanying text.

over what is best for the Indian landowner, Judge Cook's opinion in *Walker v. United States* makes it clear that the trial attorney must exercise "independent professional judgment."¹³³ At any rate, the reality of the Indian oil and gas lease transaction under the 1947 Act is that the prospective lessee will select the lawyer to file the petition on behalf of the Indian lessors in whatever manner that representation may be characterized.

B. *The Relationship of the Trial Attorney To Indian Petitioners: The Problem of Fractionated Ownership*

The anomalies in the 1947 Act are compounded by the modern reality that most restricted Indian tracts are owned in common by multiple family members. Often there are more than a dozen Indian interest owners, many of whom reside out of state. This makes attorney-client communication even more difficult.

Of particular concern is the requirement in the 1947 Act that the Indian "grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor . . ."¹³⁴ Private counsel customarily includes a statement in the petition by which the Indian grantor waives the requirement of his or her presence in the courtroom on hearing day. Sometimes a separate pleading so stating is later filed in the case—often on the day of the hearing. Seldom is such a request for waiver of appearance personally *written* by the Indian landowner. Thus, when the government trial attorney receives notice of the hearing, often as little as ten days beforehand, he or she has not only had no previous opportunity to discuss the case with the Indian client, but is also confronted with a statement that the client will not even be present at the hearing for any discussion of the value of the proposed lease or other exchange of information preceding court approval.

The 1947 Act places in the hands of the "probate attorney" the weighty decision of whether to waive the requirement of his or her client's presence. The Act makes the trial attorney's mutual consent to the nonappearance of an Indian petitioner a prerequisite to conveyance approval. Presumably, following the admonitions of Judge Cook in the *Walker* case, the trial attorney must exercise some independent judgment

133. *Walker*, 663 F. Supp. at 265.

134. Act of Aug. 4, 1947, ch. 458, § 1(b), 61 Stat. 731.

and thus be satisfied that approval of a lease or conveyance is indeed in the best interests of the absent Indian landowner who has already requested waiver of his or her appearance in writing. The state court judge may not compel the trial attorney's consent (though some trial attorneys have been admonished for declining to consent).

The waiver of an Indian petitioner's appearance was another important subject of the Regional Solicitor's November 2, 1987, letter to the state court judges. The letter advised the judges that since the written waiver of the Indian petitioner's presence at the hearing is usually obtained by agents for the prospective grantee, there is insufficient basis for reliance upon it. Furthermore, under the *Walker* ruling, the Indian grantor is entitled to government representation at the approval hearing, and mere reliance upon the written waiver could subject the United States to the risk of monetary liability. Accordingly, the judges were advised that the trial attorneys have been instructed not to consent to a hearing in the absence of Indian petitioners unless substantial evidence is presented to confirm the petitioners' informed waiver and their desire to alienate their property interests.¹³⁵ This practice has obstructed more than a few conveyance approval proceedings in the past two years. It has served, however, to increase the willingness of private counsel to provide information to the government trial attorney as to the whereabouts of all the Indian petitioners, thereby giving the trial attorney an opportunity to communicate with every Indian petitioner prior to the hearing.

This improved communication between the trial attorney and the Indian petitioners is, of course, no guarantee of a relationship of complete trust. The Indian petitioners do not have the luxury of choosing their government attorney. That attorney is sometimes perceived as nothing more than a bureaucratic obstacle to the Indian petitioners' receipt of their lease bonuses. As previously indicated, the steps the trial attorney may have to take to ensure that the Indian landowners are fully informed and receive a fair price may delay approval for weeks. Moreover, when a large and diverse family is leasing or conveying their common interests, some disagreement among the petitioners themselves on the disposition of their property is not uncommon. The trial attorney has been instructed to advise each Indian petitioner that, notwithstanding an earlier signature on a lease or deed, there is no legal obligation to lease or

135. *House Hearings, supra* note 103, at 45-46.

sell one's interest in land. If one or more petitioners withdraw, the property becomes less attractive for sale, to the potential detriment of the remaining petitioners.

These potential problems are a product of fractionated ownership of Indian allotments throughout Indian country and are not unique to the Five Tribes. What makes these problems more complex in eastern Oklahoma is the trial attorney's duty of representation under section 1 of the 1947 Act, as construed by Judge Cook in the *Walker* case, and the conflicts of interest that arise thereby. The trial attorney is not in a position to extricate himself from these conflicts, as he or she has a *statutory* duty to represent each restricted Indian landowner. Furthermore, withdrawal from representation in the short time frame of the approval process would likely mean that the Indian petitioners would not be represented at the court approval hearing, and this in turn would expose the United States to monetary liability under the precedent of *Walker v. United States*.

The duty of representation under section 1 of the 1947 Act must be contrasted to the discretionary authority to represent restricted Indians of the Five Civilized Tribes found in section 4 of the 1947 Act.¹³⁶ This distinction was not made in the *Walker* opinion.¹³⁷ Section 4 provides general authority to represent Indians of the Five Tribes in the state courts of Oklahoma in such matters as probates, partitions, and quiet title suits. When there are conflicts among putative Indian heirs in a probate, the trial attorney may withdraw from representation and recommend that the contestants hire private counsel. This discretion is recognized by Departmental regulation.¹³⁸ The duty of representation under section 1 is different. Section 1 charges the trial attorney with the responsibility of ensuring that the interests of Indian grantors are represented against the interests of a prospective grantee. Each of the Indian grantors are either willing to convey or lease their interests, or they are not. The trial attorney has no authority to make that decision for them.¹³⁹ If they decide to alienate their interests, the trial attorney must exercise independent professional judgment, under the *Walker* decision, to ensure that they get a fair price. If an Indian petitioner withdraws his or her consent to the proposed transaction, the trial attorney is obligated to move for dismissal of the petition with respect to the property interest

136. Act of Aug. 4, 1947, ch. 458, § 4, 61 Stat. 731, 733.

137. See *Walker*, 663 F. Supp. at 268.

138. See 25 C.F.R. § 16.3 (1988).

139. Cf. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968).

of the landowner who has withdrawn consent, whether the interest being conveyed is fractional or the entire property.

That exercise of independent judgment by the trial attorney may also precipitate conflicts between counsel and client. Judge Cook held that the trial attorney may not rely on the uninformed consent of an Indian petitioner.¹⁴⁰ But does the trial attorney have a duty to override the *informed* decision of an Indian landowner? If the BIA appraisal shows that the property is worth more than the price offered in court, but the Indian landowner wants to sell or lease for the offered price anyway, what is the trial attorney's duty? This dilemma arises both when all Indian landowners are present and when one or more are absent from the approval hearing.

