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# BORROWING FROM BLACKACRE: EXPANDING TRIBAL LAND BASES THROUGH THE CREATION OF FUTURE INTERESTS AND JOINT TENANCIES

STACY L. LEEDS\*

## I. INTRODUCTION

In a companion article entitled *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*,<sup>1</sup> I encouraged tribal governments to reject certain aspects of the Anglo-American property regime, and instead, look to tribal property laws<sup>2</sup> for solutions to the contemporary land tenure problems that plague Indian country.<sup>3</sup>

I suggested that tribal attorneys concentrate on reviving traditional tribal property laws, rather than relying wholesale on the property law lessons learned in the property law courses at American law schools.<sup>4</sup> A revitalization of tribal property law, I concluded, would prove particularly helpful in addressing problems of fractionated ownership throughout Indian

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1. Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL'Y 491 (2001).

2. *Id.* at 495-96. The tribal property laws at issue in the *Burning of Blackacre* were various property laws enacted by the Cherokee Nation between 1808 and 1898 and less formal customary laws that mirror their codified counterparts. *Id.*

3. For a discussion of contemporary land tenure problems throughout Indian country, see generally Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, (2003) WISC. L. REV. 729 (2003); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); Mary Christine Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1474-75 (1994); Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595 (2000); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

4. Several other commentators have suggested a shift away from Anglo-American law and a revitalization of tribal laws in other substantive areas. See generally Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. STATE L.J. 889 (2003); Christine Zuni Cruz, *On the Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229 (2000); G. William Rice, *Of Cold Steel and Blueprints: Musings of an Old Country Lawyer on Crime, Jurisprudence, and the Tribal Attorney's Role in Developing Tribal Sovereignty*, 7 KAN. J.L. & PUB. POL'Y 31 (1997); and Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

country.<sup>5</sup> In essence, a traditional tribal property law scheme would provide better solutions for dealing with the legacy of forced land allotment.

In discussing the detrimental legacy of allotment,<sup>6</sup> *The Burning of Blackacre* addressed one of the many problems plaguing tribal land tenure: highly fractionated property interests.<sup>7</sup> This article will discuss another issue of importance to tribes: the diminishing tribal land base inside Indian country.<sup>8</sup> In contrast to the initial article, which rejected Anglo-American property laws in favor of tribal law, this article encourages tribes to utilize the Anglo-American legal tools to the tribes' advantage in restoring the tribal land base. Thus, instead of conceptually setting fire to the estate of Blackacre,<sup>9</sup> this article borrows from Blackacre's traditions.

Part two of this article describes the devastating effect of the federal allotment policy on two fronts: (1) the loss of tribal land base within Indian country and (2) the destruction of local tribal economies. Part three proposes a plan for tribal governments to re-acquire non-Indian owned fee lands within their territories by the creation of future interests and joint tenancies.<sup>10</sup> Part four details how tribal economies will be revived after the

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5. Indian country is a legal term of art that will be used through the article to represent both a political and a territorial tribal jurisdictional area which is conceptually broader than the typical "reservation." "Indian country" is statutorily defined in 18 U.S.C. § 1151 as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." The term Indian country originated for use in determining federal criminal jurisdiction and has also been utilized in delineated civil jurisdiction. *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975). *But see Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001) ("Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land.")

6. The "legacy of allotment" throughout this article refers to the negative consequences of the federal allotment policy. Professor Judith Royster authored the seminal piece on the allotment process from which the phrase is attributed. *See generally Royster, supra* note 4.

7. Fractionated property interests result from multiple co-owners having fractional interest in land. The allotment process has led to most Indian lands having dozens of owners. *See JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY*, 712-14 (2001). The problem of fractionated ownership, although prolific throughout Indian country, is also prevalent in other communities of color, particularly in the rural south. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Land Ownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001).

8. The proposals set forth in this article are geographically limited in scope to lands located within Indian country, although tribes may wish to employ similar methods for expanding land bases outside of their current territorial or political boundaries.

9. The term Blackacre is a fictitious estate in land, used in legal discourse, particularly in first year law school hypotheticals in property law. Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2171 (1985).

10. Although the proposal would be equally successive if applied to fee lands owned by tribal citizens, this article does not encourage tribes to acquire fee lands from its citizenry. It is

tribe reacquires property interests from non-Indian owners. Part five concludes by charging tribes to consider these proposals together with the previous proposals in *The Burning of Blackacre*.

## II. THE ALLOTMENT PROCESS

The federal allotment policy of the late nineteenth century,<sup>11</sup> which converted the tribal land base into small parcels of individually-owned property, has rendered most tribal economies unviable.<sup>12</sup> The effects of the allotment policy, although long criticized, continue to limit economic development for both private endeavors of individual Indians and sustainability of tribal economies.

The allotment policy, as a social experiment, was designed to assimilate individual Indians into mainstream American society.<sup>13</sup> The allotment policy, as an economic experiment, was designed to transform individual Indians into capitalists who would put their privately-owned lands to more efficient use, with an eye toward full self-sufficiency.<sup>14</sup>

important for tribal communities to have private rights to property and private economic enterprise, just as they did during the pre-allotment period. For suggestions on ensuring that Indian fee remains in Indian ownership, see generally Leeds, *supra* note 2.

11. The General Allotment Act of 1887 set the federal allotment policy in motion. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-381 (1887)) (also referred to as the Dawes Act, for the sponsor of the legislation).

It is important to note that allotment was often effectuated through tribal-specific legislation based on agreements between the federal government and the various tribes. Thus, the size of allotments, the restrictions on alienation, and the periods of exemption from state taxation differ from tribe to tribe. The Atoka Agreement with the Choctaw and Chickasaw Tribes, Act of June 28, 1898, ch. 517, 30 Stat. 495 (ratified August 24, 1898) (stating lands were to remain nontaxable while title remained with the original allottee for a period of twenty-one years). Under the General Allotment Act, lands were to be held in trust for a period of twenty-five years. 24 Stat. 389 (25 U.S.C. § 348 (1887)). See also *Choate v. Trapp*, 224 U.S. 665 (1912) for general discussion of allotment exemptions to state taxation.

12. One of the most commonly cited problems within Indian country is the lack of available financing due to lands being held in trust after allotment. John McGee Ingram, *Home Ownership Opportunities in Indian Country*, 7 J. AFFORDABLE HOUS. & CMTY. DEV. L. 164, 164-65 (1998) (discussing barriers to home ownership). "Economic development on many reservations is only a dream, individuals can't find capital for investments in business—and trust land is the culprit." David Melmer, *Economics of Trust Land Ownership*, INDIAN COUNTRY TODAY, available at <http://www.indiancountry.com/content.cfm?id=1096410565> (Mar. 18, 2005). See also Carl G. Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. REV. 231, 233-52 (1997); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 718-19 (2001).

13. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?* 80 OR. L. REV. 757, 812 (2001).

14. See *id.* at 814. I suggest throughout this article that there were both social and economic reasons for allotment. A secondary goal of the allotment process is to increase economic self-sufficiency among Indian people. Most commentators have focused on the allotment policy's goals to civilize and Christianize Indians en route to American citizenship.

### A. IGNORING INDIVIDUAL PROPERTY RIGHTS

Proponents of allotment convinced Congress that Indians did not understand or value individual property rights.<sup>15</sup> Allotment, they believed, would ideally teach Indians the importance of individual property rights to better prepare them for American citizenship.<sup>16</sup> Although a growing number of contemporary scholars have refuted the notion of tribal communal ownership by providing evidence of extensive private property rights at tribal law, the federal government simply disregarded the existence of tribal property laws in effect at the time of allotment.<sup>17</sup> The federal government also ignored the opposition of Indian people who were content with tribal property law regimes.<sup>18</sup> In doing so, the rights of the individual Indians, which were otherwise protected under tribal law, were ignored to make way for the forced allotment of tribal lands.<sup>19</sup> Sometimes, the forced allotment actually reduced the land holdings of individual Indians, as

15. Bobroff, *supra* note 4, at 1567-68.

16. *See generally id.*

17. *Id.* at 1571-72.

18. Choate v. Trapp, 224 U.S. 665, 667-68 (1912) (noting the Dawes Commission found many Indians were opposed to allotment); Hagen v. Utah, 510 U.S. 399, 433 (1994) ("Indians were overwhelmingly opposed to allotments.") As the *Hagen* Court noted, after almost a week of negotiations, only 82 of 280 adult Ute men would agree to allotment. *Id.* The same opposition is evidenced in *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903).

19. In fact, it was not just tribal property laws that were ignored in the allotment process. The federal government ignored previous fee patents and their own treaty guarantees to allow for forced allotment of lands. *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902). The Cherokee lands that were allotted had previously been conveyed to the tribe in fee simple absolute, not subject to any federal trust oversight. *Id.* at 298. The language of conveyance in the deed reads,

Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant, unto the said Cherokee Nation the two tracts of land so surveyed and hereinbefore described, containing in the whole fourteen millions, three hundred and seventy-four thousand, one hundred and thirty-five acres, and fourteen-hundredths of an acre, *to have and to hold the same, together with all the rights, privileges, and appurtenances thereto belonging to the said Cherokee Nation forever*; subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article, and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved; and subject also to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-recited third article, and which condition is, that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same.

*Id.* (conveying lands to the Cherokee Nation on December 31, 1838) (emphasis added). The only restrictions contained in the deed is a permissive right in the form of a license to access salt plains and a reversionary interest in the United States shall the Cherokee Nation become extinct or abandon its property claims. *Id.* at 298.

evidenced by the testimony of an Indian farmer who lost substantial land holdings as a result of allotment:

Under our old Cherokee regime I spent the early days of my life on the farm up here of 300 acres, and arranged to be comfortable in my old age . . . . When I was assigned to that 60 acres, and I could take no more under the inexorable law of allotment enforced upon us Cherokees, I had to relinquish every inch of my premises outside of that little 60 acres . . . . What am I going to do with it? For the last few years . . . I have gone out there on that farm day after day . . . I have exerted all my ability, all industry, all my intelligence . . . to make my living out of that 60 acres, and, God be my judge, I have not been able to do it . . . . I am here to-day [sic], a poor man upon the verge of starvation—my muscular energy gone, hope gone. I have nothing to charge my calamity to but the unwise legislation of Congress in reference to my Cherokee people.<sup>20</sup>

Once an individual allotment was conveyed to the allottee, the land was then governed by Anglo-American law, most often the laws of the surrounding state.<sup>21</sup>

In addition to highly fractionated estates, the allotment process resulted in a catastrophic loss in tribal land base.<sup>22</sup> Estimates suggest that by 1934, the allotment process resulted in the loss of 86 million acres of Indian-

20. D.W.C. Duncan, *How Allotment Impoverishes the Indians: Testimony Before a Senate Comm. Investigating Conditions in the Indian Territory, November 1906*, in GREAT DOCUMENTS IN AMERICAN INDIAN HISTORY 287-88 (Wayne Moquin & Charles Van Doren eds., 1973), also cited in Bobroff, *supra* note 4, at 1603.

21. 25 U.S.C. § 348 (1887). Federal legislation extends state intestacy laws into Indian country to govern inheritance of restricted trust allotments. Richard A. Monette, *Governing Private Property in Indian Country: The Double Edged Sword of the Trust Relationship and Trust Responsibility Arising out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 40 (1995) (detailing the problem of applying state laws inside Indian country and aptly noting that the General Allotment Act provides for the application of state law, not state jurisdiction). See also Jeffrey S. Kinster, *Native American Restricted Allotments: A Surviving Spouse's Elective Share Rights*, 20 OHIO N.U. L. REV. 263, 268-71 (1993) (discussing state law applicability in testamentary disposal of allotments and in intestate succession).

Congress has attempted to remedy further fractionation of Indian allotment by proposing that certain small interest escheat to the tribe at death of a co-owner, but the legislation has failed as an impermissible taking of property interests without just compensation. *Hodel v. Irving*, 481 U.S. 704, 707 (1987); *Babbit v. Youpee*, 519 U.S. 234, 237-38 (1997); Note, *Babbit v. Youpee: Allotment and the Continuing Loss of Native American Property and the Right to Devise*, 19 HAW. L. REV. 265, 271-74 (1997).

22. Royster, *supra* note 4, at 6. Professor Judith Royster has characterized the allotment policy as "the greatest and most concerted attack on territorial sovereignty of the Indian tribes." *Id.* (citing FELIX S. COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 78-79 (Rennard Strickland ed. 1982)). Professor Bobroff aptly notes that allotment was "an unquestionable disaster." See Bobroff, *supra* note 4, at 1559.

owned land.<sup>23</sup> Other estimates suggest that by the end of the allotment era, two-thirds of all the land allotted passed into non-Indian ownership.<sup>24</sup>

## B. IGNORING TRIBAL ECONOMIES

In addition to overlooking or ignoring tribal property laws in the push for allotment, the federal government also ignored the existence of tribal economies. Proponents of allotment argued that Indians would be more self-sufficient if they became private property owners because, without private property, there was no incentive for economic progress.<sup>25</sup> What the allotment proponents ignored, was the fact that many tribal communities were already self-sufficient, with growing economies, at the time the lands were allotted.<sup>26</sup>

These allotment proponents presupposed that all tribal economies were non-existent, or at best, severely depressed. Undoubtedly there were some tribal communities that were nearing starvation, just as there were economically depressed non-Indian communities at the time. But some tribal communities had successful local economies that were destroyed by allotment: "Before this allotment scheme was put in effect in the Cherokee

23. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 20 (1987). Professor Royster reports similar figures, estimating that 27 million acres were lost from lands allotted to Indian people and another 60 million acres lost as a result of the surplus lands acts. Royster, *supra* note 4, at 12-13.