The situation is usually more manageable when all are present. Each of the Indian landowners testifies to their informed desire to lease or sell the property for the offered price; the trial attorney offers evidence of higher value, objecting to approval at the lower, offered price; and the judge weighs the evidence and renders a decision to approve or not to approve the conveyance. In this role, the state court judge functions as an administrative decision-maker charged with the responsibility of acting in the best economic interest of the Indian landowner, according to federal court decisions,¹⁴¹ and the judge's decision will not be disturbed unless the court's discretion has been abused. The only remedy left to the trial attorney is to appeal, a right expressly conferred by the 1947 Act.¹⁴² The precedent fails to guide the trial attorney in his decision to pursue an appeal. But since independent judgment must be exercised, the desire of the Indian petitioners to complete the transaction cannot be controlling.

Last year an appeal of an oil and gas lease approval was filed with the Oklahoma Supreme Court.¹⁴³ The bonus was little more than half the appraised value, and this appeal has delayed drilling. The appeals process normally lasts many months, and if exercised often, would presumably discourage many Indian land transactions. Does the failure of a trial attorney to pursue an appeal from an approval of an Indian conveyance at less than appraised value subject the United States to liability for

140. *Walker*, 663 F. Supp. at 265.

141. *See, e.g.*, *United States v. Gypsy Oil Co.*, 10 F.2d 487, 492 (8th Cir. 1925); *United States v. Goldfeder*, 112 F.2d 615, 616 (10th Cir. 1940).

142. Act of Aug. 4, 1947, ch. 458, § 1(e), 61 Stat. 731, 732.

143. *In re Approval of Oil and Gas Leases on Allotted Lands of Sakiye Deo*, No. 71-165 (Okla. filed June 10, 1988).

the difference? Some discretion is presumably permitted, given the costs of appeal and questions which may arise regarding the validity of the appraisal.

The more common dilemma facing the trial attorney occurs when the offered consideration is below appraisal and the Indian landowners desire to go through with the deal anyway, but one or more of them is not present at the judicial approval proceeding. Under these circumstances the trial attorney must decide whether to consent to the absence of certain petitioners. As previously discussed, section 1 of the 1947 Act entrusts that decision to the trial attorney, not the court.¹⁴⁴ This responsibility sometimes gives the trial attorney the necessary leverage to force the price up to the appraised value. When the prospective lessee or grantee declines to increase the offer, the entire transaction can be delayed or squelched if the trial attorney refuses to consent to a petitioner's absence. If the absent petitioner's undivided interest is small enough, the bidder might be willing to acquire a lease to less than the whole estate and leave the trial attorney to the remedy of an appeal. Of course, the threat of an appeal may itself discourage consummation of the transaction.

Internal guidelines of the Regional Solicitor's Office, developed since the *Walker* decision, provide that a trial attorney may consent to the absence of a petitioner if the price offered "substantially meets the appraised value."¹⁴⁵ If the royalty rate offered for an oil and gas lease is less than that determined by the appraisal, the guidelines consider this to be *prima facie* evidence that the offer does not substantially meet the appraised value. In the latter instance, a royalty rate difference of one per cent could mean the loss of thousands of dollars in future royalty payments. The guidelines do permit the trial attorney to consent to a petitioner's absence under such circumstances if the petitioner is fully informed, has made a considered decision to accept the lower amount, and has directed the trial attorney in writing to consent to his or her absence.

This situation arose in an oil and gas lease approval proceeding in April 1988 in the district court in Okfuskee County.¹⁴⁶ Two of the seven

144. See *supra* text accompanying note 135.

145. T. Vollmann, Procedures and Guidelines for Trial Attorneys Appearing at Conveyance Approval Proceedings in Oklahoma District Courts Pursuant to Section 1 of the Act of August 4, 1947, 61 Stat. 731 at XII.C. (June 14, 1988).

146. *In re* Approval of the Oil and Gas Leases on Allotted Lands of Amanda Harjochee, No. PIA-88-1 (Dist. Ct. Okfuskee Co. Okla. Apr. 15, 1988).

Indian heirs could not be present at the hearing, but they desired that the lease be approved at an amount less than the BIA appraisal. When one of the Indian heirs, a college professor, was advised by telephone that the trial attorney would not consent to his absence at the hearing as long as the price was below appraised value, he wrote to a member of the Oklahoma congressional delegation complaining of the trial attorney's independent advocacy. Meanwhile, based on the heirs' express written direction to the trial attorney to consent to their absence, the trial attorney did so, and the lease was approved at the lower price, subject to the trial attorney's objection preserving the opportunity for appeal. After discussing the case and the underlying appraisal with BIA officials, the Regional Solicitor declined to appeal.

In sum, the administrative response to the decision in *Walker v. United States* has evidently improved the level and quality of the representation afforded Indian petitioners in these conveyance approval proceedings. However, the potential for abuse and confusion remains. Further, to ensure that the Indian petitioners are fully informed, the trial attorneys are now employing procedural devices which often lengthen the process—to the consternation of grantors and grantees alike. What should be evident from this description of the conveyance approval procedure under the 1947 Act is that it remains (1) confusing to both participating attorneys and the Indian landowners it is intended to protect; (2) troublesome from an ethical standpoint, given the opportunities for abuse, confusion, and misrepresentation; and (3) expensive—to the parties, to the judicial system, and to the taxpayer. This last characteristic has not been discussed, but should be apparent. The participation of at least two practicing attorneys, a judge, and a court reporter for every conveyance of restricted Indian land would seem overwhelming and unnecessary were it not for the evidence and experience indicating that Indian landowners are still not fully protected. The cost to the purchasing party is manifest; but is this cost being passed on to the Indian grantors? The going royalty rate for Indian oil and gas leases at state court approval proceedings in recent years has been three-sixteenths, and the trial attorneys take all advocacy steps necessary to raise the offered royalty rate to that level. Meanwhile, pursuant to current policy, living allottees of the Five Tribes receive the standard royalty rate of one-fifth for leases sold at BIA sales.¹⁴⁷ While the difference is less than one percent, it may

147. See 25 C.F.R. § 213.4 (1988).

be some indication of the costs attributable to the nature of the 1947 Act judicial proceedings.

V. LEGISLATIVE ALTERNATIVES FOR REFORM

The authors submit that, because of the expense, complexity, and latent unfairness of the conveyance approval process under section 1 of the 1947 Act, and because no amount of administrative, judicial, and professional revisions of the procedure can completely eliminate the conflicts inherent in this federally mandated judicial process, legislative reform by the United States Congress is necessary. Of course, stating this begs the question of what kind of legislation is desirable. Accordingly, we offer below several alternative legislative approaches and provide some discussion of the advantages and disadvantages of each. This discussion will necessarily touch the underlying continuous debate in Indian Country on what the proper role of the federal government is with regard to Indian land transactions in modern times—the era of Indian self-determination.

A. *Option #1: Legislative Elimination of All Federal Restrictions on the Alienation of Individual Indian Property Interests*

The language of section 1 of the 1947 Act has a curious rhythm. It begins with the statement:

[A]ll restrictions upon all lands in Oklahoma belonging to members of the Five Civilized Tribes, [however acquired], of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and are hereby, removed at and upon his or her death¹⁴⁸

But this evident relinquishment of federal responsibilities over inherited Indian lands is then followed by a lengthy proviso imposing the judicial approval process on any

conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same¹⁴⁹

Thus, in one section of a single public law, Congress imposed two Indian policies which appear to be diametrically opposed: one that purports to eliminate all federal restrictions on the alienation of lands owned

148. Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731.

149. *Id.* § 1(a)

by Indians of the Five Tribes, and the other that sets out a state court approval procedure for the alienation of interests in lands owned by half bloods. However, these policies can be reconciled if it is assumed that Congress foresaw the historical inevitability of miscegenation—at least insofar as persons of Native American descent are concerned—that the passage of time will inexorably lead to the removal of all federal restrictions from Indian land, since fewer and fewer landowners will retain even one-half Indian blood quantum. In light of this expectation (not to mention the passage of another forty-two years), one might ask if it is time to eliminate this discrepancy in treatment between Indians of half blood or more and all other landowners. Or, as stated by the Sooner lobbyists and congressional delegation in 1908 and 1947: Aren't contemporary Indian people in eastern Oklahoma, of whatever Indian blood quantum, fully capable of managing their own affairs in mainstream American society, including the alienation of their own real property? Frankly, the authors have often heard the latter hypothesis stated as follows: Indian landowners are just as likely to succumb to the conduct of a predatory oil and gas industry as are non-Indian landowners in rural Oklahoma.¹⁵⁰

One solution, then, to the perceived problem of what to do about individual Indian land transactions in the territory of the Five Tribes of eastern Oklahoma would be to eliminate the protections of federal law in their entirety, leaving half- to full-blood Indians in the same legal position as non-Indians and Indians of less than half blood. Thus, any claim of unfairness or fraud in a land transaction would have to be brought in Oklahoma state courts by invoking state law or common law with regard to real property. This would eliminate the objectionable judicial approval process under the 1947 Act and all costs attendant to it. No federal government administration or legal representation would be required or authorized. It would, in effect, terminate any federal restrictions upon members of the Five Tribes, except those imposed by federal statute on lands of those few original allottees who are still alive.

Of course, in this modern era of Indian self-determination, one might reasonably ask: What do the Indian people themselves want? We have not polled them, but we strongly suspect that the vast majority would be opposed to this final solution. There is persuasive evidence of a universal unwillingness to free restricted members of the Five Tribes of

150. For example, on May 9 and 18, 1989, the Special Committee on Investigations of the Senate Select Committee on Indian Affairs heard testimony to the effect that short-gauging of oil at the time of delivery to the refinery is a fact of life in the Oklahoma "oil patch," whether the lands are Indian or non-Indian.

federal restrictions on the alienation of their property: *Each of them already has this option to exercise on an individual basis, without any need for federal legislation to authorize it.* Federal statutes¹⁵¹ and BIA regulations¹⁵² permit the administrative removal of restrictions against alienation upon application of the Indian landowner. Yet, Indian landowners rarely avail themselves of that procedure.¹⁵³ Austin Walker himself declined to do so.¹⁵⁴

A partial explanation for this may lie in the property tax exemption which comes with continuing restrictions against alienation. Section 6(b) of the 1947 Act provides: "All tax-exempt lands owned by an Indian of the Five Civilized Tribes on the date of this Act shall continue to be tax-exempt in the hands of such Indian during the restricted period . . ." ¹⁵⁵ When restricted lands are sold and the sale proceeds are then applied to the purchase of other restricted lands, tax-exempt status continues, up to a limit of 160 acres.¹⁵⁶ However, the prevailing view among Indian landowners is that the retention of federal restrictions against alienation is necessary for the preservation of their tribal and family heritage.

It is an historical fact that allotment and statehood were imposed on the Indians of the Five Civilized Tribes over their collective objection.¹⁵⁷ Tribal government was replaced by state and county government, and the only "protections" afforded the individual Indians were the restrictions on the alienation of their small individual tracts, plus the tax-exempt status of those tracts. In the 1950's, congressional policy toward Indians in the United States officially turned toward the termination of tribal governments throughout the nation, along with the ending of federal services and protections.¹⁵⁸ But even this policy, now rejected by numerous federal commissions and policy statements,¹⁵⁹ recognized the moral imperative that Indian communities should first consent to federal

151. See, e.g., Act of Aug. 11, 1955, ch. 786, § 2(a), 69 Stat. 666-67.

152. 25 C.F.R. § 152.13 (1988).

153. Indeed, in 1978 when Congress amended the laws pertaining to Indians of the Osage Tribe, it authorized the BIA to revoke "certificates of competency" for any Osage Indian who applied for such revocation. Act of Oct. 21, 1978, Pub. L. No. 95-496, § 3(b), 92 Stat. 1660-61. Hundreds did so, thereby becoming "incompetent" in the eyes of federal law and subjecting their oil and gas interests to BIA administration.

154. See *supra* text accompanying note 92.

155. Act of Aug. 4, 1947, ch. 458, § 6(b), 61 Stat. 731, 733.

156. *Id.* § 6(c).

157. See *supra* text accompanying note 35.

158. See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 152-80 (1982).

159. See REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES 27-28 (Nov. 1984); S. REP. NO. 864, 93d Cong., 2d Sess. (1974).

termination before Congress would impose it.¹⁶⁰ Further legislative termination is thus both unlikely and unwise today. Indian people clearly do not want it.

B. Option #2: A Return to Administration of Indian Lands by the Bureau of Indian Affairs

Indian allotted lands in western Oklahoma and elsewhere in the American West are not subject to a state judicial approval process for alienation. Rather, leases and other transactions are administratively approved by officials of the Bureau of Indian Affairs (BIA).¹⁶¹ Indeed, conveyance approval for living allottees of the Five Tribes is administered by the BIA in the same fashion as for other Indian allotments outside eastern Oklahoma.¹⁶² For oil and gas leasing, which was generally authorized by statute in 1909,¹⁶³ the BIA conducts a competitive sale for a tract, and the high bidder must then sign up the individual Indian owners of undivided interests in the tract on BIA lease forms.¹⁶⁴ Alternatively, a prospective lessee may negotiate a lease with the Indian landowners and then seek BIA approval, but the BIA usually advertises the tract to insure that the highest possible price is being paid. Indeed, after the auction the Bureau of Land Management (BLM) does an appraisal of the minerals to insure that the high bid meets appraised value. If it does not, a lease is usually disapproved by the BIA.