24. See Royster, *supra* note 4, at 12; Bobroff, *supra* note 4, at 1561.

25. Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 675 (January 1999) (stating,

The Commissioner explained in 1888 that "the degrading communism of the tribal-reservation system gives to the individual no incentive to labor, but puts a premium upon idleness and makes it fashionable. Under this system, the laziest man owns as much as the most industrious man." Allotment was to replace the Indian's "communism" with selfishness: "[H]e must be imbued with the exalting egotism of American civilization, so that he will say 'I' instead of 'We,' and 'This is mine,' instead of 'This is ours.'")

26. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L.REV. 1559, 1605 (May 2001)

The Council of the Seneca Nation of New York Indians sent a memorial to Congress opposing allotment: Under the present system by which the Senecas, with a constitutional form of government, regulate and control all their own affairs, they are rapidly improving in their social condition. Agriculture flourishes, the houses and farms of the Indians are constantly improving, the people are contented and prosperous, and there are no paupers to be a burden on the community. Many have cattle, horses, and crops in abundance. . . . [T]his condition of independence and prosperity is largely due to the system by which the lands are owned in common, controlled by the national councils, and are permanently inalienable.

(quoting *House of Representatives Executive Document No. 83*, 47th Cong., 1st Sess. 2 (1882)).

Nation we were a prosperous people. We had farms[,] . . . . Orchards and gardens—everything that promoted the comforts of private life . . . .”<sup>27</sup>

One would expect that Indian people opposing allotment would exaggerate the economic successes of their pre-allotment communities, but one would suspect the advocates of allotment to provide a more damning description of tribal economic conditions. This was simply not the case. Even the Senator who sponsored the General Allotment Act recognized the existence of sustainable tribal economies in the pre-allotment period.<sup>28</sup> After a trip to the Cherokee Nation, Senator Dawes of Massachusetts noted,

The head chief told us that there was not a family in that whole nation that had not a home of its own. There was not a pauper in that nation, and the Nation did not owe a dollar. It built its own capitol and it built its schools and its hospitals. Yet the defect of the system was apparent. They have gone as far as they can go, because they own their land in common . . . and under that there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress.<sup>29</sup>

I quote Senator Dawes, not to suggest a flawless Cherokee pre-allotment utopia, but to highlight the irony of the allotment process: the allotment process was founded on the notion that if Indians would embrace individual ownership in land, they would enjoy a better economic condition.<sup>30</sup> As a direct result of allotment, individual Indian ownership is virtually non-existent and Indian tribes are more economically dependant today than at the time of allotment.

In the Cherokee Nation, as in other tribal communities, the federal government ignored that the Cherokees already had enforceable individual property rights and a successful tribal economy. The tribe was 100% self-sufficient and debt free.<sup>31</sup> One hundred years later, only a small percentage of the land allotted to Cherokee Indians remains in Cherokee hands, and likely not a single parcel of restricted Indian land is individually owned property, but instead, encumbered with multiple co-owners of fractional

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27. Duncan, *supra* note 21, at 287-88; Bobroff, *supra* note 4, at 1603.

28. PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF FRIENDS OF THE INDIANS 43 (1886); *see also* Bobroff, *supra* note 4, at 1565.

29. Bobroff, *supra* note 4, at 1564.

30. *Id.*

31. *Id.*



interest. Rather than the vibrant economic condition hoped for in the allotment myth, the Cherokee Nation is now reliant on the federal government for over ninety percent of their annual budget.<sup>32</sup> Regardless of the condition of a tribe's pre-allotment economy or pattern of individual property rights, one thing is clear: not only was the allotment era a failure of social engineering and property law, but it was responsible for the destruction of tribal economies.

### C. LASTING EFFECTS

Today, throughout Indian country, multiple co-owners share fractional property interests in single parcels of allotted lands. The lands, if held in trust by the federal government, are inalienable due to federal restrictions.<sup>33</sup> The lands, if held in fee by the Indian co-tenants, become de facto inalienable because they are unmarketable and lack the capacity to be put to efficient economic use.<sup>34</sup> Banks and other investors will seldom lend money on lands with multiple Indian co-tenants each owning small fractional property interests.<sup>35</sup> And with each successive generation, through intestate succession or inheritance through wills,<sup>36</sup> the number of

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32. Cherokee Nation Principal Chief Chad Smith Re-Election Campaign, *Cherokee Nation Today* (2003), at <http://www.chadsmith.com/impact.htm> (last visited June 14, 2005).

Cherokee Nation operates on a budget of more than \$200 million a year. Eighty-three percent of the budget is federally funded and appropriated to more than one hundred different programs and services on behalf of Cherokee citizens. Seventeen percent of the budget is Tribally generated and goes to the General Fund for the operation of Cherokee Nation government.

*Id.*, "Up to 90 percent of our budget comes from the federal government." The Cherokee Nation, Website of Tribal Council Member William G. Johnson, District 8 (2005), at <http://www.cherokee.org/TribalGovernment/CouncilPage.asp?ID=17&Name=Council2003> (last visited June 14, 2005).

33. The Bureau of Indian Affairs (BIA) presently administers 45.6 million acres of tribally-owned land; individually-owned trust land administered by the BIA constitutes 10 million acres. Bureau of Indian Affairs, *Mission Statement*, at <http://www.doiu.nbc.gov/orientation/bia2.cfm> (last visited June 14, 2005); see also generally H.R. Rep. No. 108-195 (2004) (regarding appropriations for the Department of Interior).

34. See generally Ingram, *supra* note 13 (discussing trust land inalienability and lack of market value comparables as barriers to obtaining traditional financing).

35. *Id.*; see also John Fredericks III, *Indian Lands: Financing Indian Agriculture: Mortgaged Indian Lands and the Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105 (1989).