After leasing, BLM officials supervise operations on the lease.¹⁶⁵ Applications for drilling permits are processed and approved by BLM officials who then receive and review monthly reports from the operator on the status of operations and the amount of production.¹⁶⁶ BLM inspectors periodically view the operations firsthand to determine whether diligent and prudent practices are being followed.¹⁶⁷ Meanwhile, royalty payments and accompanying reports are made to the Minerals Management Service (MMS) which is charged with the responsibility under the Federal Oil and Gas Royalty Management Act of 1982¹⁶⁸ for accounting

160. *See, e.g.*, 25 U.S.C. § 931 (1982).

161. *See, e.g.*, 25 U.S.C. §§ 396, 415 (1982).

162. *Compare* 25 C.F.R. Part 213 (1988) *with* 25 C.F.R. Part 212 (1988).

163. 25 U.S.C. § 396 (1982).

164. 25 C.F.R. § 212.4 (1988).

165. 43 C.F.R. Part 3160 (1987).

166. 43 C.F.R. § 3162.4-3 (1987).

167. 43 C.F.R. § 3161.3 and Subpart 3162 (1987).

168. 30 U.S.C. §§ 1701, 1757 (1982 & Supp. 1987).

for payments for production on Indian lands.¹⁶⁹ Prior to 1981, the current functions of BLM and MMS were conducted by officials of the Conservation Division of the United States Geological Survey.¹⁷⁰ These post-lease services are not routinely provided for leases on inherited, restricted lands of Indians of the Five Tribes, approved in state court pursuant to section 1 of the 1947 Act.¹⁷¹ Royalty payments were made directly to the Indian heirs even before the 1947 Act.¹⁷² Direct payment, without federal oversight, continues today.

As mentioned, the BIA administrative leasing procedures are also followed for the oil and gas leasing of allotments of Indians of the Five Tribes where the lessor is the original allottee.¹⁷³ Of course, few original allottees survive, but hundreds of oil and gas leases made through this administrative process in the past are held through continuous production and therefore subject to MMS royalty collection and BLM inspections, notwithstanding the intervening death of the original allottee. The question inevitably follows: Should inherited Indian lands of half bloods or more, now leased under the 1947 Act, be made subject to the administrative leasing procedures of the BIA? Should they also be given the protections afforded by MMS royalty accounting and BLM oversight of operations? This would eliminate the complexity, expense, and abuses of leasing in court under the 1947 Act and add a measure of post-leasing protections lost long ago. It would also relieve the burden of conveyance approval proceedings from district courts with overcrowded dockets.

This may seem attractive to those unfamiliar with the bureaucratic process. It certainly has the abstract attraction of uniformity of practice throughout Indian Country. But anyone familiar with the extent of the public criticism of these administrative processes in recent years¹⁷⁴ will likely be cautious before endorsing extension of them to inherited lands of Indians of the Five Tribes. The royalty management system, for one, has been criticized for the bureaucratic delay involved in getting payments to the Indian lessors—so much so that Indians have been encouraged to request direct payment from the lessee operator, with MMS accounting statements to follow. BLM inspections have been criticized

169. 30 U.S.C. § 1711(a) (1982).

170. SEMPLE, *supra* note 128, § 314.

171. SEMPLE, *supra* note 128, § 328.

172. *See Bradburn v. Shell Oil Co.*, 173 F.2d 815, 817 (10th Cir. 1949), *cert. denied*, 338 U.S. 818 (1949).

173. *See supra* note 163 and accompanying text.

174. *See Indian Hurt in Oil Deals*, Denver Post, Nov. 22, 1983, at 26; *Honor System License to Loot: U.S. Fails to Protect Oil on Indian, Federal Lands*, Arizona Republic, Oct. 4, 1987, at A1.

as ineffective, largely because public funding of this oversight function permits only rare inspections of each well on Indian lands. Presumably, expansion of this responsibility to hundreds of additional wells in eastern Oklahoma, without a concomitant raise in federal appropriations for this service, will make overall oversight of Indian oil and gas development even less effectual.

The administration of the BIA mineral leasing program nationwide has also been criticized. Many Indian landowners throughout the West have complained that BIA officials are captives of the oil and gas industry, rarely look out for their interests, and rarely advise them of their options as owners of natural resources. It is not the purpose of this article to evaluate either the validity of this criticism or the management of these three agencies of the Department of the Interior. We only note the fact of the public criticism to assist in evaluation of this legislative option. Additionally, however, there are legal anomalies inherent in this option. As pointed out above, oil and gas leasing of most Indian allotted lands, including those in western Oklahoma under the jurisdiction of the BIA Anadarko Area Office, is done pursuant to a 1909 statute. It provides that the allotted lands may be leased "by said allottee."¹⁷⁵ Not unlike lands of Indians of the Five Tribes, however, the passage of time has resulted in the fractionated ownership of these allotments. Probates of the estates of Indians owning interests in these trust allotments are conducted by administrative law judges within the Department of the Interior,¹⁷⁶ not by state courts. The pendency of these probates often delays administrative leasing. Consequently, in 1955 Congress amended the 1909 statute to permit the Secretary of the Interior to lease the land, after competitive bid, when "the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located"¹⁷⁷ This clearly facilitated leasing in some cases.

What Congress did not address was the situation where one heir, owning a fractional, undivided interest in the allotment, declines to sign the oil and gas lease. In common law situations, the prospective lessee may decide that, if the unconsenting interest is small enough, obtaining a lease from the majority consenting owners is adequate, and the unconsenting fraction is then carried as a working interest, rather than as a

175. Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 783.

176. 25 U.S.C. §§ 372, 373 (1982); 43 C.F.R. § 4.200 (1987).

177. Act of Aug. 9, 1955, ch. 615, § 3, 69 Stat. 539, 540; 25 U.S.C. § 396 (1982).

royalty interest.¹⁷⁸ That minority interest is then accounted to as a tenant in common who is entitled to a pro rata share of production, but is also liable for a pro rata share of the costs of production as an offset against gross revenues from the well.¹⁷⁹ BIA regulations had never addressed this situation. In January 1981, the Solicitor of the Department of the Interior issued an opinion in connection with the leasing of Navajo allotted lands for uranium mining in New Mexico endorsing this common law procedure for Indian allotted lands.¹⁸⁰ The BIA later proposed regulations which would have institutionalized the procedure.¹⁸¹ However, at the same time that the BIA was promulgating that proposal as a final regulation,¹⁸² a United States district court in New Mexico ruled that the Solicitor's 1981 opinion was erroneous because the 1909 statute, which requires leasing "by said allottee," does not permit leasing by less than unanimous consent of all the heirs.¹⁸³ While the judicial decision was not published in official reports (and indeed the case was later dismissed as moot), the outcry surrounding the decision resulted in the withdrawal of the BIA regulations.¹⁸⁴ The current proposed regulations do not include a procedure for leasing with less than unanimous consent.¹⁸⁵ The partition of trust allotments leased by the BIA has not been an effective solution either. Federal statutes permit administrative partition by the Secretary of the Interior,¹⁸⁶ but this authority is rarely exercised when the fractional interests are very small. BIA regulations permit partition,¹⁸⁷ though usually only by mutual consent.¹⁸⁸ In contrast, judicial leasing under the 1947 Act has never recognized this as a problem. The courts routinely approve leases of less than 100% undivided ownership. Title opinions reflect the need to account to unleased interests, and division orders routinely call for segregation of the revenues from unleased interests for future accounting.

In sum, the present statutory framework for administrative leasing of Indian allotted lands is also in need of reform or revision, and is not a

178. *See* *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924).

179. *Id.* at 573.

180. Memorandum from Solicitor Clyde O. Martz to Deputy Assistant Secretary—Indian Affairs (Jan. 5, 1981).

181. 48 Fed. Reg. 31,978 (1983) (proposed June 15, 1983).

182. 52 Fed. Reg. 31,916, 31,942, § 225.46(d) (Aug. 24, 1987).

183. *McClanahan v. Hodel*, 14 INDIAN L. REP. 3113 (D.N.M.) (Memo. Op. and Order Aug. 14, 1987).

184. 52 Fed. Reg. 35,702 (1987) (withdrawing as final rule and republishing as proposed rule).

185. 52 Fed. Reg. 39,332 (1987) (to be codified at 25 C.F.R. pts. 211, 212, 225).

186. 25 U.S.C. § 378 (1982).

187. 25 C.F.R. § 152.33 (1988).

188. *See, e.g., Sampson v. Andrus*, 483 F. Supp. 240 (D.S.D. 1980).

ready replacement for judicial proceedings under the 1947 Act. At a minimum, if BIA administration of leasing and conveyancing of restricted lands of members of the Five Tribes is considered desirable, legislation should be drafted independent of the current statutory framework for other allotted lands. A fresh approach will be necessary.

C. *Option #3: Revisions in the Judicial Approval Process of the 1947 Act*

If the wholesale elimination of the judicial approval process pursuant to section 1 of the 1947 Act is not desirable, then at least some revisions in the 1947 Act itself should be considered. This would be a legislative tune-up rather than an overhaul.

The primary issue that must be addressed in any such revision is the role of private counsel in filing the Indian landowner's petition. One apparent alternative not dramatically different from the current procedure would be for the prospective grantee or lessee, presumably through counsel, to send to the government trial attorney a lease or conveyance package, i.e., executed leases or deeds with the names, addresses, and phone numbers of the Indian landowners, *for filing in court by the government attorney*. Under this procedure, the trial attorney could assure himself or herself of the willingness of the Indian landowners to lease or convey and obtain an early appraisal of the proposed transaction, all before filing the petition. Prospective lessees or grantees may find this unpalatable, however, if it is perceived as placing a government official in the position of blocking the transaction indefinitely until it is in a form which is fully satisfactory in the subjective judgment of that government attorney.

Indeed, this procedure would raise the elementary question of the need for the judicial approval process itself, since the filing of the petition by the trial attorney would make the federal government an advocate for the transaction, along with the Indian landowners and the prospective purchaser. But for the courtroom auction, it would not be an adversarial proceeding at all. Rather, it would be an adjudicative permit process analogous to that conducted by a public utility commission or a federal agency such as the Federal Energy Regulatory Commission or the Interstate Commerce Commission. If this analogy is carried forward, one might ask, must the court give weight to the opposition of environmental organizations, nearby municipalities, or adjacent landowners? Such a

procedure could blur the central purpose of these state court proceedings: the protection of the interests of the Indian landowner.¹⁸⁹

A less troublesome alternative would be revision of the statute to require that the conveyance approval petition be filed by the prospective grantee, not the Indian landowner. This would eliminate, once and for all, the appearance and reality of a conflict of interest on the part of the grantee's counsel. A literal reading of section 1 of the 1947 Act would appear to permit this now.¹⁹⁰ It has been the uniform practice in the state courts, at least since the 1914 promulgation of rules by the Oklahoma Supreme Court,¹⁹¹ to treat the Indian grantors as petitioners. Perhaps only a change in state law or the rules of state district courts, as long as such a change is consistent with the 1947 federal law, needs to be made to authorize this new procedure. Thus, an amendment to the 1947 Act by Congress would not be necessary.

However, this revision would also appear to have a conceptual flaw. Proceedings under section 1 of the 1947 Act have been conducted under the assumption that *voluntary* conveyances are being approved. The need for a willing Indian seller or lessor is implicit in the reference to the Indian landowner as "grantor" rather than "condemnee." Legislation permitting the prospective grantee to file the petition could be interpreted as an authorization for a nonconsensual transaction, with the court acting as a *de jure* guardian. We must allow the Indian landowner to have the ultimate say on a proposed alienation *vel non*, and that should be made clear in any statutory revision.

These options for revision of the judicial approval process also have a very elementary flaw: They require the execution of a transaction as a jurisdictional prerequisite for the approval process. This itself can be a charade. Indian landowners may wish to lease their land for oil and gas development, but are unable to find a developer willing to make a satisfactory offer. Nevertheless, in order to avail themselves of the opportunity for a courtroom auction, they must execute a lease with *someone* so that there is a transaction for the court to approve. In contrast, BIA administrative oil and gas leasing allows for advertisement and a public sale at the behest of the Indian landowner alone.

Indeed, while clarification of the role of counsel may be the source

189. See *United States v. Gypsy Oil Co.*, 10 F.2d 487, 492 (8th Cir. 1925); see also *supra* text accompanying note 87.

190. See *supra* text accompanying notes 128-29.

191. Rules of Procedure in Probate Matters Adopted by the Justices of the Supreme Court of Oklahoma, Rule 10, — Okla. — (1914) (revised version at 47 Okla. xiv (1917)).

of concern to the bench and bar, the Indian landowner is presumably more concerned with the procedure for competitive bid. In an evident attempt to speed the alienation of inherited Indian land in eastern Oklahoma, Congress required only that ten days pass from the date of publication of the sale and hearing, and that the publication need only be made in the county where the land is situated. BIA administrative sales of Indian oil and gas leases appear in national trade journals with larger circulations. These advertisements routinely draw greater interest than county publications. BIA administrative sales are also published, in accordance with regulation, for a greater period of time prior to the sale, the minimum period being thirty days.¹⁹² As discussed above,¹⁹³ the trial attorneys and BIA officials now work together to seek more time and wider publication of attractive mineral properties subject to 1947 proceedings. But there is no guarantee that either the court or the Indian landowners will consent to the delay such a procedure may cause. Indeed, despite the admonition of Judge Cook, one district court recently denied the continuance for a government trial attorney who was unable to obtain a BIA appraisal in time for the hearing to approve a mineral deed.