36. The Indian land title and probate cases present a multitude of procedural problems for attorneys practicing in the field. Sharon J. Bell, *Indian Title Problems: A Survival Primer*, PROP. & PROB., Sept.-Oct. 1987, at 30 (noting that it often takes several years to resolve ownership questions on allotted lands; for instance, it took thirty-five years of litigation to resolve ownership of surface and mineral rights in the case *Fife v. Barnard*, 186 F.2d 655 (10th Cir. 1951)).

co-tenants increases and the individual property interests become more fractured.<sup>37</sup>

The federal policy called for allotted lands to be held in trust by the federal government, or for the allotments to be otherwise protected against alienation.<sup>38</sup> The trust period typically lasted twenty-five years, or until an individual Indian was deemed competent to hold fee title.<sup>39</sup> Lands held in trust or restricted status are not subject to state taxation or other forms of regulatory authority.<sup>40</sup>

When a parcel of land loses trust status or becomes unrestricted, the Indian allottee becomes the owner in fee simple absolute.<sup>41</sup> Fee title gives the individual allottee the same rights as any other fee title owner, but subjects the land to state regulatory powers, including the exercise of eminent domain.<sup>42</sup> Fee land can also be acquired through adverse possession.<sup>43</sup> But most importantly, as the primary barrier to tribal economic development, fee lands inside Indian country are subject to state taxation.<sup>44</sup>

37. *Hodel v. Irving*, 481 U.S. 704, 713 (1987). The United States Supreme Court, in *Hodel v. Irving*, provided the oft-cited example of fractionate interested problem of one famous Indian allotment:

Tract 1305 is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1.00 . . . . The common denominator used to compute fractional interests in the property is [3 trillion, 294 billion, 923 million, 840 thousand]. The smallest heir receives \$.01 every 177 years . . . . The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,560 annually.

*Id.*

38. 25 U.S.C. § 348 (2000).

39. *Id.*

40. *Id.*

41. *Id.*

42. *See id.*

43. *See SINGER, supra* note 8, at 134. The doctrine of adverse possession allows a trespasser who occupies the lands of another and treats the property as their own to effectively oust the true title holder. *Id.*; *see generally* Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. & ECON. 161 (1995); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1984).

44. Burke Act of 1906, Pub. L. No. 149, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349); *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992) (permitting state taxation of allotment owned by Indians in fee). Robert Porter has noted that the realities of state taxation in Indian country place tribal attorneys in a difficult advisory position when the tribe wants to embrace a territorial approach to Indian taxation. Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1622 (2004); *but see In re Kansas Indians*, 72 U.S. 737, 738 (1806) (holding state taxation of lands in severalty by individual Indians was not subject to state taxation); *In re New York Indians*, 72 U.S. 761, 771 (1866) (holding state tax was premature when Indians still possessed property).

State taxation has devastated tribal economies.<sup>45</sup> When states impose property taxes on Indian-owned allotments, it precludes the tribes' ability to establish its own tax base,<sup>46</sup> and Indian lands become susceptible to forfeiture. When both tribes and states impose a business activities tax on lands within Indian country, it discourages private business enterprise in areas that are already economically deprived.<sup>47</sup> And finally, when states impose sales taxes or income taxes on activities that take place on Indian-owned lands, it effectively shuts down any hope of a burgeoning private tribal economy because the individual business owners become subject to the tax powers of all three sovereigns.<sup>48</sup> In short, the allotment process, which was the catalyst for state regulatory intrusions, has converted Indian country into a cash economy with little or no hope of economic revitalization. The only way to truly revive tribal economies is to restore and increase the tribal land base and stop state taxation within Indian country.

There are typically two ways tribes can restore or expand the tribal land base. They can depend on the will of Congress to return former land holdings,<sup>49</sup> or tribes can repurchase lands lost to allotment.<sup>50</sup> Congress has

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45. Larry Echohawk, *Balancing State and Tribal Power to Tax in Indian Country*, 40 IDAHO L. REV. 623, 624 (2004) (stating that the imposition of state taxes "cripple[s] reservation economies" and using the Ft. Hall Indian reservation as an example).

46. Arguably, the tribes retain the power to tax lands owned in fee by tribal citizens within the tribe's territorial and political jurisdiction. However, if a tribe imposed a tax on its members who are already forced to pay state taxes, it would exasperate the economic conditions of its citizenry and perhaps contribute to the loss of land association with forced tax sales.

47. See Echohawk, *supra* note 46, at 351.

48. James M. Burson, Note, *The Blaze Construction Case: An Analysis of the Blaze Construction Tax Cases and the Implications of Avoidance of Taxation in Indian Country*, 39 NAT. RESOURCES J. 845, 876 (1999) (noting that as a practical matter, the Court has foreclosed any chances of the tribe luring business on-reservation).

49. Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 434 (1998). The federal courts have long recognized the so-called "plenary power" of Congress over Indian people and their lands. *Lonewolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (allowing the allotment of Indian lands without tribal consent and in violation of treaty provisions). *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power of Indian Affairs, including the power to modify or eliminate tribal rights.") (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

If Congress has the power to modify or take away tribal rights to land, it also has the power to restore tribal land bases. Congress exercised this power in Section 5 of the Indian Reorganization Act of 1934, paving the way for the present land-into-trust regulation discussion. See *infra*, Part VI.

50. United States Department of Interior, *Strengthening the Circle: Interior Indian Affairs Highlights 2001-2004* 16, available at [http://www.doi.gov/accomplishments/bia\\_report.pdf](http://www.doi.gov/accomplishments/bia_report.pdf) ("Purchase of fractional interests increases the likelihood of more productive economic use of the land, reduces record keeping and large numbers of small-dollar financial transactions, and decreases the number of interests subject to probate."). GARY A. SOKOLOW, NATIVE AMERICANS

delegated limited power to the Secretary of the Interior to assist in the restoration of tribal land bases through various land-into-trust provisions.<sup>51</sup> The Indian Reorganization Act of 1934<sup>52</sup> initially authorized the Secretary to take lands into trust for tribes<sup>53</sup> for the purpose of restoring tribal land bases and promoting tribal self-sufficiency.<sup>54</sup> The most common scenario occurs when a tribe acquires fee title to lands within their territorial jurisdiction and then petitions the Secretary to extend trust status to the lands.<sup>55</sup>

Once trust status is extended to lands acquired by the tribe in fee, the lands become inalienable, and most importantly, free from state taxation, eminent domain and adverse possession.<sup>56</sup> Trust status ensures that the lands are within tribal jurisdiction and most importantly, free from the reach of the state.<sup>57</sup> The down-side to trust status is increased federal oversight,<sup>58</sup> including a requirement that the federal government approve any type of conveyance, including leases for business and agricultural purposes.<sup>59</sup>

AND THE LAW 231 (2000) (“There exists a procedure in federal law to transfer such land from trust status to deeded status.”).