Certainly then, wider and longer publication of the judicial sale should be a principal focus of any statutory revision of 1947 Act procedures. Other provisions in the 1947 Act, such as the appeals process, could also use some fine tuning. In 1947, county courts heard these conveyance approval petitions, and appeals were made to the district courts. The Oklahoma Constitution was amended in 1967¹⁹⁴ to eliminate county courts and give the district courts power of general jurisdiction. Thus appeals must now be made to the Oklahoma Supreme Court.¹⁹⁵ Recent experience has shown that the filing of an appeal in the Supreme Court effectively squelches the transaction entirely, since few buyers or lessees want to wait the many months or incur the additional cost necessary to confirm their acquired interests. If these transactions continue to be the subject of a judicial process, then provisions must be made for expedited appeals.

Clarification of the manner in which the interests of minors and incompetents are alienated is also needed. Section 1(f) of the 1947 Act provides that such sales "shall be made in conformity with the laws of

192. 25 C.F.R. § 212.4 (1988).

193. See *supra* text accompanying note 127.

194. OKLA. CONST. art. VII, § 7; 20 OKLA. STAT. ANN. §§ 91.1-91.6 (West 1962 & Supp. 1989).

195. See 1 Okla. Op. Att'y. Gen. 375 (1968).

the State of Oklahoma,"¹⁹⁶ notice to be given to the probate attorney at least ten days prior to the hearing. Clause (a) of the section, which imposes the judicial approval requirement, begins: "That except as provided in subdivision (f) of this section . . ."¹⁹⁷ Section 3(a) of the Act in turn gives exclusive jurisdiction to the state courts of Oklahoma over "all guardianship matters affecting Indians of the Five Civilized Tribes."¹⁹⁸ These provisions have sometimes been read together to mean that, but for the requirement of notice to the trial attorney, the sales of the interests of minors and incompetents may be conducted without regard to any of the procedural requirements and safeguards in section 1. This leads to an anomalous result: The interests of half-blood minors and incompetents receive less protection under the Act than do the interests of the competent half-blood adults.

To suggest that the appointment of a guardian was seen by Congress as a sufficient protection for the minor's interests is to imply, at best, considerable naivete on the part of Congress and at worst, a disregard for a shameful chapter in Oklahoma's early history. The naivete lies in the reasonable assumption that minors' guardians will be their own parents or grandparents, normally the very people whom the procedures in section 1 are intended to protect. Nor should we lightly impute congressional disregard for what Dr. Debo described as the "legalized robbery of the children through the probate courts."¹⁹⁹ A more enlightened interpretation of congressional intent in 1947 is that the judicial approval process was to apply to the interests of minors and incompetents, except to the extent that the detailed provisions of section 1 are in conflict with state law. At any rate, congressional clarification is sorely needed.

Section 4 of the 1947 Act authorizes the Interior Department trial attorneys to represent Indians of the Five Tribes in Oklahoma state courts in proceedings relating to their restricted lands.²⁰⁰ In years past, this authority has been primarily exercised by obtaining judicial determinations of death and heirship of deceased allottees for purposes of setting over allotments to restricted Indian heirs. In the past decade, however, as increased numbers of the original allottees and their heirs have died, the number of probates needed to distribute their restricted estates has likewise increased dramatically, and is now estimated to be in the

196. Act of Aug. 4, 1947, ch. 458, § 1(f), 61 Stat. 731, 732.

197. *Id.* § 1(a), 61 Stat. at 731.

198. *Id.* § 3(a), 61 Stat. at 732.

199. DEBO, *supra* note 1, at 182.

200. *See supra* text accompanying notes 87 and 136.

thousands. Consequently, the discretionary authority for government attorneys to represent these estates is now exercised only when substantial restricted interests are involved, the heirs cannot afford private counsel, or hardships will otherwise ensue. Further, when entitlement to the inheritance is in dispute among members of the decedent's family, the trial attorney must withdraw from representation due to the conflict of interest. As a result, a good number of small restricted estates have gone unprobated, and quiet title suits have become a costly prerequisite to any conveyance. The federal statute enacted in 1918²⁰¹ which provides for the probate of these estates in state courts, is thus also in drastic need of reform. One can justify neither the expense of a private attorney nor the expenditure of many hours of a government trial attorney's time to participate in the probate of property interests worth no more than a few hundred dollars each. To suggest that federal appropriations be sought to hire the government attorneys needed to eliminate this probate backlog simply begs the question. No amount of federal representation will resolve the problem created by this expensive and time-consuming process. A streamlined, less-costly procedure is needed. If Oklahoma district courts are to retain jurisdiction over restricted Five Tribes probate matters, state legislation to reform this process will be necessary. Federal legislation would be required to give the Interior Department administrative probate jurisdiction over the restricted lands of members of the Five Tribes similar to that exercised for other Indian allotments.²⁰²

Finally, if Congress is examining the need for revision of the 1947 Act, it would do well to also look at section 11. It provides:

All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: *Provided*, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.²⁰³

The meaning of this provision is not well understood. According to Semple, it was assumed that spacing orders of the Corporation Commission were not applicable to restricted Indian lands prior to the 1947 Act.²⁰⁴ Section 11 was an evident attempt to address the need for such regulation; and certainly today, inherited restricted lands are uniformly viewed

201. Act of June 14, 1918, ch. 101, 40 Stat. 606.

202. See *supra* notes 176-77 and accompanying text.

203. Act of Aug. 4, 1947, ch. 458, § 11, 61 Stat. 731, 734 (emphasis in original).

204. SEMPLE, *supra* note 128, § 334.

as being subject to those orders. Ordinarily, however, the BIA Muskogee Area Office approves neither the orders nor the communitization agreements negotiated among lessees in a spacing unit which includes inherited Indian land. Rather, the approval provision in the proviso of section 11 has been roughly viewed as applying only to the forced pooling of unconsenting interests in a spacing unit. On the other hand, such an interpretation of section 11 invites a complete circumvention of the judicial approval process in section 1. The BIA needs guidance on the scope of its authority and responsibility under this statute.

Perhaps the major objection to mere revision of the procedures in the 1947 Act, as opposed to a complete overhaul of the policies and procedures applicable to the alienation of restricted Indian land of the Five Tribes, is that the considerable expense of a judicial approval process would remain: attorney fees, court costs, and transcripts. Implicit in this objection is the ever-present question of whether a judicial process is necessary or desirable to effectuate the alienation of land.

D. *Option #4: Administration of Leasing and Conveyancing by the Indian Tribes*

If one is dissatisfied with conventional answers to complicated problems, such as the solutions addressed in sections V(A) and (B) above, and doubts the value of the legislative fine tuning suggested in the previous section, the authors invite examination of a truly dramatic option: the administration of alienation of restricted Indian realty by each of the Five Tribes themselves. This would be facially consistent with modern federal Indian policy, that of Indian tribal self-determination.