51. See Geoffrey D. Strommer & Craig A. Jacobson, *Indian Tribes and the Base Realignment and Closure Act: Recommendations for Future Trust Land Acquisitions*, 75 N.D. L. REV. 509, 524 (1999).

52. 25 U.S.C. §§ 461-495 (2000).

53. *Id.* § 465.

54. The authority of the Secretary to take lands into trust has been challenged under the non-delegation doctrine. *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) (rejecting delegation argument and noting that congressional delegation for trust acquisitions was appropriate).

55. 25 C.F.R. § 151 (2005) governs trust acquisitions by the Secretary of the Interior. The Secretary has the authority to take lands in trust status for individual Indians and tribes. § 151.1.

56. Trust status refers to land in which the title is “held in trust by the United States.” *Id.* § 151.2(d). Restricted land, in contrast, refers to land in which the title is held by an individual Indian or a tribe with a restriction on alienation. *Id.* § 151.2(e).

57. *Id.*

58. *E.g.*, *Cobell v. Norton*, 226 F. Supp. 2d 1, 13-14 (D.D.C. 2002). Individual tribal members who hold Individual Indian Money accounts administered by the federal government seek an historical accounting of their own trust funds. See *id.*

59. The requirement that the federal government consent to conveyances of Indian land has deep historical roots to the Indian Trade and Intercourse Acts. Act of July 23, 1790, 1 Stat. 137; Act of March 1, 1793, 1 Stat. 329; Act of March 3, 1799, 1 Stat. 743 (codified as amended at 25 U.S.C. § 177 (2000)). Under the Acts, all purchases, leases, and other types of conveyance from Indian tribes required consent of the United States because the Acts’ overriding purpose was to ensure that only the United States could acquire Indian title while preventing alienation of Indian lands by states or private parties. *Fed. Power Comm’n v. Tuscurora Indian Nation*, 362 U.S. 99, 119 (1960).

Because Indian lands are inalienable, except to the federal government or with the federal government’s consent, the United States has been considered an indispensable party to state condemnation proceedings where Indian lands are involved. Further, an express removal of restriction is necessary before state eminent domain powers may be exercised on such lands. *United States v. City of McAlester*, 604 F.2d 42, 45-46 (10th Cir. 1979); *Choctaw and Chickasaw Nations v. City of Atoka*, 207 F.2d 763, 766-67 (10th Cir. 1953). See also *United States v. Candelaria*, 271 U.S. 432, 437-38 (1926).

Tribes who wish to purchase lands or acquire property interests are free to do so, just as any private citizen or private entity may do. The problem is obvious. Tribes need money to repurchase land and property values are increasing. Land values will continue to rise, but the need for tribal land base will never diminish. Tribes realize the practical need to purchase lands as soon as possible. But, relying on luck to find affordable real estate acquisitions, such as forced tax sales foreclosures, will not yield the volume of land that the tribes seek.

### III. THE PROPOSAL FOR THE CREATION OF FUTURE INTERESTS

At the time lands were allotted it was presumed that, "within a generation or two . . . the tribes would dissolve, their reservations would disappear . . ." <sup>60</sup> The proposal set forth in this article offers a means to return many non-Indian owned fee lands within Indian country to tribal ownership, within a single generation. The proposal borrows from Anglo-American property law by creating future interests in land. Future interests have been a cornerstone of Anglo-American property law dating back to the fourteenth century. <sup>61</sup> Future interest rules allow property ownership to be divided over time, with one entity having a right to current possession and another having the right to possession at a later date. <sup>62</sup>

This proposal is the first of its kind, in that it instructs tribes to create for themselves, a future interest in land. Some commentators have briefly

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60. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 336 (1998). For similar pronouncements, see also *Solem v. Bartlett*, 465 U.S. 463, 466 (1984).

61. See generally T.P. Gallanis, *The Future of Future Interest*, 60 WASH. & LEE L. REV 513 (2003).

62. See Singer, *supra* note 8, at 290. There are several types of future interest. "Perhaps the best known example is the leasehold; the tenant has the right to present possession and the landlord has the right to regain possession at the end of the lease." *Id.* Other future interests include reversions, rights of re-entry, possibility of reverter, remainders, and executory interests. See *id.*

addressed future interests in other Indian law contexts,<sup>63</sup> but none have advocated for the tribal government to take an active role.<sup>64</sup>

#### A. CREATION OF REMAINDER OR REVERSION IN TRIBE

A future interest in property will become possessory at a future point in time. An owner of a future interest has no present right to possess the land, but still owns a valid property interest. A vested remainder is a future interest that follows a life estate.

For example, consider the following scenario: The proverbial Blackacre estate is currently owned by "Owen." Suppose Owen would like to sell his estate Blackacre to his friend Amy, but he dislikes Amy's children. Owen wants to make sure that when Amy dies, the Blackacre goes to his friend Bill. Owen executes a deed that states: "I hereby convey Blackacre to Amy for her natural life, remainder to my dear friend Bill and his heirs."

At the time of this conveyance, Amy acquires a life estate. As the holder of a life estate, Amy has a present possessory interest in Blackacre. She has the right to possess and use the property as she sees fit, as long as she lives. She can lease her interest, sell her interest, or chose not to make use of the land.

At the time of the conveyance, Bill acquires a future interest in Blackacre. When Amy dies, Bill will have full rights to the land. But, at the time of the conveyance, both Amy and Bill own a property interest in Blackacre. Amy's property interest is possessory. Bill's property is a future interest.

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63. See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 138-39 (1995) (creatively noting the policy behind the prohibition against waste should be used as a standard in the federal trust context). Professor Michael Blumm notes that federal government created a future interest for itself in *Johnson v. M'Intosh* when he wrote "the doctrine of discovery created a kind of split estate, leaving the Indians with a present estate that Marshall called occupancy title and giving to the discoveror a future interest: a right of preemption in Indian lands." Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian County*, 28 VT. L. REV. 713, 738 (2004). See also Eric R. Claeys, *Takings and Private Property Rights on the Rehnquist Court*, 99 NW. U. L. REV. 187, 227 (2004) (discussing the Court's protection of future interest holders under the Indian Lands Consolidation Acts over tribal escheat provisions).

64. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 235 (1984). In fact, in most discussions for future interest, tribes are passive observers in the dispossession of property rights. See *id.* Congress may abrogate future interest in Indian lands granted by earlier statutes. *Id.* (citing *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-56 (1976)).

It is presumed, as a matter of economic theory, that Amy would have paid less for a life estate in Blackacre than she would have paid for fee title in Blackacre. By taking only a life estate, Amy has something less than a full bundle of property rights. Most notably, Amy's interests in Blackacre are subject to Bill's future interest.