The Indian Self-Determination Act of 1975 directs the Secretaries of the Interior and Health and Human Services to contract with Indian tribes for the administration of federal Indian programs.²⁰⁵ Such contracting has increased markedly during the 1980's,²⁰⁶ and each of the Five Tribes administers significant components of BIA-funded programs. The Creek, Cherokee, and Choctaw Nations, for example, administer the BIA realty programs for tribal lands and the remaining restricted lands

205. Act of Jan. 4, 1975, Pub. L. No. 93-638, §§ 102-103, 88 Stat. 2206-07 (codified at 25 U.S.C. §§ 450f-450g (1982)), as amended by Pub. L. 100-472, 102 Stat. 2285 (1988).

206. For example, effective January 1, 1989, the Tribes under the administration of the Shawnee Agency, BIA, contracted almost all of the functions of that agency.

of individual members of the Tribes. Indeed, the government trial attorneys rely on the tribal employees to assist in communication with restricted Indian landowners and in the development of evidence necessary to defend quiet title actions, file probates, and pursue partition actions.

Of course, since the approval process for leases and conveyances of inherited restricted lands is administered by the state courts of Oklahoma as opposed to the Secretary of the Interior, that process cannot be contracted to the Tribes under existing law. Moreover, the simple superimposition of the existing scheme of the Indian Self-Determination Act on the conveyance approval process is not feasible because the exercise of purely “trust responsibility”-type functions cannot be delegated to Indian tribes under the Act.²⁰⁷ For example, the administrative decision to approve Indian leases and rights-of-way remains with the BIA even where all other realty functions have been contracted to a tribe. Thus, a tribal assumption of the conveyance/lease approval decision itself would involve a policy expansion not found in the Self-Determination Act. The legislative history of the Act shows that tribes wanted to assume various degrees of responsibility for the administration of federal programs for their people without severing or “terminating” the federal government’s trust responsibility for their natural resources reserved to them by treaty and statute.²⁰⁸ Today, with over fourteen years of experience under the Self-Determination Act, tribes might be willing to tread this additional policy expanse as long as there are statutory assurances that the tribal-federal relationship will not then be terminated by a simple snip of the federal budgetary scissors. This concern is not solely one of dollars and cents. Since Indian and tribal immunities from state taxation are often viewed by the courts as a function of federal preemption,²⁰⁹ the wholesale takeover by tribes of federal programmatic responsibilities—social, economic, and natural resource-based—could result in the elimination of such immunities. To avoid this, the tribal takeover would have to be authorized by a federal statute which provides explicit acknowledgement of continued tribal governmental status under the federal system with a concomitant freedom from state tax and regulation.

If the Five Tribes are willing to assume the responsibility for administering a process for the approval of conveyances and leases, then legislation to effectuate this transfer of responsibility must also address

207. 25 U.S.C. § 450j(f) (1982); 25 C.F.R. § 271.34(a) (1988).

208. See S. REP. NO. 762, 93d Cong., 2d Sess. 21 (1974).

209. E.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

the issue of review and enforceability. Indian tribes as sovereigns are immune from suit.²¹⁰ The Indian Civil Rights Act of 1968²¹¹ requires that tribes, in the exercise of the powers of self-government, accord persons the protections of the Bill of Rights, including due process of law and equal protection of the laws.²¹² However, the Act has been interpreted as not granting jurisdiction to federal courts to enforce these protections, except for the writ of habeas corpus, nor as generally waiving tribal sovereign immunity for purposes of enforcing such protections.²¹³ Many tribal governments have internal mechanisms for addressing grievances. However, at the time few Oklahoma tribes have developed their own tribal courts.

Thus, at a minimum, meaningful mechanisms for enforcement and review will have to be re-established, with adequate assurances that the exercise of this governmental responsibility will protect the rights of Indian landowners and grantees. The importance of this is not just a due process issue, as proper relief from erroneous decisions will be necessary to assure marketable titles in the future.

Accordingly, if the destinies of the governments of the Five Tribes are to include the addition of the responsibility for administration and oversight of transactions in the individual restricted lands of their members, it is incumbent upon the Indian citizens of each of these Tribes to insist that these emerging tribal institutions address their real needs. When such a consensus is achieved, then these important governmental functions may grow from the seeds of the Tribes' sovereignty.

VI. CONCLUSION

We believe that there is a need for statutory reform of the judicial approval process for conveyances and leases of restricted lands of members of the Five Civilized Tribes. This belief is based on fairness, pragmatism, cost, and the illicit historical origins of the current process. However, this article does not purport to be exhaustive of possible approaches, or even of the merits and demerits of the alternatives discussed. Further discussion is certainly needed, and the resolve of the Indian community and the bar to seek a new approach. It certainly seems appropriate to create a fair and effective system for the administration of

210. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

211. 25 U.S.C. §§ 1301-1303, 1311-1312, 1321-1326, 1331, 1341 (1982).

212. 25 U.S.C. § 1302(8) (1982).

213. *Santa Clara Pueblo*, 436 U.S. at 59.

restricted Indian lands in eastern Oklahoma as Oklahomans celebrate the 100th anniversary of the opening of former Indian lands to non-Indian settlement.

At the end of Dr. Angie Debo's preface to *And Still the Waters Run*, she offered this hope: "[W]ith an enlightened Federal policy . . . and a growing public awareness, I am even daring to hope that the lost fullbloods are being saved."²¹⁴ Seventeen years later we can and should grant her wish.

214. DEBO, *supra* note 1, at xxxi.

APPENDIX

THE ACT OF AUGUST 4, 1947

AN ACT

Relative to restrictions applicable to Indians of the Five Civilized Tribes of Oklahoma, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all restrictions upon all lands in Oklahoma belonging to members of the Five Civilized Tribes, whether acquired by allotment, inheritance, devise, gift, exchange, partition, or by purchase with restricted funds, of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and are hereby, removed at and upon his or her death: *Provided,* (a) That except as provided in subdivision (f) of this section, no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated; (b) that petition for approval of conveyance shall be set for hearing not less than ten days from date of filing, and notice of hearing thereon, signed by the county judge, reciting the consideration offered and a description of the land shall be given by publication in at least one issue of a newspaper of general circulation in the county where the land is located and written notice of such hearing shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition is to be heard. The grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor, and the court must be satisfied that the consideration has been paid in full. Proceedings for approval of conveyances by restricted heirs or devisees under this section shall not be removable to the Federal court; (c) the evidence taken at the hearing shall be transcribed and filed of record in the case, the expense of which, including attorney fees and court costs, must be borne by the grantee. The court in its discretion, when deemed for the best interest of the Indian, may approve the conveyance conditionally, or may withhold approval; (d) that at said hearing competitive bidding may be had and a conveyance may be confirmed in

the name of the person offering the highest bid therefor or when deemed necessary the court may set the petition for further hearing; (e) that the probate attorney shall have the right to appeal from any order approving conveyances to the district court of the county in which the proceedings are conducted within the time and in the manner provided by the laws of the State of Oklahoma in cases of appeal in probate matters generally, except that no appeal bond shall be required; (f) that sales of the interests of minor and incompetent persons shall be made in conformity with the laws of the State of Oklahoma. Notice of such sale shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition for sale is to be heard; (g) that nothing contained in this section shall be construed to modify or repeal the Act of February 11, 1936 (49 Stat. 1135), relating to leases for farming and grazing purposes.