Although a small handful of tribes are located in geographic areas of wealth and prosperity, the overwhelming majority of tribes are located in areas with depressed economies.<sup>65</sup> Economic problems impact all people within a community, Indian and non-Indians, alike. Non-Indian property owners who live on or near Indian reservations are often as impoverished as the tribal citizens.<sup>66</sup> Non-Indians within Indian country are often looking for financial assistance to pay off consumer debts.<sup>67</sup> The media bombards its audiences with advertisements from businesses that provide home equity loans, lines of credit, debt consolidation plans and, in serious cases,

65. See Christian C. Bedortha, *The House Always Wins: A Look at the Federal Government's Role in Indian Gaming & The Long Search for Autonomy*, 6 SCHOLAR: ST. MARY'S LAW REVIEW ON MINORITY ISSUES 261 (Spring 2004) (stating,

In fact, many of the Indian lands look more like impoverished third world nations when viewed in terms of the unemployment, economic depression, and inadequate housing facilities. "Unemployment and poverty levels on reservations are incomprehensible to most Americans, even to those who lived through the Great Depression and suffered twenty-five to thirty percent unemployment during its heights.")

(quoting, 138 Cong. Rec. S3,425 (Mar. 12, 1992) (statement from Senator McCain)); Galen Lemei, *Abandoning the PIA Standard: A Comment on Gila V*, 9 MICH. J. RACE & L. 235, 262 (Fall 2003) ("These doctrinal principles are bolstered by the practical consideration that Indian reservations are some of the 'most economically depressed sectors of the nation.'") (quoting Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 717 (1997)); Jana L. Walker & Susan M. Williams, *Indian Reserved Water Rights*, 5 NAT. RESOURCES & ENV'T 6 (Spring 1991) ("Indian tribes, whose reservations persist as the most economically depressed areas in the nation, obviously need the full economic benefit of their water rights from any fair perspective.")

66. See *supra* note 65. As this article went to print, the United States Supreme Court clarified the point that merely purchasing the land may not remove state tax obligations. See *City of Sherill v. Oneida Indian Nation of New York*, 125 S.Ct. 1478, 1493-94 (2005) (holding that "the doctrine of laches, acquiescence, and impossibility...render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate"). The Court warned that

[i]f OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent it from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area...Congress has provided, in 25 U.S.C. § 465, a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.

*Id.* at 1482.

67. John Warren Kindt & John K. Palchak, *Legalized Gambling's Destabilization of U.S. Financial Institutions and the Banking Industry: Issues In Bankruptcy, Credit, and Social Norm Production*, 19 BANKR. DEV. J. 21 (2002).

bankruptcy relief.<sup>68</sup> Many of these programs are financed and secured through a second or perhaps third mortgage on real property.<sup>69</sup>

To avoid foreclosure and ensure their possessory rights to property, many consumers are looking for quick financial solutions with a secondary concern of long-term financial recovery. Most people who find themselves in this situation merely want to retain the right to live in their homes. Often times, these people are not able to take on the payments that are required in a home equity loan.

Tribes should, with the available capital, offer similar debt-relief programs to non-Indian consumers who own fee lands within Indian country. In exchange for a cash loan, the tribe receives a security interest that provides no immediate return on investment, but looks toward the future. Consumers would use the tribal loan for the purpose of paying off consumer debt or delinquent mortgages. The tribe's investment is secured, not through a second mortgage, but through the creation of a future interest in the land.

Borrowing from Blackacre, the conveyance could take two forms: (1) Owner conveys Blackacre to Tribe (or strawman), who then immediately re-conveys the property to Owner for life; or (2) Owner conveys Blackacre to Owner for life, remainder to the Tribe.

In the first transaction, at the time of the conveyance, Owner receives a life estate and the tribe retains a future interest in the land, which will become possessory at Owner's death. The tribe gains no immediate right to possess the property, but the tribe acquires a property interest in the land. Under Anglo-American future interest law, the tribe's future interest will be classified as a reversion.<sup>70</sup> Owner's life estate is followed by a reversion in the tribe as the grantor.

In the second transaction, at the time of the conveyance, Owner receives a life estate and the tribe receives a future interest in the land, which will become possessory at Owner's death. Like the first scenario, the tribe gains no immediate right to possess the property, but the tribe, nonetheless acquires a property interest in the land. Under Anglo-American future interest law, the tribe's future interest will be classified as a vested

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68. See Azmy Baher, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 FLA. L. REV. 295 (April 2005) ("Indeed, subprime lenders often aggressively market home equity loans as debt consolidation products or 'upsell' a borrower into progressively larger and unnecessary loan products.").

69. *Id.*; Sokolow, *supra* note 51, at 91 ("Banks and other lenders will often make a loan to the owner of a fee simple and use the land as collateral (that is, security) by placing a mortgage against it.").

70. Future interest are classified as reversions if they are retained or created by the transferor, in this case, the tribe.



remainder.<sup>71</sup> Owner's life estate is followed by a remainder in the tribe, since Owner was both the grantor and the life estate holder.

In both scenarios, upon the acquisition of the future interest, the tribe then petitions the Secretary of Interior to place the property interest in trust status, rendering the land inalienable. Inalienability protects the land from adverse possession or the exercise of state eminent domain laws, but most importantly, preserves the land for the future use of the tribe. Within one generation, the tribal land base increases significantly. The tribe gains a future interest in land and the costs are minimal compared to the tribe purchasing fee title to the lands at market value. The investment returns are not immediate and tribes will need to administer the lands to ensure the viability of their future interests.

Critics of this proposal will likely raise questions of whether non-Indian property owners would agree to this type of transaction. Ethical considerations might also be raised on the grounds that such transactions border on predatory lending. Although not all property owners would agree to such transactions, individuals that find themselves in a critical financial situation will likely see this as a viable option. This proposal is targeted at individuals that are unable to otherwise obtain affordable financing in the traditional market. Furthermore, pending amendments to bankruptcy laws, which make it harder for consumers to obtain relief, might increase the class of individual property owners that would consider accepting the tribe's offer.

Property owners that would not be willing to sell their lands outright, may consider selling a future interest. The downside from the property owner's perspective is that they would effectively disinherit their children, but in light of severe economic difficulties, the possibility of remaining in their homes during their lifetime should be sufficient incentive.

## B. JOINT TENANCIES

Another proposal borrowed from Anglo-American property law is the creation of joint tenancies. Similar to the proposal for the creation of future interests, tribes would acquire a present interest as a co-owner with non-Indian fee owners. In exchange for cash, the tribe could acquire a joint tenancy with the right of survivorship.