SEC. 2. In determining the quantum of Indian blood of any Indian heir or devisee, the final rolls of the Five Civilized Tribes as to such heir or devisee, if enrolled, shall be conclusive of his or her quantum of Indian blood. If unenrolled, his or her degree of Indian blood shall be computed from the nearest enrolled paternal and maternal lineal ancestors of Indian blood enrolled on the final rolls of the Five Civilized Tribes.

SEC. 3. (a) The State courts of Oklahoma shall have exclusive jurisdiction of all guardianship matters affecting Indians of the Five Civilized Tribes, of all proceedings to administer estates or to probate the wills of deceased Indians of the Five Civilized Tribes, and of all actions to determine heirs arising under section 1 of the Act of June 14, 1918 (40 Stat. 606).

(b) The United States shall not be deemed to be a necessary or indispensable party to any action or proceeding of which the State courts of Oklahoma are given exclusive jurisdiction by the provisions of subsection (a) of this section, and the final judgment rendered in any such action or proceeding shall bind the United States and the parties thereto to the same extent as though no Indian property or question were involved: *Provided*, That written notice of the pendency of any such action or proceeding shall be served on the Superintendent for the Five Civilized Tribes within ten days of the filing of the first pleading in said action or proceeding. Such notice shall be served by the party or parties causing the first pleading to be filed. Section 3 of the Act of April 12, 1926 (44 Stat. 239), shall have no application to actions or proceedings covered by the provisions of subsection (a) of this section.

(c) No action or proceeding in which notice has been served on the Superintendent for the Five Civilized Tribes pursuant to the provisions of section 3 of the Act of April 12, 1926 (44 Stat. 239), shall be removed to a United States district court except upon the recommendation of the Secretary of the Interior or his duly authorized representative. The United States shall have the right to appeal from any order of remand entered in any case removed to a United States district court pursuant to the provisions of the Act of April 12, 1926 (44 Stat. 239).

(d) Nothing contained in this section shall be construed to limit any right of appeal.

SEC. 4. That the attorneys provided for under the Act of May 27, 1908 (35 Stat. 312), are authorized to appear and represent any restricted member of the Five Civilized Tribes in Oklahoma before any of the courts of the State of Oklahoma in any matter in which the said restricted Indian may have an interest.

SEC. 5. That all funds and securities now held by, or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until otherwise provided by Congress, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe.

SEC. 6. (a) Except as hereinafter provided, the tax-exempt lands of any Indian of the Five Civilized Tribes in Oklahoma shall not exceed one hundred and sixty acres, whether the said lands be acquired by allotment, descent, devise, gift, exchange, partition, or by purchase with restricted funds.

(b) All tax-exempt lands owned by an Indian of the Five Civilized Tribes on the date of this Act shall continue to be tax-exempt in the hands of such Indian during the restricted period: *Provided*, That any right to tax exemption which accrued prior to the date of this Act under the provisions of the Acts of May 10, 1928 (45 Stat. 495), and January 27, 1933 (47 Stat. 777), shall terminate unless a certificate of tax exemption has been filed of record in the county where the land is located within two years from the date of this Act.

(c) Any interest in restricted and tax-exempt lands acquired by descent, devise, gift, exchange, partition, or purchase with restricted funds,

after the date of this Act by an Indian of the Five Civilized Tribes of one-half or more Indian blood shall continue to be tax-exempt during the restricted period: *Provided*, That the tax-exempt lands of any such heir, devisee, donee, or grantee, whether acquired by allotment, descent, devise, gift, exchange, partition, or purchase with restricted funds, shall not exceed one hundred and sixty acres in the aggregate: *Provided further*, That nothing contained in this subsection shall be construed to terminate or abridge any right to tax exemption to which any Indian was entitled on the effective date of this Act.

(d) Nothing contained in this section shall be construed to affect any tax exemption provided by the Act of June 26, 1936 (49 Stat. 1967).

(e) On or before the 1st day of January of each year following the date of this Act, the Superintendent of the Five Civilized Tribes shall file with the county treasurer of each county in the State of Oklahoma where restricted Indians' lands of any type of members of the Five Civilized Tribes are situated, a statement showing what lands are regarded as tax exempt, and the names of the Indians for whom the lands are claimed as tax exempt. Before a county treasurer shall proceed to sell any restricted land for delinquent taxes, it must appear from the records of the office of the county treasurer that a list of the tracts included in the proposed sales of land for delinquent taxes in said county has been sent by registered mail to the Superintendent for the Five Civilized Tribes at Muskogee, Oklahoma, at least ninety days before the date fixed by the laws of the State of Oklahoma for sales of land for delinquent taxes.

SEC. 7. All removals of restrictions and approvals of deeds heretofore made by the Secretary of the Interior, regardless of whether applications were made therefor by the Indian owner, are hereby validated and confirmed.

SEC. 8. That no tract of land, nor any interest therein, which is hereafter purchased by the Secretary of the Interior with restricted funds by or for an Indian or Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, shall be construed to be restricted unless the deed conveying same shows upon its face that such purchase was made with restricted funds.

SEC. 9. That all conveyances, including oil and gas or mineral leases, by Indians of the Five Civilized Tribes in Oklahoma of lands acquired by inheritance or devise, made after the effective date of the Act of January 27, 1933, and prior to the effective date of this Act, that were approved either by a county court in Oklahoma or by the Secretary of the Interior

are hereby validated and confirmed: *Provided*, That if any such conveyance is subject to attack upon grounds other than sufficiency of approval or lack of approval thereof, such conveyance shall not be affected by this Act.

SEC. 10. Section 2 of the Act of June 26, 1936 (49 Stat. 1967), commonly known as the Oklahoma Welfare Act, shall be amended by the addition of a new paragraph as follows:

“The preference right of the Secretary to purchase shall be considered as waived where notice of the pendency of sale is given in writing to the Superintendent of the Five Civilized Tribes for at least ten days prior to the date of sale and the Secretary does not within that time exercise the preferential right to purchase.”

SEC. 11. All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: *Provided*, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

SEC. 12. Sections 1 and 8 of the Act of January 27, 1933 (47 Stat. 777), are hereby repealed.

SEC. 13. All Acts and parts of Acts in conflict herewith are hereby repealed.

Approved August 4, 1947.