The conveyance could take two forms: (1) Owner conveys Blackacre to Tribe (or strawman), who immediately re-conveys the property to Owner

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71. A vested remainder is a future interest in a third party after the expiration of the life estate. The tribe would be considered a third party because it is not the grantor, nor the life estate holder.

and Tribe as Joint Tenants, with the right of survivorship; or (2) Owner conveys Blackacre to Owner and Tribe, with the right of survivorship. In both transactions, Owner retains a possessory interest in the land that is then shared in concurrent ownership with the Tribe. When Owner dies, Owner's interest will pass to Tribe who will then own the land in fee simple.

The conveyance allows the original owner the right to possess the whole property. The limitation, in this instance, would be self-imposed by the tribe. Anglo-American property recognizes and protects the right of co-owners to contract between themselves concerning the use of land. In this scenario, the tribe would contract not to exercise any possessory rights to the land during the life of the original owner. The tribe's possessory interest would be invoked only at the time of survival, when the estate would convert to fee simple title with the tribe as the sole owner.

This option would require more discussion and agreement between the parties than the proposal for the creation of a future interest following a life estate. However, there is perhaps another incentive to entice non-Indian fee owners to consider this option.

The original owner, as a non-Indian owner of fee lands, currently pays state real estate taxes.<sup>72</sup> Although the tribe might, as a matter of private contract law, agree not to possess the property, as a matter of property law, once the tribe becomes a joint tenant, the tribe has a legal right to possess the whole property. Unlike the future interest proposal, the tribe here would be viewed as having a possessory right to land. The tribe would then petition the Secretary to take the land into trust status pursuant to land-into-trust provisions.

The Secretary might be more willing to take the land into trust where the tribe has a present possessory interest in the land. If the Secretary exercises authority to place the land in trust, the land becomes inalienable and immediately protected against state taxation. The non-Indian occupant, now joint tenant, as a partner with the tribe, no longer pays state taxes. Over a significant time period, the lack of state income tax on property will allow the non-Indian to recoup some of the financial costs of agreeing to the joint tenancy.<sup>73</sup>

This is not to say, however, that the Secretary would not also exercise discretion to extend trust status to the tribe's newly acquired future interest, in the first proposal. The Secretary has the authority to take "land" into

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72. Sokolow, *supra* note 51, at 70 ("Deeded land is subject to taxation. The vast majority of land in the United States is deeded land."); *id.* at 226-27 ("Native Americans can, of course, also own land in nontrust status, which is taxed by states and local governments and regulated just as is real estate owned by non-Indians.")

73. Joint tenants do not have the power to devise property at death.

trust. Federal land-into-trust regulations define "land" broadly to include "real property or any interest therein."<sup>74</sup>

A future interest is a well-recognized interest in property, and should therefore be treated in the same manner as a possessory property interest. The regulations place no other distinction on the type of property interest that may be held in trust by the federal government. In fact, the Secretary already administers life estates and future interests in Indian lands.<sup>75</sup> The rules that govern life estates and future interests are prescribed by state law, in absence of a federally-approved tribal law to the contrary.<sup>76</sup>

Currently the Secretary administers trust lands which include a wide variety of different property interests: (1) lands held solely by a tribal government, on and off the reservation; (2) lands held individually by multiple Indian co-owners, on and off the reservation; (3) lands held by the federal government for the benefit of Indian programs; (4) lands held in co-ownership between the tribe and individual Indians, on reservation.<sup>77</sup> This variety of property interests in trust lands suggests a broad application that would entertain various types of ownership interests. The system already embraces trust status for lands held individually or as co-tenancies. Extending trust status to lands held in the form of joint tenancies and future interests in the form of reversions or remainders would be a permissible Secretarial action given the present diversity of estates. There is simply no reason, as a matter of property law for the Secretary to deny petitions on the grounds that the interest is future rather than possessory. The Secretary's

74. 25 C.F.R. §15.2 (2005).

75. 25 C.F.R. Pt. 179 (2005). Indian lands under this provision is defined broadly to include the land of individual Indians or the property interests of tribes. 25 C.F.R. § 179.2 (2005).

76. 25 C.F.R. § 179.3 (2005). Even if tribes are not prepared to enact the proposals set forth in this article, they should consider tribal code provisions to govern life estates and future interest of trust lands within their jurisdiction. Otherwise, state law will continue to be applied inside Indian country. *Id.*

77. See Yvonne Mattson, Comment, *Civil Regulatory Jurisdiction Over Fee Simple Tribal Lands: Why Congress Is Not Acting Trustworthy*, 27 SEATTLE U. L. REV. 1063, 1082 (Spring 2004) (stating,

The changes in federal policy resulted in reservation lands being designated as "one or more of following three types of land tenure: (1) tribally owned land held in trust by the federal government; (2) allotted lands owned by individual Indians but held in trust by the federal government; and (3) parcels of property owned in fee simple, usually by non-Indians, as a result of the Allotment policy.")

quoting Mary C. Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1477-78 (1994)); Sokolow, *supra* note 51, at 97 (stating,

Today, many non-Indian parcels may be intermingled with parcels owned by a tribe or its members, either in trust or in deeded status. This checkerboard pattern causes a great deal of confusion for those trying to determine whether the tribe or the state has civil or criminal jurisdiction over a given parcel of land within Indian country.)

primary charge is to take lands into trust in fulfillment of the current federal policy of tribal self-determination.

#### IV. RESTORING TRIBAL ECONOMIES AFTER REACQUISITION OF PROPERTY INTERESTS

Once property interests are acquired, and particularly when those interests become possessory, tribal economies will rebound quickly, particularly if tribes are successful in removing state taxation and regulatory authority. Tribes, with newly acquired property interests and an expanding land-base will have better opportunities to generate revenues. But before tribes consider revenue projects, expanding the tribal tax base and economic development through the promotion of private enterprise, there are considerations to be made in the management of the newly acquired property interests.

##### A. FEDERAL LAND-INTO-TRUST PROVISIONS

Tribes need to determine whether they would like to petition the Secretary to take the newly acquired property interest into trust.<sup>78</sup> At the present time, tribes should take advantage of this mechanism because it is the only recognized avenue for freeing lands from state taxation. However, given the history of mismanagement of tribal assets by the federal government, it is understandable that tribes would proceed with caution before subjecting their lands to federal oversight.<sup>79</sup>

The federal land acquisition policy promotes the extension of trust status to Indian fee lands.<sup>80</sup> In addition, the Secretary is authorized to acquire trust lands for the tribe where the property is located within the exterior boundaries, or adjacent to, an Indian reservation.<sup>81</sup> It is not necessary for the tribe to be the sole owner of lands. The Secretary is permitted to extend trust status when a tribe acquires a fractional interest in

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78. Tribes initiate a land-into-trust petition pursuant to 25 C.F.R. § 151.9 (2005):

An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of the part.

*Id.*

79. See discussion of *Cobell* litigation, *supra* note 59.

80. 25 C.F.R. § 151.3 (2005). When the tribe already owns the land, as will be the case under this proposal, the Secretary is authorized to take the land into trust. *Id.* § 151.3(a)(2), § 151.4.

81. *Id.* § 151.3(a)(1). The Secretary has broader discretion to acquire lands "necessary to facilitate tribal self-determination, economic development or Indian housing."

land.<sup>82</sup> Because the lands in this proposal are located within Indian country, the requests for trust status receives less departmental scrutiny than if the lands were located off-reservation.<sup>83</sup> Under the provisions, the state and local government are permitted to provide written comments regarding potential impacts on their regulatory jurisdiction and property taxes.<sup>84</sup>

## B. TRIBAL LAND TRUSTS

Due to mismanagement concerns and the increasing costs of administering trust lands, there is some disdain for the federal government to get out of the trust lands business altogether.<sup>85</sup> Some have advocated that the federal government convey the trust lands to the tribes, where the tribal government would hold title for the benefit tribe or individual Indians.<sup>86</sup>

In the *Burning of Blackacre*, I suggested that tribes should create and extend a tribal trust status over lands held in fee by tribal citizens.<sup>87</sup> The individual Indian co-tenants would convey their land to the tribe and the tribe would immediately re-convey the beneficial interest back to the tribal citizen.<sup>88</sup> The legal title would then rest with the tribe as trustee, analogous to the federal trust lands status.<sup>89</sup>

Although these tribal trust lands would likely fall under the adjudicatory and regulatory authority of the tribe, it is not clear whether tribal trust lands established through this proposal would be free from state taxation. Fee lands owned by individual Indians are subject to state real estate taxes.<sup>90</sup> If the tribe acquired title to these lands and then extended

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82. *Id.* § 151.7 (2005). Acquisition of a fractional interest can be approved by the Secretary if the buyer already owns a fractional interest in the land or if the interest acquired is in fee. *Id.* § 151.7(a)-(b).

83. Compare 25 C.F.R. § 151.10 (2005) (On-reservation acquisitions) with 25 C.F.R. § 151.11 (2005) (Off-reservation acquisitions). The Secretary will consider the tribe's need for more land, the purposes for which the land will be used, and other tribal and federal considerations. *Id.* § 151.10(a)-(d) and (g). The Secretary will also take into consideration the tax consequences of the state. *Id.* § 151.10(e). Compliance with federal environmental statutes will also be taken into consideration. *Id.* § 151.10(h). For off-reservation acquisitions, all of the considerations of § 1151.11 apply in addition to two additional considerations: (1) the location of the land relative to the tribe's reservation with increased scrutiny the further away from the tribe's Indian country and (2) the economic benefits associated with the land use. *Id.* § 1151.11(b)-(c).

84. *Id.* § 151.10. The time period for written comments is thirty days, after which the petitioning tribe is given an opportunity to respond. *Id.*

85. David Melmer, *Morgan Tells BIA: 'Get Out of the Trust Land Business,'* INDIAN COUNTRY TODAY, (Mar. 18, 2005), available at <http://www.indiancountry.com/content.cfm?id=1096410563>.

86. *Id.*

87. Leeds, *supra* note 2, at 497.

88. *Id.*

89. *Id.*

90. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 263-64 (1992).

tribal trust status to the lands, it would not necessarily remove them from the state tax base.

Interestingly, the concept of tribal trust lands has been contemplated by the federal government, at least in hindsight.<sup>91</sup> The Cherokee Nation received a fee patent to their lands after being removed from the southeastern United States.<sup>92</sup> As a prelude to the allotment process, federal agents in the late 1890s, began exercising control over Cherokee lands for the approval of leases.<sup>93</sup> When the Cherokee Nation challenged the federal actions, the federal government retreated by stating that the Cherokee Nation did not, in fact, hold fee title to its lands, but instead, the tribe held the land in trust for its citizens:

As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.<sup>94</sup>

The federal government, after reclassifying the way in which the Cherokee Nation held title to the lands, suggested that tribal mismanagement of tribal trust lands justified federal government intervention.<sup>95</sup> What resulted, as discussed throughout this article, was the allotment of Cherokee lands and a full dispossession of Cherokee tribal title.

The Cherokee story is useful on two fronts. First, it evidences that the concept of tribal trust land is not as novel as it appears.<sup>96</sup> Second, if the alleged mismanagement of tribal trust funds was a rationale for taking Cherokee trust title and replacing it with federal oversight, then perhaps the same rationale applies to abolish the federal trust model in favor of tribal control. If tribes began establishing tribal trust land offices under the proposal set forth in *The Burning of Blackacre*, the existing governmental infrastructure would be available to readily accept a transfer of federal trust lands should it become feasible.

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91. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 302 (1902) (quoting SEN. REP. NO. 377 (1894)).

92. *Id.* at 295.

93. *Id.* at 298-99.

94. *Id.* at 302 (quoting SEN. REP. NO. 377 (1894)).

95. *Id.* at 307.

96. Leeds, *supra* note 2, is the first proposal for the creation of tribal trust status.

## V. CONCLUSION

In Anglo-American property law, or so the metaphor goes, property rights are akin to a bundle of sticks. A person who owns land in fee retains the full bundle of rights. The right to exclude is one stick. The right to possess is another. There are many other sticks. When a person possesses even one of these sticks, a property interest is born.

Federal Indian law has taught Indian people the importance of the bundle. In *Johnson v. McIntosh*,<sup>97</sup> Justice Marshall concluded that Indians lacked the full bundle of sticks.<sup>98</sup> Indian people only had the "right of occupy" stick.<sup>99</sup> The United States had a bigger stick: the future interest to acquire the Indian's stick.

Indians learned the hard way that one missing stick can severely damage the whole bundle. But Indians have also witnessed, through Anglo-American property laws, that the acquisition of certain sticks can restore the full bundle of rights. Anglo-American property law offers creative avenues for the acquisition of property interest. Tribes, while continuing to revitalize their own property laws, should consider acquiring future interests or joint tenancies in non-Indian fee lands as a means to reacquire a portion of the lands lost to allotment. Once property interests are reestablished, tribal economies will be better situated for economic recovery.

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97. 21 U.S. (8 Wheat.) 543 (1823).

98. *Johnson*, 21 U.S. (8 Wheat.) at 592.

99. *Id.*